

# “SUSTAINABLE” FASHION’S TRUE COLORS: A PROPOSAL FOR “RESTYLING” THE FTC GREEN GUIDES

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## SUMMARY

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The fashion industry continues to grow exponentially, along with marketers’ use of false and misleading claims about “sustainability” and other environmental attributes of fashion garments. This Article explores recent instances of greenwashing in the industry and other countries’ efforts to address the issue, and proposes specific ways that the Federal Trade Commission (FTC) should improve its guidelines for environmental marketing claims and expand enforcement. It provides an overview of the FTC’s authority to regulate under §5 of the FTC Act and an analysis of recent enforcement actions, and demonstrates how the agency’s current “Green Guides,” last revised in 2012, inadequately address greenwashing in fashion today. The FTC is currently in the process of regulatory review for the Green Guides, and the Article incorporates and responds to comments submitted during the public process.

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Fashion, typically considered to encompass clothing, shoes, bags, and accessories,<sup>1</sup> is a \$2.4 trillion global industry.<sup>2</sup> The fashion industry is responsible for an estimated 2% to 8% of the world’s annual greenhouse gas emissions,<sup>3</sup> driving climate change at a level that is only surpassed by two other industries: food and construction.<sup>4</sup> Further, the production and consumption of fashion garments heavily pollute the natural environment, accounting for 20% of the world’s wastewater and 20% to 35% of microplastic flows into the oceans,<sup>5</sup> and contribute to the waste of millions of tons of textiles every year.<sup>6</sup> Textile and garment production also often entails the use of child labor and other hazardous and exploitative labor practices throughout the supply chain.<sup>7</sup>

The growing trend of “fast fashion,” in which companies continually retail large numbers of new designs, typically inexpensive and often poor in quality, to consumers who in turn use such garments for increasingly short periods before discarding them, has resulted in unsustainable levels of overproduction and overconsumption.<sup>8</sup> Despite the increased attention brought to and outrage about fashion’s devastating social and environmental impacts, the problem will likely only get much worse: the consumption of clothing and footwear, which has already increased exponentially in recent years, is expected to increase by 63% by 2030.<sup>9</sup>

Fortunately, consumer demand for “green” fashion in the United States is significant and continues to grow: 55% of respondents to a 2021 survey indicated their interest “in purchasing so-called ‘sustainable clothing.’”<sup>10</sup> Consumers also “care about the materials that make their clothes and want them to not be harmful to the planet.”<sup>11</sup> At the same time, many consumers are becoming increasingly skeptical about the environmental benefits touted by fashion companies: 88% of participants said that they “don’t immediately

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1. Ellen Terrell, *Fashion Industry: A Resource Guide*, LIBR. CONG.: RSCH. GUIDES (May 2019), <https://guides.loc.gov/fashion-industry>.

2. Julia Adamkiewicz et al., *Greenwashing and Sustainable Fashion Industry*, 38 CURRENT OP. GREEN & SUSTAINABLE CHEMISTRY 100710 (2022).

3. *Id.*

4. WORLD ECONOMIC FORUM & BOSTON CONSULTING GROUP, NET-ZERO CHALLENGE: THE SUPPLY CHAIN OPPORTUNITY 12 (2021), [https://www3.weforum.org/docs/WEF\\_Net\\_Zero\\_Challenge\\_The\\_Supply\\_Chain\\_Opportunity\\_2021.pdf](https://www3.weforum.org/docs/WEF_Net_Zero_Challenge_The_Supply_Chain_Opportunity_2021.pdf).

5. Adamkiewicz et al., *supra* note 2; BUSINESS OF FASHION & MCKINSEY & CO., THE STATE OF FASHION 2020, at 52 (2019).

6. *EU Strategy for Sustainable and Circular Textiles*, COM (2022) 141 final (Mar. 30, 2022), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022DC0141> (noting that “every second somewhere in the world a truckload of textiles is landfilled or incinerated”).

7. See, e.g., Emma Ross, *Fast Fashion Getting Faster: A Look at the Unethical Labor Practices Sustaining a Growing Industry*, GEO. WASH. L. INT’L L. & POL’Y BRIEF (Oct. 28, 2021), <https://studentbriefs.law.gwu.edu/ilpb/2021/10/28/>

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fast-fashion-getting-faster-a-look-at-the-unethical-labor-practices-sustaining-a-growing-industry/.

8. *EU Strategy for Sustainable and Circular Textiles*, *supra* note 6.

9. *Id.*

10. *Survey: Consumers Want Sustainable Clothing*, GENOMATICA (May 26, 2021), <https://www.genomatica.com/news-content/survey-consumers-want-sustainable-clothing/>.

11. *Id.*

trust brands that say they're sustainable," and 51% "believe 'greenwashing' is common in the fashion industry."<sup>12</sup>

Research also suggests that the value of the ethical fashion market<sup>13</sup> will increase significantly to reach a value of \$9.81 billion in 2025 and \$15.17 billion in 2030.<sup>14</sup> Fashion retailers continue to capitalize on this demand by advertising their processes or garments as, for example, "sustainable," "natural," "eco-friendly," "plant-based," "organic," "vegan," "cruelty-free," "non-toxic," "plastic-free," "recycled," "upcycled," "recyclable," "biodegradable," "compostable," or as being produced with less toxic materials, less water, less energy, renewable energy, or through a carbon-neutral process.<sup>15</sup> But not all fashion brands marketing to consumers make such environmental claims honestly and clearly: a 2020 study by the European Commission found that more than one-half of environmental claims made to consumers in the European Union were "vague, misleading, or unfounded," and that 40% were unsubstantiated.<sup>16</sup> Of these misleading claims, which are an example of the act or practice of greenwashing,<sup>17</sup> "25 per cent came from the fashion industry, making it the top offending industry."<sup>18</sup>

In the United States, the greenwashing of fashion products to American consumers brings violators within the scope of the enforcement authority of the Federal Trade Commission (FTC), which regulates unfair or deceptive marketing practices under §5 of the FTC Act.<sup>19</sup> Although

greenwashing has been a regulatory focus of the FTC for decades, the Commission's current guidelines under the Guides for the Use of Environmental Marketing Claims (Green Guides) have not been updated since 2012.<sup>20</sup> The agency is in the process of regulatory review, and called for public comment on the topic of revisions to the Green Guides in December 2022.<sup>21</sup>

Research and the average fashion consumer experience make clear that these non-enforceable guidelines have not sufficiently addressed the rampant problem of greenwashing in one of the most problematic and impactful industries for deceptive environmental marketing claims. Fashion as an industry has also seen numerous changes in environmental marketing trends over the past decade, making aspects of the Green Guides somewhat outdated. Nonetheless, the Green Guides provide a useful, proven, and potentially highly powerful tool that the agency should and must use to address this pressing environmental and consumer protection issue: as one commenter, although not commenting about the fashion industry, put it, "[t]he very fabric of society is at stake here" when consumers are consistently confronted with misleading marketing amidst the growing threat of climate change.<sup>22</sup>

Part I of this Article illustrates how potentially deceptive environmental claims arise in the context of the fashion industry today. Part II provides an overview of the FTC's authority to regulate greenwashing, and analyzes how the Green Guides' current language and the narrow focus of recent enforcement actions fall short of protecting fashion consumers. Part III explores possible broad changes to the enforcement of the Green Guides as well as suggested additions, deletions, and examples for the Green Guides' existing language. Part IV concludes.

## I. Greenwashing Grows Amidst the Rise of "Sustainable" Fashion

The "sustainable" fashion movement describes a broad range of company activities and consumer trends: beyond the new retail market, the apparel rental market<sup>23</sup> and the secondhand market<sup>24</sup> also have benefitted from increased consumer demand for "green" fashion, and are similarly

12. *Id.*

13. For this statistic, "ethical fashion market" is defined as "fair trade, sustainable, with no abuse or exploitation during any stage of the supply chain." *See Estimated Value of the Ethical Fashion Market Worldwide From 2022 to 2027*, STATISTA (Dec. 9, 2022), <https://www.statista.com/statistics/1305641/ethical-fashion-market-value>.

14. Press Release, Business Research Company, Sustainable Fashion Market Analysis Shows the Market Progress in Attempt to Decrease Pollution in the Global Ethical Fashion Market 2020 (Oct. 28, 2020), <https://www.globenewswire.com/news-release/2020/10/28/2116073/0/en/Sustainable-Fashion-Market-Analysis-Shows-The-Market-Progress-In-Attempt-To-Decrease-Pollution-In-The-Global-Ethical-Fashion-Market-2020.html>.

15. *See, e.g.*, CAALO, *Home Page*, <https://caalo.studio/home> (last visited July 26, 2023) (advertising sustainable down coats); *see also, e.g.*, Walmart, *Sustainable*, <https://www.walmart.com/c/kp/sustainable> (last visited July 26, 2023) (advertising sustainable bras, underwear, and shirts; advertising organic baby clothes); *see also, e.g.*, TALA, *Responsibility at TALA*, <https://www.wearatala.com/en-us/pages/responsibility-at-tala> (last visited July 26, 2023) (advertising activewear made using "recycled or naturally sourced materials" and "sustainably sourced" fibers); *see also, e.g.*, KENT, *Home Page*, <https://www.wearkent.com/> (last visited July 26, 2023) (advertising plant-based, plastic-free, natural, biodegradable, compostable underwear); *see also, e.g.*, Reformation, *Home Page*, <https://www.thereformation.com/> (last visited July 26, 2023) (advertising plastic-free, vegan leather; recycled and recyclable textile materials; garments produced with less water and fewer carbon emissions).

16. *Questions and Answers on European Green Claims*, EUR. COMM'N (Mar. 22, 2023), [https://ec.europa.eu/commission/presscorner/detail/en/QANDA\\_23\\_1693](https://ec.europa.eu/commission/presscorner/detail/en/QANDA_23_1693).

17. *See* Adam Hayes, *What Is Greenwashing? How It Works, Examples, and Statistics*, INVESTOPEDIA (Mar. 31, 2023), <https://www.investopedia.com/terms/g/greenwashing.asp> (defining "greenwashing" as involving "making an unsubstantiated claim to deceive consumers into believing that a company's products are environmentally friendly or have a greater positive environmental impact than they actually do").

18. Bella Webb, *The EU Is Targeting Greenwashing Claims, and Fashion Is a Top Offender*, VOGUE BUS. (Mar. 22, 2023), <https://www.voguebusiness.com/sustainability/the-eu-is-targeting-greenwashing-claims-and-fashion-is-a-top-offender>.

19. 15 U.S.C. §45.

20. *See* FTC, *Green Guides*, <https://www.ftc.gov/news-events/topics/truth-advertising/green-guides> (last visited July 26, 2023) (noting that the first Green Guides were issued in 1992).

21. Guides for the Use of Environmental Marketing Claims, 87 Fed. Reg. 77766 (proposed Dec. 20, 2022) (to be codified at 16 C.F.R. pt. 260), *available at* <https://www.regulations.gov/document/FTC-2022-0077-0001>.

22. Rose Reilly, Public Comment on the Proposed Rule: Guides for the Use of Environmental Marketing Claims (Mar. 25, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0214>.

23. Shemona Safaya, *Rising Awareness of Sustainability Will Drive Apparel Rental Market*, JUST STYLE (Jan. 25, 2023), <https://www.just-style.com/comment/rising-awareness-of-sustainability-will-drive-apparel-rental-market/> (predicting that the apparel rental "market is expected to grow by 101.2% between 2022 and 2026 to reach US\$9.9bn").

24. *thredUP Releases 10th Annual Resale Report With Insights on a Decade of Resale*, THREDUP NEWSROOM (May 17, 2022), <https://newsroom.thredup.com/news/thredup-releases-10th-annual-resale-report-with-insights-on-a-decade-of-resale> (reporting that the "secondhand market [is] estimated to more than double by 2026, reaching \$82 billion").

expected to increase exponentially in value in the coming years. However, this Article’s scope will be limited to the environmental claims made by fashion companies that sell new products directly to consumers. Greenwashing, which describes fraudulent or deceptive environmental claims in marketing,<sup>25</sup> is extremely common in this area of the “sustainable” fashion industry. This part explores examples of greenwashing, both conceptual in nature and based on recent events in the fashion industry, and includes comments about the additional complexities introduced into this regulatory landscape with the rise of “sustainable” fashion.

The “seven sins” of greenwashing identified in 2007 after a study by TerraChoice (later acquired by UL Solutions)<sup>26</sup> provide a useful framework for identifying and understanding different types of potentially misleading sustainability claims that fashion companies currently make to consumers. The seven sins include the sin of the hidden trade off, the sin of no proof, the sin of vagueness, the sin of worshipping false labels, the sin of irrelevance, the sin of lesser of two evils, and the sin of fibbing.<sup>27</sup>

### A. *The Sin of the Hidden Trade Off*

The sin of the hidden trade off, which TerraChoice identified as the sin most commonly committed,<sup>28</sup> describes when a claim suggests “that a product is green based on a narrow set of attributes without attention to other important environmental issues.”<sup>29</sup> Although specific claims about one environmental aspect of a fashion product or brand can be more accurate than broad statements about its “sustainable” nature, these narrowly focused claims can still be misleading to consumers when they omit other relevant information. Although there are many, one fashion example of this sin is “vegan leather.”

Vegan leather does not necessarily mean a plant-based material; it is typically made from polyurethane (a type of plastic).<sup>30</sup> Although the environmental impact of the beef cattle industry is significant and vegan choices can result in environmental benefits in other contexts,<sup>31</sup> the produc-

tion of non-biodegradable plastic derived from fossil fuels to produce “vegan leather,” which then sheds microplastics throughout its life cycle, makes it questionable whether this is truly the more environmentally friendly fashion choice when all factors are considered.<sup>32</sup>

Discouraging vague claims and requiring substantiation for more specific narrow types of claims addressed in the Green Guides, two of the primary focuses of this Article’s proposals, likely will not directly assist the FTC in preventing claims that commit the sin of the hidden trade off. As such, Part III also suggests that the FTC incorporate principles similar to those outlined in the United Kingdom’s (U.K.’s) Competition and Markets Authority (CMA) guidance from September 2021 that provide a helpful framework for preventing companies from making true, but misleading due to their narrow nature, environmental claims.<sup>33</sup>

### B. *The Sin of No Proof*

Fashion retailers frequently commit the sin of no proof when making claims “not substantiated by easily accessible supporting information or by a reliable third-party certification.”<sup>34</sup> As discussed in the introduction above, investigations into companies’ greenwashing claims suggest that this is a very common practice in the industry.<sup>35</sup> As part of the European Green Deal and following alarming findings about unsubstantiated environmental claims in 2020,<sup>36</sup> the European Commission announced in March 2023 a proposal to require many environmental claims made by companies to be independently verified and supported by scientific evidence, ideally based on primary, company-specific data.<sup>37</sup>

One example of an unsubstantiated claim of a fashion garment’s environmental benefit would be an advertisement that the product was created using recycled fibers, without evidence that the fibers were either recovered after consumer use or sourced from pre-consumer material that reliable evidence suggests would have otherwise entered

25. See, e.g., Steve Cohen, *Regulating Greenwashing*, COLUM. CLIMATE SCH. (Jan. 17, 2023), <https://news.climate.columbia.edu/2023/01/17/regulating-greenwashing/>.

26. UL Solutions, *Sins of Greenwashing*, <https://www.ul.com/insights/sins-greenwashing> (last visited July 26, 2023) (used with permission from UL Solutions).

27. *Id.*

28. TERRACHOICE, THE “SIX SINS OF GREENWASHING™”: A STUDY OF ENVIRONMENTAL CLAIMS IN NORTH AMERICAN CONSUMER MARKETS 3 (2007), [https://sustainability.usask.ca/documents/Six\\_Sins\\_of\\_Greenwashing\\_nov\\_2007.pdf](https://sustainability.usask.ca/documents/Six_Sins_of_Greenwashing_nov_2007.pdf).

29. UL Solutions, *supra* note 26.

30. Hiroko Tabuchi, *How Fashion Giants Recast Plastic as Good for the Planet*, N.Y. TIMES (June 12, 2022), <https://www.nytimes.com/2022/06/12/climate/vegan-leather-synthetics-fashion-industry.html>. *But see, e.g.*, VEGEA, *Home Page*, <https://www.vegea.com/> (last visited July 26, 2023) (promoting an alternative to leather that uses grape skins, stalks, and seeds discarded during wine production).

31. See, e.g., Joan Sabaté & Sam Soret, *Sustainability of Plant-Based Diets: Back to the Future*, 100 AM. J. CLINICAL NUTRITION 476S (2014); cf. People for the Ethical Treatment of Animals, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 24, 2023),

<https://www.regulations.gov/comment/FTC-2022-0077-0894> (criticizing the marketing of animal products, including leather, wool, cashmere, silk, and fur, as sustainable).

32. Tabuchi, *supra* note 30 (noting that millions of hides actually currently go to landfills as Americans continue to consume high levels of beef); cf. Leather and Hide Council of America, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 24, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-1294> (noting that “[e]very year, U.S. hides and skins derived from food-producing animals, by-products of cattle, pig and sheep raised for meat, are wastefully disposed of in landfills or incinerators”).

33. *Guidance: Making Environmental Claims on Goods and Services*, CMA (Sept. 20, 2021), <https://www.gov.uk/government/publications/green-claims-code-making-environmental-claims/environmental-claims-on-goods-and-services> (including as a third core principle that “claims must not omit or hide important relevant information”).

34. UL Solutions, *supra* note 26.

35. See *Questions and Answers on European Green Claims*, *supra* note 16.

36. *Id.*

37. *Proposal for a Directive of the European Parliament and of the Council on Substantiation and Communication of Explicit Environmental Claims (Green Claims Directive)*, COM (2023) 166 final (Mar. 22, 2023) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2023%3A0166%3AFIN>.

the waste stream.<sup>38</sup> Although the complexity and opacity of global supply chains often makes substantiation potentially untrustworthy, or at best difficult, authentication innovations, including physical magnifying systems and newer DNA tagging technology, now allow companies to be able to differentiate between, for example, virgin and recycled polyester.<sup>39</sup> As Part III suggests, by more explicitly requiring qualification and substantiation of recycled content claims in the Green Guides, the FTC would be better equipped to address claims that lack substantiation and implicate the sin of no proof.

### C. The Sin of Vagueness

Broad environmental claims by clothing companies about the “sustainable,” “ethical,” “eco-conscious,” or “natural” features of their processes or products can implicate the sin of vagueness, which is when a claim “is so poorly defined or broad that its real meaning is likely to be misunderstood by the consumer.”<sup>40</sup> For example, H&M’s Conscious Collection launched in 2011 advertised that its items were made with at least “50% sustainable materials,” the actual meaning of which is unclear.<sup>41</sup> In September 2022, the Netherlands’ Authority for Consumers and Markets (ACM) found that certain terms, including “Ecodesign” and “Conscious,” used by H&M in their marketing of clothing products were either unclear or insufficiently substantiated.<sup>42</sup>

Similarly, the U.K.’s CMA announced in the summer of 2022 that it would investigate vague and broad claims

made by ASOS, Boohoo, and George at ASDA about the sustainable nature of their clothing collections, citing particular concern with “entire lines of clothing” such as ASOS’ “Responsible edit,” Boohoo’s “Ready for the Future” collection, and “George for Good” being labeled sustainable and eco-friendly.<sup>43</sup> As will be proposed in Part III, the FTC should clarify guidance about and prioritize enforcement of deceptive broad environmental claims that use hard-to-define words such as “sustainable” and “natural,” which not only commit the sin of vagueness, but also, misleadingly, often connote positive environmental benefits that in reality cannot be substantiated.

### D. The Sin of Worshipping False Labels

The sin of worshipping false labels is committed when, “through either words or images,” a company “gives the impression of third-party endorsement where no such endorsement exists.”<sup>44</sup> The FTC takes this issue seriously: in 2017, the agency settled with a company that, among other misleading environmental claims, advertised their mattresses as being certified by the “Green Safety Shield,” while failing to disclose that this seal was created by the company itself and awarded to its own products.<sup>45</sup> A pure example of the sin of worshipping false labels in a fashion context would be a company selling organic clothes and displaying the U.S. Department of Agriculture (USDA) organic seal or proclaiming to be using USDA organic textiles without having produced the products in accordance with the National Organic Program regulations and obtaining certification.<sup>46</sup>

This practice is addressed by the FTC in the current Green Guides, which include a section on certifications and seals of approval.<sup>47</sup> A similar, ongoing real issue in the

38. Cf. 16 C.F.R. §260.13(b) (advising marketers:

It is deceptive to represent, directly or by implication, that an item contains recycled content unless it is composed of materials that have been recovered or otherwise diverted from the waste stream, either during the manufacturing process (pre-consumer), or after consumer use (post-consumer). If the source of recycled content includes pre-consumer material, the advertiser should have substantiation that the pre-consumer material would otherwise have entered the waste stream. . . . Where a marketer distinguishes between pre-consumer and post-consumer materials, it should have substantiation for any express or implied claim about the percentage of pre-consumer or post-consumer content in an item.

39. See Applied DNA Sciences, Inc., Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 7, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0377>; see also Ana Swanson, *How A.I. and DNA Are Unlocking the Mysteries of Global Supply Chains*, N.Y. TIMES (Apr. 7, 2023), <https://www.nytimes.com/2023/04/07/business/economy/ai-tech-dna-supply-chain.html>.

40. UL Solutions, *supra* note 26.

41. Rachel, “Sustainable Style”: How Conscious Is H&M Conscious?, WHAT WONDER WOMEN WEAR (Feb. 11, 2021), <https://www.whatwonderwomenwear.com/how-conscious-is-it-to-buy-hm-conscious/>.

42. Rachel Deeley, *H&M, Decathlon Dial Back Claims to Dodge Greenwashing Crackdown*, BUS. FASHION (Sept. 13, 2022), <https://www.businessoffashion.com/news/sustainability/hm-decathlon-to-make-donations-dial-back-sustainability-claims-to-avoid-dutch-greenwashing-crackdown/>. But cf. Tiffany Ferris et al., *Guidance for “Sustainable” Claims After Dismissal of H&M “Greenwashing” Class Action*, REUTERS (June 2, 2023), <https://www.reuters.com/legal/legalindustry/guidance-sustainable-claims-after-dismissal-hm-greenwashing-class-action-2023-06-02/> (reporting that in May “a federal judge in the Eastern District of Missouri dismissed a proposed class action lawsuit against H&M for its ‘Conscious Choice’ line of products based, in part, on a finding that plaintiff’s allegations that H&M’s ‘sustainable’ marketing violated . . . the FTC’s [Green Guides] . . . were not supported” and that “U.S. District Court Judge Rodney W. Sippel found that H&M’s ‘sustainable’ claims were appropriately qualified”).

43. Rupert Neate & Sarah Butler, *Asos, Boohoo, and George at Asda Investigated Over Eco-Friendly Claims*, GUARDIAN (July 29, 2022), <https://www.theguardian.com/business/2022/jul/29/asos-boohoo-george-at-asda-investigated-over-eco-friendly-claims-sustainability>; *ASOS, Boohoo, and Asda: Greenwashing Investigation*, CMA (Jan. 26, 2023), <https://www.gov.uk/cma-cases/asos-boohoo-and-asda-greenwashing-investigation>.

44. UL Solutions, *supra* note 26.

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

46. See Policy Memorandum 11-14 From Miles McEvoy, Deputy Administrator of the National Organic Program, USDA, to Stakeholders and Interested Parties, Labeling of Textiles That Contain Organic Ingredients (May 20, 2011), <https://www.ams.usda.gov/sites/default/files/media/OrganicTextilePolicyMemo.pdf>. Although not an example from the fashion industry, a retailer recently agreed to “pay \$1.76 million to settle a FTC complaint alleging that their nationally marketed bath and beauty products are neither ‘100% organic’ nor ‘certified organic’ by the U.S. Department of Agriculture (USDA).” FTC, *Truly Organic Inc.*, <https://www.ftc.gov/legal-library/browse/cases-proceedings/192-3077-truly-organic-inc> (last updated Sept. 19, 2019).

47. 16 C.F.R. §260.6 (communicating that “[i]t is deceptive to misrepresent, directly or by implication, that a product, package, or service has been endorsed or certified by an independent third party,” that “[t]hird-party certification does not eliminate a marketer’s obligation to ensure that it has substantiation for all claims reasonably communicated by the certification,” and “marketers should use clear and prominent qualifying language that clearly conveys that the certification or seal refers only to specific and limited benefits”).

global organic cotton industry is the lack of credibility and transparency from inspection agencies that certify organic materials in India, which is the largest producer of organic cotton: investigations have revealed widespread fraud, including a “scheme by certain producers to create fake government-approved transaction certificates and websites,”<sup>48</sup> and one consulting firm estimates that “between one half and four-fifths of what is being sold as organic cotton from India is not genuine.”<sup>49</sup>

The FTC is currently seeking public comment on whether there is a need for additional guidance in the Green Guides regarding “organic” claims.<sup>50</sup> More broadly, the number of environmental labels and third-party certifications continues to increase, and consumers risk drowning in a “green” sea of acronyms: a review of Ecolabel Index’s website suggests there are at least 200 eco-labels in use in the United States currently, although only a small number are geared toward the fashion and textile industry.<sup>51</sup>

### E. The Sin of Irrelevance

Claims “that may be truthful but [are] unimportant or unhelpful for consumers” represent the sin of irrelevance, particularly if all other products in the same category can make the same claim.<sup>52</sup> For example, an irrelevant claim may be merely equivalent to meeting requirements imposed by law: TerraChoice uses the example of claims made about products being free of chlorofluorocarbons (CFCs), most uses of which are banned under the Montreal Protocol.<sup>53</sup> Although there are few truly irrelevant claims made by fashion retailers that are analogous to such CFC-free claims, the increasing focus on a piece of clothing’s end of life is an area in which such claims, without more information, may be unimportant or unhelpful to consumers.

A claim that clothing can be recycled may be irrelevant to consumers because although most garments can theo-

retically be repurposed into new products, the reality is that most recycling facilities do not accept textiles, and less than 1% of recycled clothing is used to make new clothing due to the difficulties of closed-loop textile recycling.<sup>54</sup> Unsubstantiated or unqualified claims about a fashion garment’s compostable or biodegradable nature represent multiple greenwashing “sins,” notably the sin of no proof, and can mislead consumers if they do not understand the actions required at the clothing item’s end of life for it to degrade properly. In reaching a settlement with a clothing company about unsubstantiated and unqualified biodegradability claims and other false claims about their textile products, the FTC noted that “[m]ost clothing and textiles are disposed of either by recycling or in a landfill, where such biodegradation does not occur.”<sup>55</sup>

### F. The Sin of Lesser of Two Evils

The sin of lesser of two evils can be illustrated by the marketing of many products in the “sustainable” fashion industry. Even true claims about these products “risk[ ] distracting the consumer from the greater environmental impacts of the category as a whole,”<sup>56</sup> obscuring the reality that there is no such thing as sustainable fast fashion. A more specific example, also illustrating the sin of the hidden trade off, is the rise of the use of recycled polyester in fast-fashion clothing.<sup>57</sup> Currently, most of the world’s clothing is made of polyester.<sup>58</sup> Polyester is made from polyethylene terephthalate (PET), a type of plastic, and its production results in significant fossil fuel extraction.<sup>59</sup> Recycled polyester (rPET) is made by melting down existing plastic, such as recycled water bottles,<sup>60</sup> and creating new fibers from this recycled material.<sup>61</sup>

Although the diversion of these pre- and post-consumer materials keeps these plastics out of the ocean and landfills and manufacturing rPET is less resource-intensive

48. Alden Wicker et al., *That Organic Cotton T-Shirt May Not Be as Organic as You Think*, N.Y. TIMES (Feb. 13, 2022), <https://www.nytimes.com/2022/02/13/world/asia/organic-cotton-fraud-india.html>.

49. *Id.*

50. Press Release, FTC, FTC Seeks Public Comment on Potential Updates to Its “Green Guides” for the Use of Environmental Marketing Claims (Dec. 14, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/12/ftc-seeks-public-comment-potential-updates-its-green-guides-use-environmental-marketing-claims>. This Article does not advocate for any specific proposal related to the regulation of “organic” marketing claims, although this issue is certainly important for the agency in its expertise to consider given the prevalence of claims in multiple non-food industries, including fashion.

51. See Ecolabel Index, *All Ecolabels in United States*, <https://www.ecolabelindex.com/ecolabels/?st=country,us> (last visited July 26, 2023). Some eco-labels that are used in the fashion industry include Global Organic Textile Standard (GOTS), OEKO-TEX® STANDARD 100, OEKO-TEX® MADE IN GREEN, OEKO-TEX® ORGANIC COTTON, OEKO-TEX® LEATHER STANDARD, Forest Stewardship Council (FSC) 100%, FSC Recycled, and FSC Mix. IDFL Laboratory and Institute, *Global Organic Textile Standard (GOTS)*, <https://idfl.com/services/audits-certifications/global-organic-textile-standard-gots/> (last visited July 26, 2023); OEKO-TEX, *Make Decisions Which Protect Our Planet*, <https://www.oeko-tex.com/en/our-standards> (last visited July 26, 2023); FSC International, *What’s in a Label?*, <https://fsc.org/en/what-the-fsc-labels-mean> (last visited July 26, 2023).

52. UL Solutions, *supra* note 26.

53. *Id.*

54. See Alden Wicker, *Fast Fashion Is Creating an Environmental Crisis*, NEWSWEEK (Sept. 1, 2016), <https://www.newsweek.com/2016/09/09/old-clothes-fashion-waste-crisis-494824.html>. H&M offers a garment-collecting program that encourages the reuse and recycling of unwanted textiles, and currently advertises a number of products as part of their Circular Design Stories series that include features to “further enable recycling.” See H&M, *H&M Innovation Circular Design Story 2021004*, [https://www2.hm.com/en\\_us/sustainability-at-hm/our-work/the-latest/2094-the-future-is-circular.html](https://www2.hm.com/en_us/sustainability-at-hm/our-work/the-latest/2094-the-future-is-circular.html) (last visited July 26, 2023); see also H&M, *Let’s Close the Loop*, [https://www2.hm.com/en\\_us/sustainability-at-hm/our-work/close-the-loop.html](https://www2.hm.com/en_us/sustainability-at-hm/our-work/close-the-loop.html) (last visited July 26, 2023).

55. Press Release, FTC, *Maker of Rayon Clothes Barred From Deceptive “Bamboo” Claims* (Oct. 22, 2009), <https://www.ftc.gov/news-events/news/press-releases/2009/10/maker-rayon-clothes-barred-deceptive-bamboo-claims>.

56. UL Solutions, *supra* note 26.

57. *Cf.* Class Action Complaint, *Lizama v. H&M*, No. 4:22-cv-01170 (E.D. Mo. filed Nov. 3, 2022), available at <https://assets.law360news.com/1546000/1546614/https-ecf-moed-uscourts-gov-doc1-107110638852.pdf>.

58. Marjorie van Elven, *How Sustainable Is Recycled Polyester?*, FASHIONUNITED (Nov. 15, 2018), <https://fashionunited.uk/news/fashion/how-sustainable-is-recycled-polyester/2018111540000>.

59. *Id.*

60. See, e.g., Patagonia, *Recycled Polyester*, <https://www.patagonia.com/our-footprint/recycled-polyester.html> (last visited July 26, 2023) (making rPET from plastic soda bottles since 1993).

61. van Elven, *supra* note 58.

than PET production, most rPET is mechanically recycled, which causes the fibers to degrade in quality, and often requires mixing with virgin PET to create the final product.<sup>62</sup> Finally, rPET still contributes to the problem of microplastic pollution,<sup>63</sup> which is part of why some who are critical of rPET argue that clothing made of natural fibers like hemp, wool, and cotton should be encouraged instead.<sup>64</sup> Regardless, the overproduction and overconsumption of clothes, recycled or not, is the larger problem and without more comprehensive regulation of the fashion industry and fundamental changes in consumer habits, the sin of lesser of two evils may be difficult to fully address through improved enforcement of deceptive marketing practices.

### G. *The Sin of Fibbing*

Finally, as the name suggests, the sin of fibbing covers “claims that are simply false.”<sup>65</sup> Beyond making unsubstantiated claims, fashion retailers also sometimes market products and processes in an outright untrue way. For example, according to a Quartz investigation into 600 women’s clothing Higg Index<sup>66</sup> scorecards on H&M’s U.K. website in 2022, more than 100 of the cards included errors that made the clothing products appear more sustainable than they were.<sup>67</sup>

In one instance, Quartz found that H&M marketed a dress as using 20% less water to manufacture when the actual score indicated that it used 20% more water.<sup>68</sup> A class action has been filed in the Southern District of New York against H&M for the false and misleading use of these environmental scorecards.<sup>69</sup> Part II of this Article analyzes past enforcement actions of the FTC that demonstrate the agency’s previous focus on false claims, which entail the sin of fibbing, and its success using authority under §5 of the FTC Act and the Textile Fiber Products Identification Act (Textile Act) to tackle such claims made by industry.

## II. **FTC’s Authority and Enforcement History**

Created in 1914 with an initial primary focus on preventing anti-competitive business practices, the FTC’s authority has been broadened to include a variety of important consumer protection goals.<sup>70</sup> Through law enforcement, advocacy, research, and education, the agency carries out its mission to protect “the public from deceptive or unfair business practices and from unfair methods of competition.”<sup>71</sup> Tackling greenwashing is important for the agency in achieving these goals, as FTC Chair Lina Khan recently reaffirmed following the agency’s call for regulatory review of the Green Guides in December 2022.<sup>72</sup> Khan noted that “[f]or the average consumer, it’s impossible to verify these claims,” and explained how misleading and false claims not only harm consumers but “distort[ ] the market for environmentally friendly products” and “put[ ] honest companies, who bear the costs of green business practices, at a competitive disadvantage.”<sup>73</sup>

This part explains the FTC’s existing statutory authority to regulate deceptive marketing practices in the fashion industry, explores the sections of the 2012 Guides most relevant to this industry, and analyzes previous enforcement actions by the agency for their value in informing future fashion greenwashing prevention and enforcement strategies.

### A. *Statutory Authority: The FTC Act and Textile Act*

Amended in 1938 to prohibit “unfair or deceptive acts or practices in or affecting commerce” in addition to “unfair methods of competition,” §5 of the FTC Act has long provided the FTC with the authority to regulate misleading marketing claims made to American consumers.<sup>74</sup> Under §18 of the Act, the agency has been empowered since 1975 to issue both legally binding rules, known as “trade regulation rules,” and nonbinding administrative guidance such as the Green Guides to address unfair or deceptive acts or practices under the FTC Act.<sup>75</sup> To commence a rule-

62. *Id.*

63. *Id.*

64. *Id.*

65. UL Solutions, *supra* note 26.

66. The Higg Index is a rating standard developed by the Sustainable Apparel Coalition in 2011, which has received criticism from environmental advocates for its decisions in rating synthetic versus natural materials. *See* Tabuchi, *supra* note 30; *see also* Sarah Kent, *Norway Warns H&M, Norrona Over Misleading Sustainability Claims*, BUS. FASHION (June 16, 2022), <https://www.businessoffashion.com/articles/sustainability/hm-norrona-norway-sustainability-environmental-marketing-higg/> (reporting that Norway’s consumer authority banned references to the Higg Index in marketing materials in June 2022 after finding the consumer-facing aspects of the rating system could be misleading to consumers).

67. Amanda Shendruk, *Quartz Investigation: H&M Showed Bogus Environmental Scores for Its Clothing*, QUARTZ (June 29, 2022), <https://qz.com/2180075/hm-showed-bogus-environmental-higg-index-scores-for-its-clothing>.

68. Class Action Complaint, *Commodore v. H&M*, No. 7:22-cv-06247 (S.D.N.Y. filed July 22, 2022), available at <https://www.classaction.org/media/commodore-v-h-and-m-hennes-and-mauritz-lp.pdf>.

69. *Id.*

70. *See, e.g.*, FTC, *About the FTC*, <https://www.ftc.gov/about-ftc> (last visited July 26, 2023).

71. *Id.*

72. Statement of FTC Chair Lina M. Khan Regarding the Regulatory Review of the Guides for the Use of Environmental Marketing Claims (Dec. 14, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/statement\\_of\\_chair\\_lina\\_m.\\_khan\\_re\\_green\\_guides\\_-\\_final.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/statement_of_chair_lina_m._khan_re_green_guides_-_final.pdf).

73. *Id.*

74. 15 U.S.C. §45; J. Howard Beales, *The FTC’s Use of Unfairness Authority: Its Rise, Fall, and Resurrection*, FTC (May 30, 2003), <https://www.ftc.gov/news-events/news/speeches/ftcs-use-unfairness-authority-its-rise-fall-resurrection>.

75. FTC, *A Brief Overview of the Federal Trade Commission’s Investigative, Law Enforcement, and Rulemaking Authority*, <https://www.ftc.gov/about-ftc/mission/enforcement-authority> (last revised May 2021) [hereinafter *FTC, A Brief Overview*] (defining “trade regulation rules” as “rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce” within the meaning of Section 5(a)(1) of the Act”); 15 U.S.C. §57a(a)(1); *see also, e.g.*, FTC, *R-Value Rule*, <https://www.ftc.gov/legal-library/browse/rules/r-value-rule> (last visited July 26, 2023) (providing an example of a trade regulation rule, the Trade Regulation Rule Concerning the Labeling and Advertising of Home Insulation, which “requires home insulation manufacturers, professional installers, new home

making proceeding to prescribe a trade regulation rule, the FTC “must have reason to believe that the practices to be addressed by the rulemaking are ‘prevalent.’”<sup>76</sup> For these proceedings, the FTC Act requires that the agency “provide an opportunity for informal hearings at which interested parties are accorded limited rights of cross-examination.”<sup>77</sup>

Violators of trade regulation rules are liable for civil penalties, which the agency obtains in federal district court.<sup>78</sup> Beyond promulgating specific trade regulation rules, the FTC can enforce the prohibition against deceptive acts or practices under the FTC Act by instituting an administrative adjudication by issuing a complaint in line with the processes prescribed in §5(b) when the agency has “reason to believe” that a violation has occurred.<sup>79</sup> Many respondents choose to settle such charges and sign consent agreements, waiving the right to judicial review.<sup>80</sup> Violations of these final orders subject respondents to liability for civil penalties assessed by a federal district court.<sup>81</sup>

The FTC Policy Statement on Deception, which has communicated the agency’s understanding of deceptive acts or practices since 1983, clarifies that a representation, omission, or practice is deceptive if it is likely to mislead consumers acting reasonably under the circumstances and is material to consumers’ decisions.<sup>82</sup> The agency defines “material” to mean affecting a “consumer’s conduct or decision with regard to a product or service.”<sup>83</sup> In many cases, materiality “can be presumed from the nature of the practice,” and often inherently implies injury to the consumer.<sup>84</sup>

sellers, and retailers to provide R-value information, based on the results of standard tests, to help inform consumers”).

76. FTC, *A Brief Overview*, *supra* note 75; 15 U.S.C. §57a(b)(3).

77. FTC, *A Brief Overview*, *supra* note 75.

78. *Id.* (noting also that “any person who violates a rule (irrespective of the state of knowledge) is liable for injury caused to consumers by the rule violation”); 15 U.S.C. §45(m)(1)(A).

79. FTC, *A Brief Overview*, *supra* note 75; 15 U.S.C. §45(b). Although a recent U.S. Supreme Court case limited the FTC’s power to seek equitable monetary relief such as disgorgement or restitution under §13(b) of the FTC Act, this ruling does not affect the agency’s authority to seek injunctions in federal court nor otherwise initiate administrative proceedings or promulgate trade regulation rules under other sections of the Act as discussed in this part. *See generally* AMG Cap. Mgmt. LLC v. Federal Trade Comm’n, 141 S. Ct. 1341 (2021).

80. FTC, *A Brief Overview*, *supra* note 75 (explaining that “[i]f the respondent elects to contest the charges, the complaint is adjudicated before an administrative law judge [(ALJ)],” and “[u]pon conclusion of the hearing, the ALJ issues an ‘initial decision’ that “[e]ither complaint counsel or respondent, or both, may appeal . . . to the full Commission.” This final decision is appealable in “any United States court of appeals within whose jurisdiction the respondent resides or carries on business or where the challenged practice was used,” and “[w]here the Commission has determined in a litigated administrative adjudicatory proceeding that a practice is unfair or deceptive and has issued a final cease and desist order, the Commission may obtain civil penalties from non-respondents who thereafter violate the standards articulated by the Commission” if the agency shows “that the violator had ‘actual knowledge that such act or practice is unfair or deceptive and is unlawful’ under Section 5(a)(1) of the FTC Act”); *see, e.g.*, ECM BioFilms v. Federal Trade Comm’n, No. 15-4339 (6th Cir. 2016) (exemplifying a company appealing the Commission’s decision after an ALJ concluded that the biodegradability representations made by the company about its products were false and misleading in violation of §5 of the FTC Act).

81. 15 U.S.C. §45(l).

82. FTC Policy Statement on Deception, 103 E.T.C. 174 (1983).

83. *Id.*

84. *Id.*

In considering whether a consumer’s interpretation or reaction is reasonable when allegedly deceptive practices are targeted to a specific audience, the agency considers reasonableness from the perspective of this group.<sup>85</sup> Notably, depending on the circumstances, the agency warns that accurate information provided in fine print or written disclosures may not be sufficient to correct a false or misleading headline.<sup>86</sup> However, the FTC generally does not enforce its authority in cases involving “obviously exaggerated or puffing representations,” which are understood to be “those that the ordinary consumers do not take seriously.”<sup>87</sup>

There are also limits to the FTC’s authority under the First Amendment, although commercial speech is less protected than other forms of speech. Importantly, commercial speech only comes within the First Amendment when it concerns lawful activity and is not misleading, which are highly relevant constraints on marketers’ First Amendment protection in the context of the FTC’s authority and enforcement with respect to deceptive acts or practices.<sup>88</sup> A comment from the National Federation of Independent Business alleges that the “FTC designed the Guides to chill certain commercial speech by marketers.”<sup>89</sup> However, the

85. *Id.*; *see also* FTC, FTC GREEN GUIDES: STATEMENT OF BASIS AND PURPOSE 25 (2012), <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-issues-revised-green-guides/greenguidesstatement.pdf> [hereinafter FTC GREEN GUIDES STATEMENT] (noting that “when a marketer targets a particular segment of consumers, such as those who are particularly knowledgeable about the environment, the Commission will examine how reasonable members of that group interpret the advertisement,” but cautioning that “more sophisticated consumers may not view claims differently than less sophisticated consumers,” citing the FTC consumer perception study that “yielded comparable results for both groups,” which both “believed that a general, unqualified ‘green’ claim suggested specific, unstated environmental benefits, such as biodegradable and recyclable”).

86. FTC Policy Statement on Deception, *supra* note 82 (“recognizes that in many circumstances, reasonable consumers do not read the entirety of an ad”); *see, e.g.*, Complaint at 5, In re M Grp., Inc., FTC Docket No. 9340 (Aug. 7, 2009) (alleging violations of the Textile Act although the company website included one web page “where, as part of a series of questions and answers, [the company acknowledged] that, (a) ‘[t]he fiber produced chemically is what [Bamboosa] use[s] and what most companies are using at this time,’ and (b) ‘[t]he main chemical used in the processing [of Bamboosa’s textile fiber products] is sodium hydroxide also known as caustic soda’”; the agency noted that these statements were “not clear and conspicuous, nor are they in close proximity to either the website’s individual product pages or any of the advertisements”).

87. FTC Policy Statement on Deception, *supra* note 82.

88. Government regulation of only such lawful and not misleading speech must satisfy a test established by the Supreme Court. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980). However, Supreme Court Justices, including Justice Clarence Thomas and the late Justice Antonin Scalia, have criticized the *Central Hudson* test. *See* 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 527-28 (1996) (Thomas, J., concurring in part) (criticizing the “inherently nondeterminative nature of a case-by-case balancing ‘test’ unaccompanied by any categorical rules, and the consequent likelihood that individual judicial preferences will govern application of the test,” and proposing that “[r]ather than continuing to apply a test that makes no sense to me when the asserted state interest is of the type involved here, I would return to the reasoning and holding of *Virginia Bd. of Pharmacy*”); *see also id.* at 517 (Scalia, J., concurring in part) (adding that “I share Justice THOMAS’s discomfort with the *Central Hudson* test, which seems to me to have nothing more than policy intuition to support it”).

89. National Federation of Independent Business, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Feb. 15, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0094> (calling attention to the *Central Hudson* test and highlighting the FTC’s

Green Guides, as administrative interpretations, cannot and do not create additional obligations beyond those that are already required under §5 of the FTC Act.<sup>90</sup>

In addition to the agency's long-standing consumer protection authority under the FTC Act, the Textile Act makes the manufacture, introduction, sale, transportation, distribution, or importation of misbranded or deceptively advertised textile fiber products both an unfair method of competition and an unfair and deceptive act or practice under the FTC Act.<sup>91</sup> The Textile Act and subsequent promulgated rules set forth the requirements that marketers include with their products a label listing the generic names and percentages by weight of the constituent fibers.<sup>92</sup> The Textile Act, in combination with the agency's authority under the FTC Act, holds particular relevance for the FTC's deceptive practices enforcement authority against violators in the fashion industry.<sup>93</sup>

To complicate matters, the textile and fashion industries are amidst a "materials revolution" that likely makes this regulatory landscape more complex: companies filed approximately eight times as many fiber-innovation patent applications in 2019 versus 2013, and 45% of apparel companies surveyed by McKinsey in 2019 were already looking to integrate more innovative bio-based materials.<sup>94</sup> Some existing examples of new fiber materials that emphasize "sustainability" in their marketing materials include VEGEA™,<sup>95</sup> Cycora™,<sup>96</sup> Naia™ Renew,<sup>97</sup> Lenzing™

EcoVero™,<sup>98</sup> REPREVE® Our Ocean™,<sup>99</sup> Texloop RCOT,<sup>100</sup> Mylo Leather,<sup>101</sup> Spinnova,<sup>102</sup> Piñatex, and Piñayarn.<sup>103</sup>

## B. Administrative Guidance: The Green Guides

The Green Guides were originally promulgated by the FTC in 1992 and later revised by the agency in 1996, 1998, and 2012.<sup>104</sup> The Green Guides are administrative interpretations that are not independently enforceable by the agency<sup>105</sup>; however, the FTC is authorized to take action under §5(b) of the FTC Act against marketers who make claims inconsistent with the Green Guides.<sup>106</sup> Litigants, including plaintiffs in their complaints and companies seeking to defend against allegations of deceptive practices, and courts often utilize the Green Guides to support their contentions: the Green Guides have been cited more than 120 times in federal and state court cases and administrative hearings.<sup>107</sup>

The Green Guides apply to claims about products, packages, or services made by marketers to individuals, as well as to businesses in business-to-business transactions.<sup>108</sup>

duties to ensure consistency with the First Amendment in the context of the agency's call for revisions to the Green Guides).

90. See FTC GREEN GUIDES STATEMENT, *supra* note 85, at 52 (explaining that the Green Guides instead "clarify this obligation, cautioning marketers that unqualified general environmental benefit claims are difficult, if not impossible, to substantiate and reminding marketers not to make claims they cannot substantiate").
91. 15 U.S.C. §70(a); *cf. id.* §68 (Wool Products Labeling Act); *cf. id.* §69 (Fur Products Labeling Act).
92. See, e.g., Rules and Regulations Under the Textile Fiber Products Identification Act, 85 Fed. Reg. 8781 (Feb. 18, 2020).
93. *Cf.* Circ. Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 24, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-1298> (representing a startup company offering a technology to recycle textiles and commenting that the "FTC should consider improving labeling requirements under the FTC Textile and Wool Act[s] to allow emerging material innovators to communicate the nature of their innovations").
94. See BUSINESS OF FASHION & MCKINSEY & CO., *supra* note 5, at 61.
95. VEGEA, *supra* note 30.
96. Cycora, *Home Page*, <https://cycora.com/> (last visited July 26, 2023) (recycling polyester from textile waste using Ambercycle systems, which eliminates the use of virgin polyester).
97. Naia, *Sustainable Style Your Way*, <https://naia.eastman.com/renew> (last visited July 26, 2023) (creating filament yarn and staple fiber from "60% sustainably sourced wood pulp and 40% certified recycled waste material").

98. Lenzing EcoVero, *Home Page*, <https://www.ecovero.com/> (last visited July 26, 2023) (marketing viscose fibers "derived from sustainable wood and pulp, coming from certified and controlled sources").
99. REPREVE Our Ocean, *Home Page*, <https://repreve.com/repreve-our-ocean> (last visited July 26, 2023) (offering "a premium collection of fiber and resin sourced from bottles at high risk of entering the ocean").
100. Circular Systems, *Texloop Recycling*, <https://circularsystems.com/texloop> (last visited July 26, 2023) (describing a platform that "reclaims pre-consumer cotton textile waste and upgrades it into high quality RCOT™ recycled cotton fiber").
101. Mylo, *Home Page*, <https://mylo-unleather.com/> (last visited July 26, 2023) (advertising a "sustainable leather alternative made from mycelium, the root-like system of mushrooms").
102. Spinnova, *Home Page*, <https://spinnova.com/> (last visited July 26, 2023) (marketing a cellulosic staple fiber made from FSC-certified wood).
103. Ananas Anam, *Home Page*, <https://www.ananas-anam.com/> (last visited July 26, 2023) (offering yarn and a leather alternative made from waste pineapple leaves).
104. FTC GREEN GUIDES STATEMENT, *supra* note 85, at 1 n.1.
105. Agency guidance is treated very differently from agency rules by the courts. See, e.g., National Mining Ass'n v. McCarthy, 758 F.3d 243, 252, 44 ELR 20153 (D.C. Cir. 2014) (explaining that "agency action that merely explains how the agency will enforce a statute or regulation—in other words, how it will exercise its broad enforcement discretion or permitting discretion under some extant statute or rule—is a general statement of policy" and "reiterat[ing] what [the D.C. Circuit] ha[s] said before: 'When the agency applies [a general statement of] policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued'" (quoting Pacific Gas & Elec. Co. v. Federal Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974)).
106. FTC GREEN GUIDES STATEMENT, *supra* note 85, at 1. Thirteen states and territories (Alabama, California, Florida, Guam, Indiana, Maryland, Michigan, Minnesota, New Mexico, New York, Pennsylvania, Rhode Island, and Washington) have incorporated parts of the Green Guides "as the standard for lawfully including environmental marketing claims on consumer products," and provisions in these states "often refer to specific terms and/or sections of the Guides." CONNOR J. FRASER, STATE ENERGY AND ENVIRONMENTAL IMPACT CENTER, WHAT'S IN A LABEL?: THE FTC'S "GREEN GUIDES" IN CONTEXT (2023), <https://stateimpactcenter.org/files/Whats-in-a-Label-The-FTC-Green-Guides-Issue-Brief.pdf>.
107. Paul Davies et al., *Anticipated Changes to FTC Green Guides Portend New Areas of Potential Litigation*, JDSUPRA (Feb. 7, 2023), <https://www.jdsupra.com/legalnews/anticipated-changes-to-ftc-green-guides-9854136> (reporting that "[l]itigants and courts have used the Green Guides frequently to plead, defend against, and support or dismiss deceptive environmental marketing claims").
108. 16 C.F.R. §260.1.



They are framed with a set of general principles that apply to all claims.<sup>109</sup> In line with the FTC's 1984 Policy Statement Regarding Advertising Substantiation, which requires that marketers ensure that their claims are "supported by a reasonable basis," the Green Guides reiterate that environmental claims often require "competent and reliable scientific evidence."<sup>110</sup>

The structure of the Green Guides consists of four general principles that apply to all environmental marketing claims,<sup>111</sup> followed by more specific guidance for particular types of claims, including examples to illustrate the agency's interpretations.<sup>112</sup> The current version of the Green Guides, found at 16 C.F.R. §260, includes sections potentially relevant to fashion marketers that address the use of general environmental benefit claims,<sup>113</sup> certifications and seals of approval,<sup>114</sup> compostable claims,<sup>115</sup> degradable claims,<sup>116</sup> free-of claims,<sup>117</sup> non-toxic claims,<sup>118</sup> recycled con-

tent claims,<sup>119</sup> renewable energy claims,<sup>120</sup> and renewable materials claims.<sup>121</sup>

Of particular relevance in the "sustainable" fashion industry where brands make broad and vague claims, the Green Guides warn that "marketers should not make unqualified general environmental benefit claims," and instead "should use clear and prominent qualifying language that limits the claim to a specific benefit or benefits."<sup>122</sup> Marketers also increasingly boast claims about fashion garments' recycled content, but are not currently required or even strongly advised under the Green Guides to distinguish between pre-consumer and post-consumer materials.<sup>123</sup>

### C. FTC Environmental Marketing Enforcement History

FTC enforcement actions, some of which have involved the marketing of textile and clothing products, illustrate the agency's apparent priorities and strengths in this area. This section focuses on the FTC's history of enforcement under §5 of the FTC Act, against companies that falsely label rayon textile products and companies that make false, misleading, or unsubstantiated biodegradability or compostability claims. Although two recent settlements suggest agency support for addressing the rampant problem of broad and vague environmental benefit claims in the fashion industry, the FTC's greenwashing enforcement actions reflect a focus on a fairly narrow set of issues that

109. *Id.* §260.3 (making clear, for example, that in all contexts, "an environmental marketing claim should specify whether it refers to the product, the product's packaging, a service, or just to a portion of the product, package, or service").

110. *Id.* §260.2; FTC Policy Statement Regarding Advertising Substantiation, 104 F.T.C. 839 (1984) (stating that the FTC "intends to continue vigorous enforcement of this existing legal requirement that advertisers substantiate express and implied claims" and that "a firm's failure to possess and rely upon a reasonable basis for objective claims constitutes an unfair and deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act").

111. 16 C.F.R. §260.3 (providing general principles related to (a) qualifications and disclosures; (b) distinction between benefits of product, package, and service; (c) overstatement of environmental attribute; and (d) comparative claims).

112. *Id.* §§260.4-17.

113. *Id.* §260.4 (stating that it is "deceptive to misrepresent, directly or by implication, that a product, package, or service offers a general environmental benefit").

114. *Id.* §260.6 (stating that it is "deceptive to misrepresent, directly or by implication, that a product, package, or service has been endorsed or certified by an independent third party").

115. *Id.* §260.7 (stating that it is "deceptive to misrepresent, directly or by implication, that a product or package is compostable").

116. *Id.* §260.8 (stating that it is "deceptive to misrepresent, directly or by implication, that a product or package is degradable, biodegradable, oxo-degradable, oxo-biodegradable, or photodegradable," and warning marketers that it is "deceptive to make an unqualified degradable claim for items entering the solid waste stream if the items do not completely decompose within one year after customary disposal").

117. *Id.* §260.9 (stating that it is "deceptive to misrepresent, directly or by implication, that a product, package, or service is free of, or does not contain or use, a substance"). The "Free-of claims" section also includes the following guiding example that is relevant to the fashion industry:

**Example 1:**

A package of t-shirts is labeled "Shirts made with a chlorine-free bleaching process." The shirts, however, are bleached with a process that releases a reduced, but still significant, amount of the same harmful byproducts associated with chlorine bleaching. The claim overstates the product's benefits because reasonable consumers likely would interpret it to mean that the product's manufacture does not cause any of the environmental risks posed by chlorine bleaching. A substantiated claim, however, that the shirts were "bleached with a process that releases 50% less of the harmful byproducts associated with chlorine bleaching" would not be deceptive.

*Id.*

118. *Id.* §260.10 (stating that it is "deceptive to misrepresent, directly or by implication, that a product, package, or service is non-toxic").

119. *Id.* §260.13 (stating that it is "deceptive to represent, directly or by implication, that an item contains recycled content unless it is composed of materials that have been recovered or otherwise diverted from the waste stream, either during the manufacturing process (pre-consumer), or after consumer use (post-consumer)").

120. *Id.* §260.15 (stating that it is "deceptive to misrepresent, directly or by implication, that a product or package is made with renewable energy or that a service uses renewable energy," and warning marketers that it is "deceptive to make an unqualified 'made with renewable energy' claim unless all, or virtually all, of the significant manufacturing processes involved in making the product or package are powered with renewable energy or non-renewable energy matched by renewable energy certificates"). The "Renewable energy claims" section also includes the following guiding example that is relevant to the fashion industry:

**Example 1:**

A marketer advertises its clothing line as "made with wind power." The marketer buys wind energy for 50% of the energy it uses to make the clothing in its line. The marketer's claim is deceptive because reasonable consumers likely interpret the claim to mean that the power was composed entirely of renewable energy. If the marketer stated, "We purchase wind energy for half of our manufacturing facilities," the claim would not be deceptive.

*Id.*

121. *Id.* §260.16 (stating that it is "deceptive to misrepresent, directly or by implication, that a product or package is made with renewable materials" and warning marketers that "[r]esearch suggests that reasonable consumers may interpret renewable materials claims differently than marketers may intend").

122. *Id.* §260.4 (noting that "it is highly unlikely that marketers can substantiate all reasonable interpretations of [unqualified general environmental benefit] claims").

123. *Id.* §260.13 (suggesting only that "[w]here a marketer distinguishes between pre-consumer and post-consumer materials, it should have substantiation for any express or implied claim about the percentage of pre-consumer or post-consumer content in an item").

the agency has pursued primarily in instances of egregious company behavior in violation of the FTC Act.

## 1. False Labeling of Rayon Textiles as Made of “Bamboo”

In 2022, the FTC reached a \$5.5 million settlement with Kohl’s and Walmart related to the retailers’ misleading and deceptive marketing of “bamboo” sheets, towels, and other textile products that were made of rayon.<sup>124</sup> This settlement, involving “by far the largest penalties in this area,” in many ways closely resembles previous actions that the agency has pursued over the past two decades that also involved enforcement under the Textile Act and the FTC Act for the false labeling and advertising of “bamboo” products.<sup>125</sup> In 2009, the FTC strongly signaled to marketers the importance of labeling “bamboo” textile products in a way that adheres to the requirements of the Textile Act by announcing three settlements and one administrative action.<sup>126</sup> The charges against these four companies also criticized the companies’ advertising of the clothing and textile products as retaining the natural antimicrobial properties of bamboo when, in fact, the rayon manufacturing process, which

also involves the release of hazardous air pollutants, eliminates such properties.<sup>127</sup>

Shortly after, in 2010, the agency sent warning letters to 78 companies that were labeling and advertising rayon clothing and other textile products as “bamboo.”<sup>128</sup> While none of the four 2009 actions involved civil penalties to settle the FTC’s charges, the agency in 2013 reached settlements with Amazon, Leon Max, Macy’s, and Sears for mislabeling rayon textiles, which included agreements to pay penalties totaling \$1.26 million.<sup>129</sup> In 2015, the agency settled similar charges with Bed Bath & Beyond, Nordstrom, J.C. Penney, and Backcountry.com, which collectively were required to pay civil penalties totaling \$1.3 million.<sup>130</sup>

What distinguishes the recent complaints filed against Walmart and Kohl’s from these previous bamboo enforcement actions is that the FTC also focused on the two companies’ marketing of their products using other misleading environmental benefit claims.<sup>131</sup> In addition to charges related to the false labeling of the fiber material, the complaints alleged violations of §5 of the FTC Act, in part because Walmart’s and Kohl’s representations that their “textile fiber products made of bamboo or bamboo fiber provide an environmental benefit, in whole or in part, because they are derived from bamboo” were false, misleading, or unsubstantiated.<sup>132</sup> The FTC highlighted how, in addition to making deceptive “bamboo” fiber claims, Walmart claimed that these “bamboo” products were “eco-friendly & sustainable,” “renewable and environmentally sustainable,” or “environmentally friendly.”<sup>133</sup>

124. According to the FTC, the companies had marketed these products as “providing general environment benefits, such as being produced ‘free of harmful chemicals, using clean, non-toxic materials.’” Rayon is a generic name for a type of fiber. The manufacturing process of making rayon from cellulose, which can be sourced from bamboo fiber but does not retain the qualities of bamboo itself, emits hazardous air pollutants. Lesley Fair, *\$5.5 Million Total FTC Settlements With Kohl’s and Walmart Challenge “Bamboo” and Eco Claims, Shed Light on Penalty Offense Enforcement*, FTC: BUS. BLOG (Apr. 8, 2022), <https://www.ftc.gov/business-guidance/blog/2022/04/55-million-total-ftc-settlements-kohls-and-walmart-challenge-bamboo-and-eco-claims-shed-light>.

125. Press Release, FTC, FTC Uses Penalty Offense Authority to Seek Largest-Ever Civil Penalty for Bogus Bamboo Marketing From Kohl’s and Walmart (Apr. 8, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/04/ftc-uses-penalty-offense-authority-seek-largest-ever-civil-penalty-bogus-bamboo-marketing-kohls>; see *infra* notes 126-38 and accompanying text.

126. Press Release, FTC, FTC Charges Companies With “Bamboo-zling” Consumers With False Product Claims (Aug. 11, 2009), <https://www.ftc.gov/news-events/news/press-releases/2009/08/ftc-charges-companies-bamboo-zling-consumers-false-product-claims> [hereinafter Press Release, FTC, “Bamboo-zling”] (charging “four sellers of clothing and other textile products with deceptively labeling and advertising these items as made of bamboo fiber, when they are made of rayon,” and “with making false and unsubstantiated ‘green’ claims that their clothing and textile products are manufactured using an environmentally friendly process, that they retain the natural antimicrobial properties of the bamboo plant, and that they are biodegradable”); Press Release, FTC, *supra* note 55 (barring Bamboosa, a company that sells “bamboo fiber” clothing, “from making any false, misleading, or unsubstantiated claims that any textile product is made of bamboo or bamboo fiber, is antimicrobial or retains the antimicrobial properties of the product from which it is made, or is biodegradable”).

What is concerning when considering the effectiveness of this enforcement action is that Bamboosa’s current website appears to continue to make very similar claims to those that subjected the company’s advertising practices to FTC scrutiny: Bamboosa, perhaps more careful now to specify that their socks are made of “85% Viscose from Organic Bamboo,” still highlights that “[a]nother unique quality with bamboo fiber is it’s [sic] antibacterial qualities” and that “Bamboo fabric is beyond usefulness [sic], it is completely biodegradable in soil.” See, e.g., Bamboosa, NO MORE STICKY FEET. 10qty Adult Deluxe Ankle Socks 85% Viscose From Organic Bamboo/10% Nylon/5% Lycra, <https://www.bamboosa.com/MSPProductDetail.aspx?itemcode=120ANKLESOCK&lang=&itemoptioncustom=&theme=> (last visited July 26, 2023).

127. See sources cited *supra* note 126.

128. Press Release, FTC, FTC Warns 78 Retailers, Including Wal-Mart, Target, and Kmart, to Stop Labeling and Advertising Rayon Textile Products as “Bamboo” (Feb. 3, 2010), <https://www.ftc.gov/news-events/news/press-releases/2010/02/ftc-warns-78-retailers-including-wal-mart-target-kmart-stop-labeling-advertising-rayon-textile>.

129. Press Release, FTC, Four National Retailers Agree to Pay Penalties Totaling \$1.26 Million for Allegedly Falsely Labeling Textiles as Made of Bamboo, While They Actually Were Rayon (Jan. 3, 2013), <https://www.ftc.gov/news-events/news/press-releases/2013/01/four-national-retailers-agree-pay-penalties-totaling-126-million-allegedly-falsely-labeling-textiles> (reporting that Amazon, Leon Max, Macy’s, and Sears “agreed to pay penalties totaling \$1.26 million to settle Federal Trade Commission charges that they violated the Textile Products Identification Act (Textile Act) and the FTC’s Textile Rules by labeling and advertising products sold in stores and online as made of bamboo, while they actually were made of rayon”).

130. Press Release, FTC, Nordstrom, Bed Bath & Beyond, Backcountry.com, and J.C. Penney to Pay Penalties Totaling \$1.3 Million for Falsely Labeling Rayon Textiles as Made of “Bamboo” (Dec. 9, 2015), <https://www.ftc.gov/news-events/news/press-releases/2015/12/nordstrom-bed-bath-beyond-backcountrycom-jc-penney-pay-penalties-totaling-13-million-falsely> (announcing “complaints and proposed court orders barring four national retailers from mislabeling and advertising rayon textiles as made of ‘bamboo’”).

131. See Complaint at 7-11, *United States v. Walmart, Inc.*, No. 22-965 (D.D.C. filed Apr. 8, 2022).

132. *Id.* at 16; Complaint at 22, *United States v. Kohl’s Inc.*, No. 22-964 (D.D.C. filed Apr. 8, 2022).

133. Complaint at 8-11, *United States v. Walmart, Inc.*, No. 22-965 (D.D.C. filed Apr. 8, 2022) (noting also that a “bamboo” nursing sleep bra was marketed “with the claim that it has a ‘unique eco-friendly Fabric,’” “silky soft bamboo sheets” were described as being “[i]n harmony with nature,” a “bamboo” comforter was described as “appeal[ing] to your sense of luxury and your desire to help the planet,” and an “Eco-Friendly Stripe Tee Shirt” was marketed to consumers as “a cute and comfy tee that’s all about sustainability”).

In its complaint against Kohl's, the FTC documented how the company described "bamboo" pillows, duvet covers and sham sets, and mattress pads as "gentle on the planet," marketed kitchen towels as being made of a "[h]ighly renewable bamboo blend [that] promises environmentally friendly use," and frequently used a "Cleaner Solutions" icon on "bamboo" products that led consumers who clicked on it to a web page titled "Sustainability at Kohl's" that suggested the company "care[s] about the planet."<sup>134</sup> The Kohl's complaint additionally charged the company with making false, misleading, or unsubstantiated representations that "[i]ts textile fiber products made of bamboo or bamboo fiber are produced free of harmful chemicals, using non-toxic materials, in a way that is nonpolluting and safe for humans and the environment."<sup>135</sup> As part of the orders, Walmart and Kohl's agreed to "[s]top making unsubstantiated green marketing claims" with respect to these "bamboo" rayon textile products.<sup>136</sup>

This apparent commitment to stricter enforcement against deceptive practices in the textile industry and the agency's inclusion of other greenwashing claims in the complaints is encouraging for the future of greenwashing enforcement in the fashion industry.<sup>137</sup> But the driving factor of the agency's relatively aggressive enforcement in these cases still seems to be the mislabeling of rayon products in violation of the Textile Act, rather than the companies' other environmental benefit claims, and the fact that the retailers ignored warnings from the agency for years.<sup>138</sup> Fashion companies selling rayon or other textile products that are more careful to label the fiber content of their products accurately, but that still make some of the same broad, vague "eco-friendly" or "sustainability" claims, may unfortunately continue to avoid the scrutiny of the agency if these same priorities remain unchanged.

134. See Complaint at 9-17, *United States v. Kohl's Inc.*, No. 22-964 (D.D.C. filed Apr. 8, 2022) (explaining how Kohl's marketed "Cleaner Solutions" products as being "[p]roduced free of harmful chemicals, using clean, non-toxic materials" and "MADE IN GREEN by OEKO-TEX®," and highlighting how the company frequently described "bamboo" textile products as "eco-friendly").

135. *Id.* at 22-23.

136. Press Release, FTC, *supra* note 125 (reporting that the proposed orders prohibit the companies from claiming that bamboo or bamboo fiber products are "produced free of harmful chemicals, using non-toxic materials, or in a way that is safe for the environment or non-polluting, or has any other environmental benefits because it is derived from bamboo, unless they can substantiate it").

137. Cf. Davies et al., *supra* note 107 (concluding that [t]he broad scope of the FTC's recent solicitation of comments, including its reference to claims that are not specifically addressed by the 2012 Green Guides and that are becoming more common as part of many companies' ESG [environmental, social, and governance] programs (e.g., 'sustainable'), provide a solid indication that the FTC has turned its attention back to these environmental marketing claims, and, in turn, FTC enforcement against allegedly misleading environmental marketing claims will increase).

138. The following quote from Samuel Levine, the director of the FTC's Bureau of Consumer Protection, also suggests that the false labeling is what motivated the high penalties in this case: "Kohl's and Walmart are paying millions of dollars under the FTC's Penalty Offense Authority for mislabeling their rayon products as bamboo." *Id.* (emphasis added).

## 2. Biodegradability and Compostability Claims

Since the mid-1990s, the FTC has taken seriously deceptive biodegradability and compostability claims made by companies operating across a variety of industries<sup>139</sup>; however, there has been significant variation in the number of greenwashing enforcement actions brought under Democratic versus Republican administrations.<sup>140</sup> Specific to the textile and clothing industry, Pure Bamboo and Bamboosa, two of the four companies charged with deceptive labeling and advertising of "bamboo" fiber rayon textile products by the FTC in 2009 as described above, also claimed that their products were biodegradable.<sup>141</sup>

139. See, e.g., Press Release, FTC, FTC Concludes ECM BioFilms Made False, Misleading, and Unsubstantiated Claims About the Biodegradability of Plastic Products Treated With Its Additive (Oct. 19, 2015), <https://www.ftc.gov/news-events/news/press-releases/2015/10/ftc-concludes-ecm-biofilms-made-false-misleading-unsubstantiated-claims-about-biodegradability> (reporting the Commission's "finding that the company acted deceptively by making false and unsubstantiated environmental claims about its product, a chemical additive that supposedly would make treated plastics biodegrade in a landfill within nine months to five years or within a reasonably short period of time"); see also, e.g., Press Release, FTC, FTC Approves Final Orders Settling Charges That Three Companies Made Misleading and Unsubstantiated Biodegradability Claims for Their Plastic Products (Jan. 6, 2014), <https://www.ftc.gov/news-events/news/press-releases/2014/01/ftc-approves-final-orders-settling-charges-three-companies-made-misleading-unsubstantiated>, reporting the agency's approval of

three final orders settling charges that [three companies] violated the FTC Act by misrepresenting that plastic products they sell that are treated with additives are: 1) biodegradable, 2) biodegradable in a landfill, 3) biodegradable in a certain timeframe, or 4) scientifically shown to be biodegradable in a landfill, or that various scientific tests prove their biodegradability claims;

see also, e.g., Press Release, FTC, Down to Earth Designs, Inc. Settles FTC Charges That Its Environmental Claims for Diapers and Related Products Were Deceptive (Jan. 17, 2014), <https://www.ftc.gov/news-events/news/press-releases/2014/01/down-earth-designs-inc-settles-ftc-charges-its-environmental-claims-diapers-related-products-were> (announcing the proposed settlement order with a diaper company that advertised their disposable pad inner liners and baby wipes as biodegradable and compostable, when in fact "gRefills and gWipes are not biodegradable because they do no [sic] completely break down and decompose into elements found in nature within one year after customary disposal, which is in the trash" (order "also prohibits 'free of' certain materials claims, such as plastic, unless the claim is true, not misleading, and substantiated by competent and reliable scientific evidence")); see also, e.g., Press Release, FTC, FTC Announces Actions Against Kmart, Tender, and Dyna-E Alleging Deceptive "Biodegradable" Claims (June 9, 2009), <https://www.ftc.gov/news-events/news/press-releases/2009/06/ftc-announces-actions-against-kmart-tender-dyna-e-alleging-deceptive-biodegradable-claims> (announcing settlements with three companies charged "with making false and unsubstantiated claims that their paper products were 'biodegradable'"); see also, e.g., Complaint, BPI Env't, Inc., 118 F.T.C. 930 (1994) (involving grocery bags); see also, e.g., Complaint, Keyes Fibre Co., 118 F.T.C. 150 (1994) (involving paper tableware products); see also, e.g., Complaint, LePage's, Inc., 118 F.T.C. 31 (1994) (involving adhesive tapes); see also, e.g., Complaint, RMED Int'l, Inc., 115 F.T.C. 572 (1992) (involving disposable diapers).

140. For example, there are no cases tagged with environmental marketing on the FTC's website for the years 2001 to 2009 during the George W. Bush Administration. During this period, the agency investigated but closed five cases without an administrative hearing. FTC greenwashing enforcement peaked under the Barack Obama Administration. Under the Donald Trump Administration, the agency initiated noticeably fewer such cases. FTC, *Cases Tagged With Environmental Marketing*, <https://www.ftc.gov/enforcement/cases-proceedings/terms/1408> (last visited July 26, 2023); Davies et al., *supra* note 107 (noting also that "there was a significant uptick in environmental marketing cases brought by the FTC following the publication of the 2012 Green Guides").

141. Complaint at 5, M Grp., Inc., 082 F.T.C. 3184 (2009) (noting that the company framed their products as "Biodegradable & Eco-Friendly," claim-

The FTC challenged these unqualified biodegradability claims, and noted that given “[m]ost clothing and textiles are disposed of either by recycling or sending to a landfill” and “[n]either method results in quick biodegradation,” the company’s statements were false, misleading, or unsubstantiated.<sup>142</sup> Given the rise of biodegradability and compostability claims generally across multiple sectors and increased consumer skepticism about such disposal claims, the agency’s enforcement policies could support agency consideration of an independently enforceable trade regulation rule that codifies or improves upon the Green Guides’ existing administrative guidance.<sup>143</sup>

### III. Proposed Revisions to the Green Guides

Amidst the agency’s current review of the Green Guides,<sup>144</sup> this Article first and foremost calls on the FTC to prioritize enforcement and consider promulgating enforceable rules to prevent misleading marketing in the fashion industry. Second, this part highlights how the pervasive nature of vague and broad claims in the fashion industry requires building on the existing framework of the Green Guides to prevent marketers from misleading consumers into thinking that their products or brands as a whole produce greater environmental benefits than they do in reality or when, worse, they instead result in environmental harms. Finally, this part proposes modifications to the existing language of the Green Guides and highlights issues raised by commenters following the agency’s initiation of review in late 2022.

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ing that “as a natural cellulose fiber, bamboo is 100% biodegradable and the decomposition process does not cause any pollution to the environment”); Complaint at 3, Pure Bamboo, LLC, 082 F.T.C. 3193 (2009) (documenting the company’s claim that “PURE Bamboo clothing is better for your skin than most cottons and it’s biodegradable”).

142. Press Release, FTC, “Bamboo-zling,” *supra* note 126; Complaint at 6-7, M Grp., Inc., 082 F.T.C. 3184 (2009) (alleging that “[a]pproximately 91 percent of total municipal solid waste in the United States is disposed of in either landfills, incinerators, or recycling facilities” and “[t]hese disposal methods do not present conditions that would allow for Respondents’ textile fiber products to completely break down and return to nature, i.e., decompose into elements found in nature, within a reasonably short period of time”); Complaint at 6-7, Pure Bamboo, LLC, 082 F.T.C. 3193 (2009) (alleging the same).

143. Abigail Gampher, *Analysis: Green Product Claims Face Growing Consumer Scrutiny*, BLOOMBERG L. (Mar. 13, 2023), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-green-product-claims-face-growing-consumer-scrutiny> (finding that “[i]n 2022, complaints that alleged that products didn’t meet their recyclable, biodegradable, or compostable claims accounted for nine of the sustainable product lawsuits” in a Bloomberg Law search of federal fraud complaints “for allegations that products made false or misleading sustainability claims in advertising, labeling, or marketing”).

144. See generally *Guides for the Use of Environmental Marketing Claims*, 87 Fed. Reg. 77766 (proposed Dec. 20, 2022) (to be codified at 16 C.F.R. pt. 260). The proposals in this Article are tailored to the needs of fashion consumers and are not intended to be comprehensive; however, some of the broad principles outlined in this part will likely help deter similarly rampant greenwashing in other consumer-facing industries.

#### A. Enforcement: Enforce More and Promulgate Trade Rules

The FTC has previously emphasized the importance of enforcement for compliance in the context of misleading environmental claims,<sup>145</sup> and several comments submitted to the agency in 2023 highlight the continued demand for both more enforcement and enforceability.<sup>146</sup> The Fashion

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145. FTC GREEN GUIDES STATEMENT, *supra* note 85, at 10 (following the most recent revisions to the Green Guides, reporting that “the Commission agrees that enforcement is a key component of greater compliance”).

146. See, e.g., Green America, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 20, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0994> (commenting that the FTC “should increase enforcement”); see also, e.g., Anonymous, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Feb. 21, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0121> (calling for the FTC to “both expand and make these guides enforceable”); see also Anonymous, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 19, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0860> (suggesting that the FTC consider “[c]odifying the Green Guides: Moving from a ‘guide document’ to policy”); see also Douglas Hileman, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Feb. 23, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0129> (emphasizing that the “imbalance between vendors and [actual or prospective] consumers of green products or services highlights the importance for stronger actions by the FTC, including rulemaking and substantially enhanced enforcement”); see also Earthjustice, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 24, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-1003> (“encourag[ing] the FTC to move swiftly to update the Green Guides regardless of whether it decides to initiate a rulemaking”).

But see National Federation of Independent Business, *supra* note 89 (recommending that the agency “eliminate language from the Guides that purports to mandate duties in the face of the clear statement in the Guides that they do not bind the FTC or the public” and concluding that “every opportunity to consider the elimination of burdensome federal regulations or guidance is a welcome one,” suggesting that the organization would be in opposition to any additional trade regulation rules); see also Association of National Advertisers, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 24, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0915> (commenting that “Guides, as opposed to a rulemaking, support a flexible approach, which is necessary when providing guidance in an industry that constantly develops and grows”); cf. Gibson, Dunn & Crutcher LLP, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 24, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0931> (commenting that the Green Guides “must be” adopted through formal rulemaking because they consist of “specific guidance” and “often speak in binding or definitive terms”); cf. Consumers’ Research, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 24, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-1339> (suggesting that because the Green Guides are often currently “treated as binding by courts,” the FTC should respond to address this perception by either making their format “more generalized” with “greater flexibility” or beginning a formal rulemaking process).

The FTC has recognized that in the context of environmental marketing claims, “consumer perception research provides the best evidence upon which to formulate guidance.” FTC Green Guides Statement, *supra* note 85, at 3. Although here referring to formal studies like the one the agency conducted in 2009 before its most recent revisions to the Green Guides become final, this recognition also underscores the value of the notice-and-comment process. This Article quotes comments from both organizations and individual consumers who, although they may make less informed comments, offer an important perspective. A handful of the 7,066 total comments submitted to the agency, of which about 1,360 are posted online as of June 7, 2023, address greenwashing in the fashion industry specifically: one commenter, for example, said that she previously worked in the garment industry and detailed her experience witnessing the mistreatment of workers and the misleading of consumers. Irina M., Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 8, 2023), <https://www.regulations.gov/comment/FTC-2022-0077->

Connection, a 501(c)(3) organization dedicated to advancing the U.S. “sustainable” fashion movement, implored the agency, “[i]f there is one thing that we want you to take from our comments, it is this—enforceability is essential and deeply needed for green claims to mean anything.”<sup>147</sup>

The Association of the Nonwoven Fabrics Industry commented, “some of our members have expressed frustration with having guidance within the Green Guides and not binding regulations.”<sup>148</sup> The Fashion Advocates Group similarly suggested that “[f]or the Green Guides to best protect consumers against green-washing, they must be not only recommendations but enforceable standards.”<sup>149</sup> Evrnu®, a recycling textile innovations company, added that “[r]ule-making would enhance the ability for the Green Guides to provide the necessary level of guidance to textile/apparel companies so they can more accurately convey the performance and environmental properties of their garments.”<sup>150</sup>

## 1. Enforcement: Utilize Warning Letters Authority

In a recent 2023 survey conducted by Harris Poll for Google Cloud, 72% of executives reported believing that “most organizations in their industry would actually be caught greenwashing if investigated thoroughly.”<sup>151</sup> Recognizing the resources required for investigation and enforcement, this Article proposes that agency action does not have to take the form of million-dollar settlements or high penalties such as those discussed in Part II. Warnings allow companies and individuals time to comply, protecting those businesses, particularly small businesses, from greater financial consequences.<sup>152</sup> By issuing more warnings to fashion retailers making deceptive environmental claims

and publicizing these warnings, the agency can and should take effective first steps to protect consumers.<sup>153</sup>

## 2. Enforceability: Incorporate Specific Claims Into Trade Regulation Rules

In addition to greater enforcement under the agency’s existing authority under §5 of the FTC Act, many commenters urged the agency to consider making the Green Guides enforceable in response to the agency’s question about considering a rulemaking proceeding.<sup>154</sup> Currently, the Green Guides “do not confer any rights on any person and do not operate to bind the FTC or the public.”<sup>155</sup> Although the agency is empowered to act under the FTC Act for marketing claims inconsistent with the Green Guides,<sup>156</sup> promulgating trade regulation rules addressing specific misleading environmental claims in addition to revising the Green Guides should be a concurrent long-term goal of the agency. Trade regulation rules set clearer expectations for marketers and consumers, and provide for more consistent agency enforcement.<sup>157</sup>

Codifying the entire Green Guides, as some commenters propose, may be difficult given the nature of the agency’s existing guidance, some parts of which better lend themselves to case-by-case consideration.<sup>158</sup> Acknowledging that the additional administrative rulemaking

pliance after informal counseling or a warning letter advising them of the need to revise claims to avoid deceiving consumers”).

153. FTC, *Legal Library: Warning Letters*, <https://www.ftc.gov/legal-library/browse/warning-letters> (last visited July 26, 2023) (noting that “[o]verwhelmingly, companies that receive FTC warning letters take steps quickly to correct problematic advertising or marketing language and come into compliance with the law” and stating that “[i]n many cases, warning letters are the most rapid and effective means to address the problem”); cf. Ocean Conservancy, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 24, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0898> (commenting that “[i]ncreased enforcement action, including the issuance of cease and desist letters for products and packaging making deceptive claims, will also ensure the goal to protect consumers is realized”).

154. See *supra* note 146; Guides for the Use of Environmental Marketing Claims, 87 Fed. Reg. 77766, 77768 (proposed Dec. 20, 2022) (asking “[s]hould the Commission initiate a proceeding to consider a rulemaking under the FTC Act related to deceptive or unfair environmental claims?” and “[i]f so, which principles set out in the Green Guides should be incorporated into a rule?”).

155. 16 C.F.R. §260.1(a).

156. *Id.*

157. See Sydney Helsel, *The Truth Is Always in Style: Targeting Greenwashed Advertising in the Fashion Industry*, 21 SUSTAINABLE DEV. L. & POL’Y 15, 16 (2021).

158. Cf. ISEAL, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 24, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0953> (noting that “the breadth of scope of the Green Guides and of the types of environmental claims that fall within its scope means that it will be very challenging to develop a rule that encompasses or accommodates that full scope”); cf. American Cleaning Institute, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 24, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0920> (“request[ing] that the FTC limit its rulemaking to claims for which there are clear standards that marketers can easily follow, such as ‘free-of,’ ‘recyclable,’ and ‘recycled content,’” and noting that “[c]urrently, many of the standards remain open to some interpretation or contain vague language” and that “[i]t would be unfair to marketers to seek civil penalties against them related to ambiguous standards”); cf. Circ, *supra* note 93 (expressing support for “the FTC initiation of proceedings to consider rulemaking if the ultimate legislation is designed to encourage the growth of environmental technologies,” but expressing concern that “if written incor-

0381 (commenting that “I worked in garnet [sic] Industry for 20 years. I witness how clients getting [sic] misled by greenwashing, how garment workers treated [sic] poorly by companies that lying [sic] to costumers [sic]. I’m sick of seeing and reading news on how fashion damages environment [sic].”).

147. Fashion Connection, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 12, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0631> (including as signatories individuals and three other 501(c)(3) organizations: Collective Fashion Justice, Fair Trade LA, and Remake).

148. Association of the Nonwoven Fabrics Industry (INDA), Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 20, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0870>; cf. Sophia Curran-Moore, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 4, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0350> (commenting that “many fast fashion brands market themselves as ‘sustainable’ while emitting enormous amounts of carbon” and “with new regulations, I would be able to make a more informed decision about which brands I want to support”).

149. Fashion Advocates Group, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 24, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0969>.

150. Evrnu, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 21, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0968>.

151. GOOGLE CLOUD, GOOGLE CLOUD SUSTAINABILITY SURVEY 2023, at 5, [https://services.google.com/fh/files/misc/google\\_cloud\\_cxo\\_sustainability\\_survey\\_final\\_2023.pdf](https://services.google.com/fh/files/misc/google_cloud_cxo_sustainability_survey_final_2023.pdf) (reporting also that 59% of executives “admitted to overstating—or inaccurately representing—their own sustainability activities”).

152. FTC GREEN GUIDES STATEMENT, *supra* note 85, at 11 (describing how the “FTC often gives such [small] businesses the opportunity to come into com-

requirements associated with this process represent a significant burden on the agency,<sup>159</sup> agency efforts to codify the Green Guides may be best focused on specific types of misleading environmental claims rather than broad principles, like those promulgated at 16 C.F.R. §260.3, that would likely be difficult to comprehensively regulate and administer with standards.<sup>160</sup> One such kind of specific claim already discussed here is an unqualified claim about a product's degradability. The agency has repeatedly indicated through both the strong language of the Green Guides<sup>161</sup> and enforcement actions<sup>162</sup> the high burden that marketers must meet in order to make such a claim in a nondeceptive way.

The FTC should also consider incorporating into a rulemaking its guidance on recyclability and compostability claims, although these terms are less prevalent in the fashion industry.<sup>163</sup> States including California, Washington, Minnesota, and Maryland have recently passed laws largely based on third-party certification standards that restrict the marketing of certain products with terms like

“biodegradable,”<sup>164</sup> “compostable,”<sup>165</sup> and “recyclable.”<sup>166</sup> A rulemaking requiring a distinction between pre- and post-consumer materials for recycled content claims, and prominent qualification of the amount or percentage of recycled content in the finished product or package, may help resolve issues with the existing guidance for such claims, which this part discusses in more detail below.<sup>167</sup>

## B. General Environmental Benefit Claims: Addressing Vague “Green” Buzzwords

Many commenters, representing both individual consumers and organizations, responded to the FTC's inquiry about potentially adding guidance for “sustainable” claims to the Green Guides.<sup>168</sup> This was one of the issues most frequently addressed by comments, and most

rectly, legislation can inhibit the growth of small companies by imposing burdensome costs of compliance”).

159. See *supra* Section II.A.

160. See, e.g., 16 C.F.R. §260.3(c) (advising, for example, that “[a]n environmental marketing claim should not overstate, directly or by implication, an environmental attribute or benefit”). A rule covering all claims that clarifies which claims do and do not overstate, particularly by implication, an environmental benefit may be difficult to write.

161. *Id.* §260.8(c), warning:

It is deceptive to make an unqualified degradable claim for items entering the solid waste stream if the items do not completely decompose within one year after customary disposal. Unqualified degradable claims for items that are customarily disposed in landfills, incinerators, and recycling facilities are deceptive because these locations do not present conditions in which complete decomposition will occur within one year.

162. See *supra* Section II.C.2.

163. Cf. Sarah Oliver, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Mar. 28, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0244> (commenting that “[o]ften I see packaging that says ‘compostable’ but there are no compost options near me, and these products end up in the trash”); cf. Ecosystem Events, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 4, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0351> (commenting that “it’s incredibly difficult for the average person to differentiate between products that are labeled as compostable, plant-based, biodegradable, landfill-degradable, bio-based”). If the FTC were to incorporate its guidance on such claims into a formal rulemaking, it should consider the issue of preemption. Cf. Global Witness, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 24, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0908> (commenting that the FTC should initiate a proceeding to consider a rulemaking under the FTC Act related to deceptive or unfair environmental claims “provided that such future rule includes an anti-preemption provision”).

164. See, e.g., Will Wagner & Kelsie Sicinski, *California Enacts New Law Restricting Environmental Marketing Claims on Consumer Products*, ARNOLD & PORTER (Oct. 14, 2021), <https://www.arnoldporter.com/en/perspectives/blogs/environmental-edge/2021/10/ca-enacts-new-law-restricting-environmental> (reporting that Assembly Bill 1201, which was signed into law in October 2021, “effectively prohibits the labeling of any consumer product sold in the State of California as ‘biodegradable,’ ‘degradable,’ or ‘decomposable,’” but noting that “there is a vague limitation in the law that potentially exempts fiber products that do not incorporate any plastics or polymers”); see also MD. CODE ANN., ENVIR. §9-2102 (2018) (prohibiting the sale of “a plastic product that is labeled as biodegradable, degradable, decomposable, or with any other term to imply that the product will break down, fragment, biodegrade, or decompose in a landfill or any other environment” unless it is a film plastic product “labeled as soil degradable ag mulch film or biodegradable mulch film” that either “[m]eets the OK Biodegradable Soil certification standard adopted by Vincotte” or “[a]t ambient temperatures and in soil, shows at least 90% biodegradation absolute or relative to microcrystalline cellulose in less than 2 years’ time, tested according to the ISO 17556 standard test method or ASTM D5988 standard test method” and “[f]ulfills the plant growth and regulated metals requirements under section 6.4 of the ASTM D6400 standard specification”).

165. See, e.g., MD. CODE ANN., ENVIR. §9-2102 (2018) (prohibiting the sale of a plastic product labeled as compostable unless it meets either the ASTM D6400 standard specification or the ASTM D6868 standard specification; and prohibiting the sale of a plastic product labeled as home compostable unless it meets the OK Compost Home certification standard adopted by Vincotte); cf. Evanesce Inc., Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Feb. 21, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0112> (commenting that the focus for updates to the Green Guides for “compostable” and “biodegradable” claims “needs to shift toward proper product identification and certifications such as BPI [Biodegradable Products Institute]”); cf. Crua Foam, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Mar. 30, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0279> (proposing that the agency “[a]dvance a universal standardization of ‘compostability’ claims and certifications for bioplastics”).

166. See, e.g., George Gigounas et al., *New California Law Adds Significant Restrictions for Recycling Claims on Products and Packaging: Action Steps*, DLA PIPER (Jan. 6, 2022), <https://www.dlapiper.com/en/insights/publications/2022/1/new-california-law-adds-significant-restrictions-for-recycling-claims-on-products-and-packaging> (reporting that Senate Bill 343, which was signed into law in October 2021, “prohibits the use of symbols or other claims suggesting recyclability, including the familiar ‘chasing arrows symbol,’ on any product or packaging that fails to meet a California regulator’s strict recyclability criteria”).

167. *Infra* Section III.C.2.

168. Guides for the Use of Environmental Marketing Claims, 87 Fed. Reg. 77766, 77769 (proposed Dec. 20, 2022) (noting that “[i]n 2012, the Commission determined it lacked a basis to give specific guidance on how consumers interpret ‘sustainable’ claims,” and asking if the agency should revisit this determination and, if so, “why, and what guidance should be provided”).

commenters called on the agency to include this and other such broad terms in the revised Green Guides or other regulations of environmental marketing.<sup>169</sup> Some comments even called for “sustainable” and other similar terms to be prohibited entirely in marketing,<sup>170</sup> although such sweeping propositions may implicate commercial speech First Amendment issues.<sup>171</sup>

169. See, e.g., Circ, *supra* note 93 (commenting that it “believes that the Commission should provide guidance that [‘sustainable’] is a deceptive term when utilized without qualification”); see also American Apparel and Footwear Association, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 24, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0904> (calling on the FTC to cover “sustainable” product-level claims and arguing that the agency has “sufficient basis to advise companies against making unqualified environmentally ‘sustainable’ product-level claims”); see also, e.g., Textile Exchange, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 24, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-1287> (noting that since the Green Guides’ “last revision in 2012, sustainability and environmental communication towards consumers has increased dramatically”); see also, e.g., Anonymous, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Mar. 27, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0172> (commenting that “[f]alse and meaningless claims of ‘sustainable’, ‘eco-friendly’, and ‘clean’ need to be cracked down on”); see also, e.g., Taylor Behnke, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Feb. 21, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0122> (commenting that “[r]ampant claims like ‘green’ ‘eco friendly’ ‘sustainable’ that have no real meaning, or net-zero or carbon offset claims which are impossible for me to fact check or verify make my efforts harder and harder”); see also, e.g., Charlene Woodcock, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 11, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0509> (commenting “I write to urge much more rigorous attention to corporate claims of ‘sustainability’ or other claims of environmental responsibility”); see also, e.g., Jacob Tee, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Mar. 10, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0147> (commenting “I am asking that the FTC strictly limit a company’s ability to use blanket terms such as sustainable, environmentally friendly, eco-friendly, and so on, when they describe their products—unless they are able to provide objective data that backs up their claims”).

170. See, e.g., Polymerist Newsletter, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Jan. 7, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0006> (commenting that “[g]eneric marketing terms such as sustainable, eco-friendly, good for the planet, green material (when not inferring the color green), and similar phrases should not be allowed to describe a physical good or service”); see also, e.g., Sustainable Packaging Research, Information, and Networking Group (SPRING), Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Jan. 4, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0004> (commenting that “[g]eneric terms such as ‘sustainable’, ‘eco-friendly’, and ‘good for the planet’ should not be allowed”); cf. Chelsea Xie, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Feb. 2, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0060> (commenting, “The government should eliminate vague terms such as ‘green’, ‘eco-friendly’, and ‘made of recycled materials’. They are unspecific and usually exaggerated.”); cf. FTC GREEN GUIDES STATEMENT, *supra* note 85, at 37 (explaining how some commenters on the agency’s previous call for revisions to the Green Guides that ultimately resulted in the 2012 version “argued that even qualified, general environmental benefit claims are misleading”). But see Lynda Grose, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Feb. 5, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0092> (commenting that “[s]ince ‘sustainable’ is operating within the carrying capacity of nature’s [sic] resources and systems[,] and no companies are doing this, I agree FTC does not have a basis for providing specific guidance to companies”).

171. See *supra* Section II.A.

## 1. Given the Difficulty of Defining “Sustainable,” Do Not

Despite its prevalence in marketing and claims made by the fashion industry, the terms “sustainable” and “sustainability,” among others, lack consistent meaning, and consumers may have different perceptions about what these words imply about a product or brand. In its comment, the Center for Biological Diversity described the fashion industry as a “strong example of the need for guidance on the use of ‘sustainable’ claims.”<sup>172</sup> Companies marketing to American consumers currently do not have specific guidance from the FTC on the use of specific words, including “sustainable,” under the 2012 Green Guides.<sup>173</sup> Such broad claims fit well within the existing framework of the Green Guides under 16 C.F.R. §260.4, which covers general environmental benefit claims.<sup>174</sup> Some “sustainability” claims made in the fashion industry likely already risk being considered deceptive under this existing framework, particularly if applied to businesses and brands as a whole.<sup>175</sup>

Multiple comments proposed that the FTC provide legal definitions for “sustainable.”<sup>176</sup> The United Nations (U.N.) Brundtland Commission, which some commenters referenced,<sup>177</sup> defined “sustainability” as “meeting the needs

172. Center for Biological Diversity, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 24, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-1269>.

173. Guides for the Use of Environmental Marketing Claims, 77 Fed. Reg. 62122, 62124 (Oct. 11, 2012) (codified at 16 C.F.R. pt. 260) (noting that “[t]he final Guides do not address organic, sustainable, and natural claims”).

174. See 16 C.F.R. §260.4; cf. American Sustainable Business Network, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 24, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0984> (commenting that “the claim of ‘sustainability’ should be classified as a general claim”).

175. See *infra* Section III.B.2.

176. See, e.g., Kasey DiSessa, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 5, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0354> (commenting that “[w]e need to define terms like ‘sustainable’, ‘eco-friendly’, and ‘compostable’”); cf. Jimmy Asa, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Jan. 9, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0009> (commenting that “[i]t will be helpful to provide a comprehensive definition of ‘sustainable’ or ‘sustainably made/sourced’”); see also, e.g., Derek Binelli, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 11, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0508> (commenting that “I recommend you do your part in defining what’s sustainable”); see also, e.g., S.M.D. Howell, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 12, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0632> (commenting “[p]lease clarify and specify exactly what a sustainable tag on a product means”); see also, e.g., Michael Duclos, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 11, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0600> (commenting that “[c]laims of a product being ‘green’ or ‘sustainable’ are essentially meaningless absent clear legal definition”).

177. See American Gem Trade Association, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 12, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0642> (commenting that “[t]he Commission should use the generally accepted definition of ‘sustainable’ as developed by the Brundtland Commission in 1987”); cf. Biotechnology Innovation Organization (BIO), Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Mar. 31, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0293> (commenting that “BIO encourages the FTC to consider the UN Sustainable Development Goals as a resource in providing updated guidance on sustainability claims”).

of the present without compromising the ability of future generations to meet their own needs.”<sup>178</sup> This broad definition includes not only environmental but also social dimensions, as the requirement to meet the current and future needs of the world’s most disadvantaged groups should be a priority.<sup>179</sup> When this definition is considered, it becomes clear that claims made by many fashion brands fall short of such “sustainability.”

Given that the essential needs of many people today, including some garment workers, are not being adequately met, it is hard to see how any clothing item made in the context of widespread unfair and exploitative labor practices is “sustainable.”<sup>180</sup> Yet, if a sustainability claim is merely attached to a singular product (e.g., a T-shirt), such a claim at the same time could be reasonable to describe a company’s manufacturing of this item and a consumer’s singular use and disposal of it.<sup>181</sup> In light of the difficulty of defining “sustainable” and the potential unintended consequences that may result from providing a single definition, this Article does not suggest a definition for the agency to use.<sup>182</sup>

Rather than attempting to standardize the meaning of “sustainability” and other similarly hard-to-define terms, it proposes that the FTC make more clear, through the language and examples of the existing General Environmental Benefit Claims section of the Green Guides, that companies that use such words and phrases broadly should prominently explain what this word means in that context and offer substantiation for their claims.<sup>183</sup> In this respect, the FTC should also consider following the language of guidance finalized in 2021 by the U.K.’s CMA, which specifically calls out the use of terms including “sustainable,” “eco,” and “environmentally friendly.”<sup>184</sup> Other vague terms that are also increasingly prevalent in environmental marketing and regulation, which involve many of the same considerations as “eco-friendly” and “sustainable,” are “circular,” “regenerative,” and “plant-based.”<sup>185</sup>

178. U.N., *Sustainability*, <https://www.un.org/en/academic-impact/sustainability> (last visited July 26, 2023).

179. VERONICA BATES KASSATLY & DOROTHEE BAUMANN-PAULY, GENEVA CENTER FOR BUSINESS AND HUMAN RIGHTS ET AL., *THE GREAT GREEN WASHING MACHINE PART 1: BACK TO THE ROOTS OF SUSTAINABILITY 7-9* (2021), <https://gcbhr.org/backoffice/resources/reportfinal72dpi2.pdf> (“sustainability encompasses environmental and social dimensions because they are inextricably linked” and “overriding priority must be given to meeting the essential needs of the world’s poor”); see also National Milk Producers Federation, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 23, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0884> (noting that sustainability “extends to social and economic topics”); cf. *Guidance: Making Environmental Claims on Goods and Services*, *supra* note 33 (explaining that “[b]y ‘sustainability claims’, we mean claims which suggest that a product is made, a service delivered or a business run in accordance with principles of sustainability, sustainable consumption or sustainable development,” which “could include claims relating to the environment and climate change, biodiversity, animal welfare, workers’ welfare or corporate social responsibility”).

180. Cf. Anonymous, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Feb. 9, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0080> (commenting that “sustainability has socio-economic as well as environmental dimensions . . . can any garment that was made by a worker who was not paid a living wage, ever be considered sustainable/green?”).

181. Producing and consuming just one product like a T-shirt could be seen as part of meeting this generation’s needs while allowing future generations to also meet their own needs. Another meaning of “sustainable,” “of, relating to, or being a method of harvesting or using a resource so that the resource is not depleted or permanently damaged,” also illustrates the inability of a definition to capture the true problem with many “sustainability” claims. Most products or services, especially when considered at the individual level, can hardly be said to singlehandedly deplete or permanently damage a resource. See MERRIAM-WEBSTER, *Sustainable*, <https://www.merriam-webster.com/dictionary/sustainable> (last visited July 26, 2023).

182. The FTC’s difficulty in addressing the use of “sustainable” in environmental marketing lends itself to comparison with the Food and Drug Administration’s (FDA’s) regulation, or lack thereof, with respect to the word “natural.” Many consumers have called on FDA to intervene in the misleading use of this term in food labels. FDA “has not engaged in rulemaking to establish a formal definition for the term,” but does “have a longstanding policy” concerning its use in “human food labeling”: the agency considered the word to “mean that nothing artificial or synthetic . . . has been included in, or has been added to, a food that would not normally be expected to be in that food,” but the agency “did not consider whether the term ‘natural’ should describe any nutritional or other health benefit.” See FDA, *Use of the Term Natural on Food Labeling*, <https://www.fda.gov/food/food-labeling-nutrition/use-term-natural-food-labeling> (last updated Oct. 22, 2018).

183. Cf. National Milk Producers Federation, *supra* note 179 (commenting that “the FTC Green Guides should not seek to define” sustainable); cf. Joanne Stephanie Joven, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Feb. 12, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0088> (noting that “[t]here are a variety of definitions of sustainability in use today, and if the Commission adds its own definition, it will further confuse consumers”); cf. Anonymous, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Jan. 11, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0013> (commenting that “[t]he term sustainability should never be used without clearly stipulating in which way, to what extent, and/or to what activity or element sustainability refers to”); cf. Hanna Cook-Wallace, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Jan. 11, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0012> (commenting “I believe the term ‘sustainable’ is problematic, and nearly impossible to prove . . . no one process or location can be definitively determined to be ‘sustainable’”).

184. *Guidance: Making Environmental Claims on Goods and Services*, *supra* note 33 (saying that “[g]eneral or all-encompassing sustainability claims such as ‘environmentally friendly’, ‘eco’, or ‘sustainable’ don’t provide any real indication of what is meant” and advising marketers that “[t]erms like ‘green’, ‘sustainable’ or ‘eco-friendly’, especially if used without explanation, are likely to be seen as suggesting that a product, service, process, brand or business as a whole has a positive environmental impact, or at least no adverse impact” and “[u]nless a business can prove that, it risks falling short of its legal obligations”).

185. See, e.g., Coach, *Coachtopia*, <https://www.coach.com/shop/coachtopia> (last visited July 26, 2023) (offering “[a] new world of circular craft from Coach”); cf. Fashion Law and Social Justice, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 23, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0886> (“recommend[ing] that the FTC add a new section that defines and provides the basic elements necessary to support circular claims”); cf. National Fiber Welding, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 24, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0910> (commenting that the “FTC should consider including in the Guides direction surrounding the use of the terms ‘circularity’, ‘circular’, and ‘circular economy’”); cf. National Cotton Council of America, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 24, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-1314> (suggesting the addition of guidance for “regenerative” and “circular” claims, noting that “circularity in terms of the textile industry is a topic of confusion for consumers”); cf. Center for Biological Diversity, *supra* note 172 (noting that the “vague, inconsistent or unsubstantiated use of ‘regenerative’ is also becoming increasingly prevalent in the fashion industry”); see also, e.g., Unless Collective, *Home Page*, <https://unlesscollective.com/> (last visited July 26, 2023) (selling “plant-based” streetwear that “can be harmlessly returned to the earth”).



## 2. Clarify the Scope of the Green Guides to Include Entire Brands

Another way in which the existing Green Guides can better address these general environmental benefit descriptions is to amend the language of the Purpose, Scope, and Structure of the Guides section at 16 C.F.R. §260.1(c). Currently, the Green Guides “apply to claims about the environmental attributes of a product, package, or service in connection with the marketing, offering for sale, or sale of such item or service.”<sup>186</sup> To better respond to the increasing number of companies that make environmental claims about their entire business or brand,<sup>187</sup> the Green Guides should be clarified to extend to environmental claims about an entire brand or business by incorporating language similar to that used in the recently revised guidance from the U.K.’s CMA.<sup>188</sup>

## 3. Add Illustrative Examples Directed at the Fashion Industry

Even without providing definitions, the Green Guides can convey to marketers the agency’s understanding of deceptive and nondeceptive “sustainable” or “sustainability” claims through additional examples that incorporate these specific terms. Ideally, more examples throughout the Green Guides would illustrate deceptive environmental marketing claims through the lens of fashion given that this industry is one of the most greenwashed.<sup>189</sup> In the current

Green Guides, only two examples include facts related to the production and marketing of new clothing products.<sup>190</sup>

These examples should as much as possible discourage fashion retailers from making sweeping “sustainable” claims about entire products, processes, or brands that lack specificity, explanation, or substantiation.<sup>191</sup> Notably, Patagonia, an American apparel brand widely known for its consideration of environmental and social causes in doing business, explicitly does not use the word “sustainable” in its marketing because, in its own words, it “recognizes that [it is] part of the problem.”<sup>192</sup>

## C. Improve Recycled Content and Renewable Materials Sections

Even without transformative changes to enforcement and enforceability, small changes to the existing Green Guides can deter misleading environmental claims. In the words of one commenter, “[r]evising the Green Guides is literally the least of the least” that the FTC can do.<sup>193</sup> The final section of this part proposes specific revisions to the 2012 language of the Recycled Content Claims and Renewable Materials Claims sections.

### 1. Recycled Content Claims

Recycled content claims are becoming increasingly important and prevalent in the fashion industry as manufacturers shift to fabrics made with recycled materials, as one commenter noted in recognizing the rise of recycled clothing.<sup>194</sup> Following the last round of revisions to the Green Guides, the FTC remained “concerned about the potential for deceptive recycled content claims for pre-consumer materials.”<sup>195</sup> Yet, marketers are not currently strongly advised to distinguish between these two dif-

186. 16 C.F.R. §260.1(c) (emphasis added) (clarifying also that the Green Guides apply to business-to-business transactions). However, the scope of the Green Guides as described in this quote does not mean that the authority of the FTC under §5 is currently limited in this way.

187. See, e.g., Reformation, *supra* note 15 (using the slogan “Being naked is the #1 most sustainable option—we’re #2,” and otherwise marketing their brand with “sustainability” claims); see also, e.g., Valani, <https://shopvalani.com/> (last visited July 26, 2023) (branding their website as “VALANI: Sustainable, ethical, vegan, plant-based clothing”); see also, e.g., Outerknown, *Home Page*, <https://www.outerknown.com/> (last visited July 26, 2023) (describing their brand as “The First Brand Founded on a Total Commitment to Sustainability”).

188. *Guidance: Making Environmental Claims on Goods and Services*, *supra* note 33 (noting that “[e]nvironmental claims are claims which suggest that a product, service, process, brand or business is better for the environment” and that the guidance “applies to all commercial practices, which can include various dimensions of a trader’s behaviour, including but not limited to how it markets its products, services, processes or brand”) (emphasis added); cf. Union of Concerned Scientists, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 24, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0905> (calling on the agency to “[e]xtend Green Guides to cover ‘brand’ or ‘promotional’ advertising, as well as, ‘issue’ advertising or ‘information and influence campaigns”). A possible implementation of this change to 16 C.F.R. §260.1(c) could be: “These guides apply to claims about the environmental attributes of a product, package, or service, **business, or brand** in connection with the marketing, offering for sale, or sale of such item or service, **or general marketing of such a business or brand** to individuals.”

189. See *supra* note 18 and accompanying text; see also Trade Association Coalition Letter, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 24, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0954> (“encourag[ing] the Commission to include additional explanatory text in the Guides to offer marketers a clearer, more actionable framework to help mitigate the risk of consumer deception” and, “[i]n particular, we encourage the Commission to update the guidance to better address how marketers’ interface and share information with consumers online including . . . on e-commerce platforms”);

see also National Retail Federation, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 24, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0900> (including specific possible examples about fashion in its comment); cf. Fashion Advocates Group, *supra* note 149 (commenting on “the need for the Guides to be more directly relevant and useful to the fashion industry, as this industry has both a significant impact on the environment and a high prevalence of green-washing”).

190. See sources cited *supra* notes 117, 120.

191. Cf. BUSINESS OF FASHION & MCKINSEY & CO., THE STATE OF FASHION 2023, at 77 (2022) (advising that companies prioritize being precise: “[a]void broad, vague terms like ‘green’ or ‘eco-friendly,’ which can have multiple interpretations and give a false impression about impact” and, “[i]nstead, provide important caveats or context, along with concrete and factual information”).

192. Beth Thoren, *Patagonia Doesn’t Use the Word “Sustainable.” Here’s Why*, FORTUNE (Nov. 2, 2021), <https://fortune.com/2021/11/02/patagonia-doesnt-use-the-word-sustainable-cop26/>.

193. Ashley Cooper, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Mar. 25, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0204>.

194. Karri Livingston, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 2, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0331>; cf. National Cotton Council of America, *supra* note 185 (suggesting that the “source of material should be taken into consideration and stated in addition to any recycled content claims being made by marketers”).

195. FTC GREEN GUIDES STATEMENT, *supra* note 85, at 193.

ferent types of recycled materials to avoid deception,<sup>196</sup> a change that the agency should implement.<sup>197</sup> Clarifying the FTC’s understanding of the difference between these two types of materials in this section of the Green Guides may also help consumers and marketers: a commenter who is an executive at a small fashion company emphasized how a “strong definition of pre- and post-consumer waste is necessary for this to be a truthful and impactful statement for consumers.”<sup>198</sup>

Similarly, the FTC recognized that “qualifications remain necessary” for recycled content claims after conducting a survey that indicated “consumers may be deceived by unqualified claims for products that contain less than 100 percent recycled content.”<sup>199</sup> In line with this finding and recommendations from several commenters,<sup>200</sup>

the agency should more strongly advise marketers to prominently qualify recycled content claims with the percentage or amount of recycled content that is in the final product or package, or incorporate such a requirement into a trade regulation rule.

## 2. Renewable Materials Claims

Given the language of the examples provided in 16 C.F.R. §260.16, it would seem that the FTC views “renewable materials” as commonly being interpreted by consumers to mean some combination of recycled content, recyclable, and biodegradable.<sup>201</sup> These three attributes are also more narrow types of claims that are addressed elsewhere in the Green Guides.<sup>202</sup> Although this section already warns marketers of “the risk of unintended implied claims” created by the phrase “renewable materials,” and suggests that marketers minimize this by “identifying the material used and explaining why the material is renewable,” its existence as a separate section may unintentionally invite and validate such misleading “renewable materials” claims. Removing this section entirely or changing the language to more strongly encourage marketers to instead use more specific claims may positively impact consumers.

## IV. Conclusion

Greenwashing in fashion hurts consumers, creates unfairness in business competition, and allows the serious environmental problems associated with this industry to worsen. The FTC must utilize its existing authority under §5 of the FTC Act to not only revise its administrative guidance in the Green Guides, but also to ensure meaningful enforcement by making deceptive practices in the fashion industry an agency priority.

Broad, vague, and often unsubstantiated claims of general environmental benefit that many marketers make about their brands or products using difficult-to-define terms, such as “sustainability,” are a significant issue that the FTC can and should address both in the Green Guides and through enforcement. Other small changes to the Recycled Content Claims and Renewable Materials Claims sections will better ensure that fashion retailers and other marketers across all industries make clear and honest environmental claims about their products, services, processes, or entire brands. While these changes may improve consumer experiences and assist marketers in creating fair advertisements, these proposals ultimately address only a small part of a large, harmful industry.

196. 16 C.F.R. §260.13(b) (providing that “[r]ecycled content claims may—but do not have to—distinguish between pre-consumer and post-consumer materials”). A possible implementation of this change to §260.13(b) could be: “Recycled content claims may—but do not have to—distinguish **should distinguish** between pre-consumer and post-consumer materials.” Cf. TC Transcontinental Packaging, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 21, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0999> (suggesting changing the language in this section to “it is preferable to distinguish between pre-consumer and post-consumer content when making recycled content claims”).

197. Cf. Natural Resources Defense Council, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 24, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-1334> (commenting that “[r]ecycled content claims should clearly and separately distinguish percentages of pre-consumer (post-industrial) and post-consumer content”); cf. TOMRA Systems, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 24, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0973> (“recommend[ing] that claims for recycled content should clearly distinguish between post-industrial and post-consumer in order to assign accurate measurement, transparency, and further, to incentivize the highest and best use of materials, in accordance with the principles of the waste hierarchy”). But see Paper Recycling Coalition, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 24, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0937> (commenting that “the Commission discontinue making a distinction between pre- and post-consumer” because “distinguishing between pre- and post-consumer recycled content is ambiguous, misleading, and results in otherwise recyclable material being landfilled or burned”); cf. TerraCycle Inc., Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 24, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0989> (“recommend[ing] that the definition of ‘Recycled Content’ refer only to Post-consumer material”).

198. Dana Davis, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 1, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0307>.

199. FTC GREEN GUIDES STATEMENT, *supra* note 85, at 197.

200. See, e.g., Haofang Zhu, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Feb. 3, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0067> (commenting that “[p]ercentages for recycled materials, ingredients, etc. should be written in a large font”); see also, e.g., Jayden L., Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Feb. 3, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0068> (commenting that “[c]ompanies should have to release exactly how much percent of recycled material is in a product”); see also, e.g., Anonymous, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Feb. 3, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0074> (commenting “I believe companies that use recycled materials should be required to provide specific proof/statistics of their actions”); see also Anirudh Subramanian, Public Comment on Proposed Rule: Guides for the Use of Environmental Marketing Claims (Feb. 2, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0051> (commenting that “[c]ompanies should be mandated to state the percentage of recycled material used in their products”). But see Exxon Mobil Corp., Public Comment on

Proposed Rule: Guides for the Use of Environmental Marketing Claims (Apr. 24, 2023), <https://www.regulations.gov/comment/FTC-2022-0077-0925> (commenting that the Green Guides should “allow marketers to make unqualified claims that a product is made of or contains ‘recycled content’ if it is composed of materials to which plastic waste processed through advanced recycling has been attributed through a verified, third-party mass balance approach”).

201. 16 C.F.R. §260.16.

202. *Id.* §§260.8, 260.12, 260.13.

One aspect of greenwashing in the modern fashion industry that remains particularly difficult for deceptive marketing regulations to capture is the problem of quantity: even if companies' environmental claims about individual products are properly substantiated, environmental and social costs continue to rise due to industry overproduction, consumer overconsumption, and resulting increases in the amount of clothing waste.<sup>203</sup>

The FTC has recognized that its role as an agency and authority, although significant in consumer protection matters, is not to set broader environmental policy.<sup>204</sup> More stringent regulation of the international fashion industry, and ultimately shifts in consumer behavior and our culture around consumption, will also be essential for mitigating the disastrous environmental consequences currently projected.<sup>205</sup>

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203. See, e.g., Solene Rauturier, *Everything You Need to Know About Waste in the Fashion Industry*, GOOD ON YOU (Feb. 21, 2022), <https://goodonyou.eco/waste-luxury-fashion/>.

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204. See FTC GREEN GUIDES STATEMENT, *supra* note 85, at 17 (noting that “[t]he Commission publishes the Guides to prevent the dissemination of misleading claims, not to encourage or discourage particular environmental claims or consumer behavior based on environmental policy concerns”).

205. Cf. Intergovernmental Panel on Climate Change, *Summary for Policymakers, in SYNTHESIS REPORT OF THE IPCC SIXTH ASSESSMENT REPORT (AR6)* 4, 33 (Paola Arias et al. eds., 2022), [https://report.ipcc.ch/ar6syr/pdf/IPCC\\_AR6\\_SYR\\_SPM.pdf](https://report.ipcc.ch/ar6syr/pdf/IPCC_AR6_SYR_SPM.pdf) (finding with high confidence that “[h]uman activities, principally through emissions of greenhouse gases, have unequivocally caused global warming” and that “[g]lobal greenhouse gas emissions have continued to increase, with unequal historical and ongoing contributions arising from unsustainable energy use, land use and land-use change, *lifestyles and patterns of consumption and production across regions, between and within countries, and among individuals*,” and recommending that “[s]ocio-cultural options, *behaviour and lifestyle changes supported by policies, infrastructure, and technology* can help end-users shift to low-emissions-intensive consumption, with multiple co-benefits”) (emphasis added).