

## ENVIRONMENTAL MARKETING CLAIMS ACT: *PULLING THE "GREEN" OVER OUR EYES*

*Senator Frank R. Lautenberg\**

When today's consumer goes to the supermarket, he is confronted by a bewildering array of products and packages which make a variety of environmental claims. Yet, because there are no commonly understood terms for environmental claims, and because the claims themselves are not currently regulated, the consumer is likely to be confused, misled or deceived when trying to make an environmentally responsible product choice.

For instance, a can of shaving cream may have a label that claims it is ozone-friendly and without chlorofluorocarbons (CFCs).<sup>1</sup> What the consumer may not know is that despite the

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\* United States Senator, New Jersey. B.S., Columbia University (1949). Senator Lautenberg (D-Secaucus, New Jersey) was born on January 23, 1924 in Paterson, New Jersey. From 1949 to 1952, Senator Lautenberg was a sales representative for Prudential Insurance Company. In 1952 he joined Automatic Data Processing (ADP) where from 1969 to 1975 he served as President of the company. In 1975 Senator Lautenberg became Chairman of the Board and Chief Executive Office of ADP. Senator Lautenberg was elected to the United States Senate in 1982 and was reelected in 1988. Senator Lautenberg is a member of the Committee on Appropriations where he serves as Chairman of the Subcommittee on Transportation. He is a member of the Committee on the Budget and the Committee on the Environment and Public Works where he serves as Chairman of the Subcommittee on Superfund, Ocean and Water Protection. Senator Lautenberg is a member of the Helsinki Commission.

<sup>1</sup> See ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF COMMUNICATIONS AND PUBLIC AFFAIRS, CFCs AND STRATOSPHERIC OZONE (1987). "A consensus has emerged worldwide that [CFCs] will decrease ozone in the stratosphere." *Id.* at 1. Ozone protects life on earth from the dangerous rays of the sun. The EPA reports that ozone depletion can result in the following health hazards:

- \* Increases in skin cancer
- \* Suppression of the human immune response system
- \* Increases in cataracts
- \* Damage to crops
- \* Damage to aquatic organisms
- \* Increases in ground level ozone
- \* Increased global warming

*Id.* at 2.

See also ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF COMMUNICATIONS AND PUBLIC AFFAIRS, EPA ANNOUNCES CFC SUBSTITUTE THAT PROMISES SIGNIFICANT ENERGY SAVINGS IN HOME REFRIGERATORS (1992); ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF COMMUNICATIONS AND PUBLICATIONS, EPA PROPOSES PHASE

absence of ozone-depleting ingredients, substitute propellants in the shaving cream, such as butane and propane contribute to ground level smog.<sup>2</sup>

The consumer might buy a new line of microwaveable rice because its label claims the dish is recyclable. Many times the dish is made of polypropylene plastic, which is theoretically recyclable, however, that type of plastic is almost never included in municipal recycling programs.<sup>3</sup>

The consumer may buy trash bags because they are marked "degradable". She might never know that such a label is meaningless unless the product ultimately is placed in a composting system where air, water, and microorganisms — the necessary components of degradation — are present.<sup>4</sup> Unfortunately, most trash and trashbags end up in landfills, where virtually nothing breaks down.<sup>5</sup>

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OUT OF U.S. CFC PRODUCTION BY 2000 (1991); Timothy C. Faries, *Clearing the Air: An Examination of International Law on the Protection of the Ozone Layer*, ALBERTA L. REV. 820-21 (1990).

<sup>2</sup> See generally Thomas A. Hemphill, *Marketer's New Motto: It's Keen to be Green*, 78 BUS. & SOC'Y REV. 39-44 (1991) [hereinafter Hemphill, *Marketer's New Motto*]. The use of advertising claiming products are "environmentally friendly" has become an effective marketing strategy. Hemphill asserts "[p]roducts were advertised and sold as 'degradable,' 'environmentally safe,' and 'recyclable,' with questionable or even nonexistent scientific evidence to back up the claims." *Id.* at 40.

<sup>3</sup> Dr. Ramani Narayan, a Professor of Chemical Engineering at Michigan State University and Senior Scientist at the Michigan Biotechnology Institute, has said that it does not matter if the plastic is degradable. If the plastic goes to a landfill it will not degrade. The problem, she states is:

people who design degradable or just plain disposable plastics merely put a label stating biodegradable, recyclable, etc. and don't indicate what the appropriate waste disposal scheme and conditions need to be to handle their material. Environmental engineers, waste management experts design these sanitary landfills, composting and recycling programs without much thought to back integrating with new product design that allows effective disposal when these proposals enter the waste stream.

*Environmental Labeling of Consumer Products: Hearing Before the Subcomm. on the Consumer of the Senate Comm. on Commerce, Science and Transp.*, 101st Cong., 2d Sess. 91 (May 16, 1990) [hereinafter Hearing]. For a further discussion on the difficulty of recycling plastics see JOSEPH L. PAVONI ET AL., *HANDBOOK OF SOLID WASTE DISPOSAL* 288-90 (1975).

<sup>4</sup> See Hemphill, *Marketer's New Motto*, *supra* note 2, at 40. For a detailed technical description of the composting and landfill process see MICROBIOLOGY OF LANDFILL SITES 2-5 (Eric Senior ed., 1990).

<sup>5</sup> Dr. Narayan describes landfills as "huge plastic lined tombs devoid of any moisture or oxygen, and support no or very little microbial activity, preserving gar-

These are not isolated instances. Each year, the number of products claiming some environmental advantage grows, as do the efforts of manufacturers to advertise such environmental benefits. According to Marketing Intelligence Service, "environmentally friendly" products increased from 1.1% in 1986 to 11.4% in 1990.<sup>6</sup>

Clearly, manufacturers are responding to consumers' desire to make environmentally responsible purchases. National surveys show that as many as 90 percent of American consumers would pay more for "environmentally safe" products and packages if they were available.<sup>7</sup> Half would switch supermarkets to shop where such products were sold.<sup>8</sup>

Yet the consumer who wants to be environmentally responsible with his pocketbook has no clear standards by which to judge the various products' environmental claims. He is likely to be misled or confused by the hodgepodge of unsupported claims, misleading labels and self-serving advertisements. Moreover, manufacturers who are making legitimate significant environmental improvements to their products or packages are at a disadvantage compared to those who are being deceptive or making false claims. Instead of environmental consumerism, we are getting environmental confusion.

What the environmentally conscious consumer needs first and foremost is a set of commonly understood terms for environmental claims. Defining national standards and criteria for such claims would end the confusion in the environmental marketplace.

That is why I introduced S. 615, the Environmental Marketing Claims Act of 1991 (Act).<sup>9</sup> The Act would require the Environmental Protection Agency (EPA) to establish uniform and accurate standards and definitions for environmental marketing

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bage for posterity and becoming superfund sites of tomorrow." See Hearing *supra* note 3, at 93 (prepared statement of Dr. Ramani Narayan).

<sup>6</sup> MARKETING INTELLIGENCE SERVICE, LTD., 1990 SET THE RECORD FOR NEW PRODUCTS 2 (1991).

<sup>7</sup> See Hearing *supra* note 3, at 43. (Statement of Denis Hays, Chairman and Chief Executive Officer of Green Seal).

<sup>8</sup> FOOD MARKETING INST. & BETTER HOMES AND GARDEN, HOW SOLID WASTE ISSUES ARE AFFECTING CONSUMER BEHAVIOR 3 (1990).

<sup>9</sup> S. 615, 102d Cong., 1st Sess. (1991). (The full text of S. 615 is set out in the appendix to this article).

claims for both products and packages.<sup>10</sup> It would establish an independent advisory board, which will be comprised of members of industry, environmental and consumer groups, to advise EPA on the standards to be set.<sup>11</sup> Finally, the Act would establish a petition process through which industry could ask the EPA to establish a standard for any unregulated claims a company may want to make.<sup>12</sup>

The Act would give consumers reliable and consistent guidance to help them compare environmental marketing claims of competing products. It would prevent the use of fraudulent, deceptive and misleading claims. This legislation would also encourage the development in innovative technologies and practices that favor natural resource conservation and environmental protection so that environmentally responsible manufacturers would receive proper credit for their environmental efforts.

I believe in the power of information to change behavior. I have seen this power at work during my legislative career. Five years ago Congress passed the "Right-to-Know" law, a piece of legislation which I drafted.<sup>13</sup> It requires facilities to report on their emissions of toxic pollutants.<sup>14</sup> When the first emissions were published in 1989, the results were startling.<sup>15</sup> The public was outraged that industry was emitting 23 billion pounds of toxins into the environment, and demanded action.<sup>16</sup>

The response of American industry was even more startling. The number of corporate officials who told me that they were unaware of the level of their company's emissions was truly outstanding. Certain corporate officials announced plans to cut their toxic emissions as a result. Accountability has revolutionized industry's approach to environmental issues. The "Right-

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<sup>10</sup> *Id.* at § 6.

<sup>11</sup> *Id.* at § 5.

<sup>12</sup> *Id.* at § 5(c).

<sup>13</sup> The Emergency Planning and Community Right-to-Know, Pub. L. No. 99-499, 100 Stat. 1729, 42 U.S.C. §§ 11001-11050 (1986). *See also* H.R. REP. NO. 253(I), 99th Cong., 2d Sess. 59-60, *reprinted in* 1986 U.S.C.C.A.N. 2835-41.

<sup>14</sup> 42 U.S.C. § 11002. *See also* H.R. REP. NO. 253(I) at 110-11, *reprinted in* 1986 U.S.C.C.A.N. 2892-93.

<sup>15</sup> ENVIRONMENTAL PROTECTION AGENCY, THE TOXICS RELEASE INVENTORY: NATIONAL PERSPECTIVE 1 (1989).

<sup>16</sup> *Id.*

to-Know" law demonstrates the ability of citizens to assert their will when armed with accurate data to support their arguments.

Regulating environmental marketing claims will help to focus our efforts on preventing pollution before it is generated. For the last twenty years, we have dealt with pollution by imposing "end-of-the-pipe" controls.<sup>17</sup> Until recently, virtually all of our regulatory efforts have been directed at managing pollution after it is produced. Too often "end-of-the-pipe" controls are expensive and simply shift pollution from one environmental medium to another.<sup>18</sup> The least expensive and safest way to protect the American people and our environment from these pollutants is to eliminate or reduce pollutants *before* they are produced.

By making accurate information about the environmental attributes of consumer products and packages available, we can revolutionize the way manufacturers make and package their products. We can duplicate the success we have enjoyed with the "Right-to-Know" program and reduce the level of pollution we generate.

It is a basic role of government to establish common standards, measures and definitions in order to provide common denominators by which competition can take place fairly in the free market. A free market relies on such standards and depends on free and accurate information. We need to create a framework to protect consumers, to protect industry, and most importantly to protect the environment. We need to provide incentives to manufacturers to make environmentally preferable products and packages by preventing false claims by those who fail to upgrade their products and packaging.

The Act is consistent with the recommendations of the Task Force of State Attorneys General.<sup>19</sup> The Task Force, made up of

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<sup>17</sup> Raymond Loehr, *What Raised the Issue?*, 17 EPA J. 7 (1991).

<sup>18</sup> *Id.*

<sup>19</sup> The Task Force of Attorneys General issued two reports: THE GREEN REPORT: FINDINGS AND PRELIMINARY RECOMMENDATIONS FOR RESPONSIBLE ENVIRONMENTAL ADVERTISING (1990) [hereinafter GREEN REPORT] and THE GREEN REPORT II: RECOMMENDATIONS FOR RESPONSIBLE ADVERTISING (1991) [hereinafter GREEN REPORT II]. In its most recent report, The Task Force recommended that:

- \* Environmental claims should be as specific as possible, not general, vague, incomplete or overly broad.
- \* Environmental claims relating to the disposability or potential for recovery of a particular product (e.g., 'compostable' or 'recycl-

attorneys general from eleven different states,<sup>20</sup> held a series of hearings and issued a Green Report recommending national definitions and standards.<sup>21</sup> The Task Force agrees on the need to establish standards which require that claims be specific, substantive and supportable, and has endorsed the Act.<sup>22</sup> This legislation has also been endorsed by environmental and consumer organizations such as the Environmental Defense Fund, Natural Resources Defense Council, Environmental Action and Consumers Union.<sup>23</sup>

The Act establishes the EPA as the lead agency for setting standards for environmental marketing claims.<sup>24</sup> The EPA has the technical expertise to establish environmental standards.<sup>25</sup> The Federal Trade Commission (FTC) is not as suitable to establish these standards. The FTC expertise is limited to determining false and deceptive advertising.<sup>26</sup> However, advertising can

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able') should be made in a manner that clearly discloses the general availability of the advertised option where the product is sold.

- \* Environmental claims should be substantive.
- \* Environmental claims should, of course, be supported by competent and reliable scientific evidence.

GREEN REPORT II at vii.

<sup>20</sup> Including: California, Florida, Massachusetts, Minnesota, Missouri, New York, Tennessee, Texas, Utah, Washington, Wisconsin. GREEN REPORT II, *supra* note 19, at 1.

<sup>21</sup> See GREEN REPORT, *supra* note 19, at 29-48.

<sup>22</sup> Letter from Hubert H. Humphrey, III, Attorney General of Minnesota, to Senator Frank R. Lautenberg, Oct. 11, 1990 (reproduced in GREEN REPORT, *supra* note 19, at appendix I).

<sup>23</sup> For further information on environmental marketing contact: Environmental Defense Fund, 257 Park Ave. South, 16th Floor, New York, New York 10010; Natural Resources Defense Fund, 1350 New York Ave., NW, Washington D.C. 20005; Environmental Action, 6930 Carroll Ave. Suite 600, Tacoma Park, MD 20009; Consumers Union, 2001 S Street, NW, Washington D.C. 20009.

<sup>24</sup> S. 615 at §§ 5, 6.

<sup>25</sup> The EPA is working on several investigations and potential rule makings in this area. See Hearing, *supra* note 3, at 25. (Statement of Christian Holmes, Principal Deputy Assistant Administrator for Solid Waste and Emergency Response, EPA).

<sup>26</sup> Congress has empowered the FTC to regulate "false and misleading" advertising. See 15 U.S.C.A. § 1125(a) (West Supp. 1991) making it illegal for:

(a) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which-

(1) is likely to cause confusion, or to cause mistake, or to deceive as

be truthful but not particularly relevant to environmental attributes the nation wants to promote. As the agency responsible for the nation's environmental policy, the EPA is in the best position to determine whether products and packaging which impact the environment are consistent with overall national environmental policy.

It should be clear that the Act in no way eliminates or undercuts the FTC's existing authority to bring actions against deceptive advertising. The FTC is investigating more than a dozen environmental marketing claims.<sup>27</sup> These investigations focus on a variety of product claims, including photodegradability, biodegradability, ozone friendly, recyclable, and nontoxic.<sup>28</sup>

The FTC has an important role to play in policing manufacturers' environmental claims. A role, however, which must rely on EPA expertise and policy direction. As the Act's author, I am

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to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or (2) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

See generally Maury Tepper, *False Advertising Claims and the Revision of the Lanham Act: A Step in Which Direction?*, 59 U. CIN. L. REV. 957-74 (1991).

<sup>27</sup> See Hearing, *supra* note 3, at 11 (Statement of Barry Cutler, Director, Bureau of Consumer Protection, FTC).

<sup>28</sup> *Id.* at 11-12. See, e.g., *Advertiser of Cleaning Products Will Not Make Deceptive Green Claims*, 62 Antitrust & Trade Reg. Rep. (BNA) 9 (Jan. 9, 1992) (manufacturer of a spray that cleans electronic equipment entered into consent agreement with FTC. FTC charged that the manufacturer's claims of its product being "ozone freindly" were unsubstantiated); *"Glad" Trash Bag Manufacturer Settles FTC Deceptive Degradability Claim Charges*, 61 Antitrust & Trade Reg. Rep. (BNA) 463 (Oct. 17, 1991) (maker of plastic trash bags claimed that its bags would decompose in a landfill in "a reasonably short time"); *Disposable Diaper Manufacturer Agrees to Substantiate Degradability Claims*, 61 Antitrust & Trade Reg. Rep. (BNA) 301 (Sept. 12, 1991) (FTC charged that manufacturer of disposable diapers made unsubstantiated claims that its "diapers will decompose 'before your child grows up'").

The FTC has also been actively involved in an attempt to enact national guidelines for environmental marketing claims. The FTC recently held a series of hearings to determine if national guidelines are necessary. *FTC Conducts Two-Day Hearing on Need to Develop Environmental Marketing Guide*, 61 Antitrust & Trade Reg. Rep. (BNA) 117-23 (July 25, 1991). The FTC's proposed guidelines were issued on May 31, 1991 and the FTC has not acted on its proposal. PETITIONS FOR ENVIRONMENTAL MARKETING AND ADVERTISING GUIDES; PUBLIC HEARINGS, 56 Fed. Reg. 21,968 (1991).

willing and eager to work with the FTC to define the its role in the implementation and enforcement of this legislation.

Some have asked why this bill is drafted to cover products as well as packages? It was drafted in this way because claims are often made about the attributes of the product itself as well as the package. Ozone-friendly, biodegradable, nontoxic, and chlorine-free are just a few of the product claims in supermarkets today.

The Act does not require that claims be preapproved by EPA before they can be used. The Act provides that companies which are making environmental claims must submit a certification to EPA that the claims are consistent with the Act.<sup>29</sup> This provision is intended to aid in enforcement. But it does not require any EPA action before a company can make the claim.

The Act does not preempt state laws. It allows states to establish tougher standards to address local problems. The states are often innovators, taking enforcement or legislative actions which serve as forerunners to federal action.

If a "green" marketplace is to help address our environmental problems, we must encourage business and industry to invest in equipment and processes that can sustain lofty environmental claims. Finally, consumers must feel confident that the products they purchase are true to the claims that are made. That will not be possible until we are all speaking the same language.

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<sup>29</sup> S. 615 at § 6(b)(7)(A)-(D).



102D CONGRESS  
1ST SESSION

# S. 615

Entitled the "Environmental Marketing Claims Act of 1991".

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## IN THE SENATE OF THE UNITED STATES

MARCH 12 (legislative day, FEBRUARY 6), 1991

Mr. LAUTENBERG (for himself and Mr. LIEBERMAN) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

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## A BILL

Entitled the "Environmental Marketing Claims Act of 1991".

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Environmental Mar-  
5 keting Claims Act of 1991".

6 **SEC. 2. FINDINGS AND PURPOSES.**

7 (a) FINDINGS.—The Congress finds and declares  
8 that—

9 (1) the United States is facing growing environ-  
10 mental problems such as global climate change,  
11 waste disposal, and air and water pollution;

## 2

1           (2) environmental marketing claims convey in-  
2           formation about products and influence purchasing  
3           decisions;

4           (3) national surveys have shown that over 90  
5           percent of American consumers would pay more for  
6           environmentally preferable products;

7           (4) conveying accurate and reliable environ-  
8           mental information in environmental marketing  
9           claims will be of great use to the consumers willing  
10          to change their purchasing patterns;

11          (5) environmental marketing claims are largely  
12          unregulated and can be deceptive; and

13          (6) deceptive environmental marketing claims  
14          exploit genuine consumer concern and may confuse  
15          consumers so as to impede the effectiveness of the  
16          use of legitimate environmental marketing claims  
17          addressing environmental problems.

18          (b) PURPOSES.—The purposes of this Act are to—

19               (1) prevent the use of fraudulent, deceptive,  
20               and misleading environmental marketing claims;

21               (2) empower consumers with reliable and con-  
22               sistent guidance to facilitate value comparisons with  
23               respect to environmental marketing claims;

## 3

1           (3) establish uniform, accurate standards and  
2       definitions that reflect the best available manufac-  
3       turing practices, products, and packaging;

4           (4) encourage the development of innovative  
5       technologies and practices to be adapted by manu-  
6       facturers in considering the environmental effects  
7       when producing products and packages; and

8           (5) encourage both consumers and industry to  
9       adopt habits and practices that favor natural re-  
10      source conservation and environmental protection.

11 **SEC. 3. DEFINITIONS.**

12       For the purposes of this Act—

13           (1) the term “product” means any commodity,  
14       good, or item distributed for promotional use, rent,  
15       lease, or sale through retail or wholesale sales agen-  
16       cies or instrumentalities for consumption or use;

17           (2) the term “package” means the coating, cov-  
18       ering, container, or wrapping used during a product  
19       life cycle (including any outer container, wrapping,  
20       or label used in the retail display of any product);

21           (3) the term “life cycle” includes the—

22                   (A) extraction;

23                   (B) processing and manufacturing;

24                   (C) transportation and distribution

25                   (D) use; and

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1                   (E) management as waste,  
2       of raw materials used in the manufacture of a prod-  
3       uct or package, and of the product or package, in-  
4       cluding the energy consumption associated with the  
5       activities described in subparagraphs (A) through  
6       (E);

7           (4) the term "environmental marketing claim"  
8       means any symbols or terms that are on a label,  
9       package, or product or that are used in promotion  
10      or advertising to inform consumers about the envi-  
11      ronmental impact or environmental attributes of a  
12      product or package during any part of its life cycle;

13          (5) the term "label" means any written, print-  
14      ed, or graphic material affixed to, appearing upon a  
15      product or package, or appearing upon a shelf or  
16      display area that refers to a product of package;

17          (6) the term "Administrator" means the Ad-  
18      ministrator of the Environmental Protection Agency;

19          (7) the term "end product" means only those  
20      items that are designed to be used until disposal;  
21      items designed to be used in production of a sub-  
22      sequent item are excluded;

23          (8) the term "postconsumer material" means  
24      only those products or packages generated by a busi-  
25      ness or consumer which have served their intended

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1 end uses, and which have been separated or diverted  
2 from solid waste except that such term shall not in-  
3 clude wastes generated during the production of an  
4 end product;

5 (9) the term "preconsumer material" means  
6 waste generated during production which cannot be  
7 returned to the same production process, nor used  
8 by another company to make a product similar to  
9 the original product, nor used by the same parent  
10 company to manufacture a different product, and in-  
11 cludes all wastes generated during the intermediate  
12 steps in producing an end product by succeeding  
13 companies;

14 (10) the term "secondary material" means any  
15 preconsumer material, postconsumer material, or  
16 any combination thereof.

17 **SEC. 4. ENVIRONMENTAL LABELING REGULATORY PRO-**  
18 **GRAM.**

19 The Administrator shall establish by regulation an  
20 environmental marketing claims regulatory program. The  
21 purpose of such a program shall be to carry out the provi-  
22 sions of this Act.

23 **SEC. 5. INDEPENDENT ADVISORY BOARD.**

24 (a) **ESTABLISHMENT.**—The Administrator shall es-  
25 tablish by regulation not later than 180 days after the

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1 date of enactment of this Act, an Independent Advisory  
2 Board (hereafter in this Act referred to as the "Board")  
3 to advise and make recommendations to the Adminis-  
4 trator, as provided in subsection (c), concerning the regu-  
5 lation of environmental marketing claims.

6 (b) MEMBERSHIP.—(1) The Board shall consist of 15  
7 members, including 4 ex officio members, who shall be ap-  
8 pointed by the Administrator as follows:

9 (A) Three members who are recognized as  
10 consumer advocates, one of which is a recognized ex-  
11 pert in marketing or consumer perception.

12 (B) Five members representative of industry  
13 and manufacturing, including—

14 (i) One retailer;

15 (ii) One manufacturer;

16 (iii) One recognized waste management ex-  
17 pert in the private sector; and

18 (iv) One end user of post-consumer mate-  
19 rials.

20 (C) 3 members representative of environmental  
21 organizations, of which 1 member is a recognized ex-  
22 pert in soil science or environmental toxicology.

23 (D) Two members who shall serve ex officio  
24 who are officers or employees of State government,  
25 and of which—

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1 (i) One member is recognized expert in  
2 consumer protection; and

3 (ii) One member who is recognized as a  
4 waste management, pollution reduction, or pol-  
5 lution prevention expert.

6 (E) One member who is an officer or employee  
7 of a local government and is engaged in pollution  
8 prevention or waste management or a municipal re-  
9 cycling program or consumer protection who shall  
10 serve ex officio.

11 (F) One member who is an officer or employee  
12 of the National Institute of Standards and Tech-  
13 nology, who shall serve ex officio.

14 (2) Members of the Board serving ex officio shall  
15 have no vote.

16 (3) The Chairman of the Board shall be designated  
17 by the Administrator. The Board shall meet at the call  
18 of the Administrator or the Chairman.

19 (c) ADMINISTRATIVE MATTERS.—(1) The Board  
20 shall conduct its business in open meetings (subject to any  
21 requirement for privacy in personal matters and review of  
22 confidential information under any provision of law), and  
23 may hold hearings to seek public comment and participa-  
24 tion in formulating recommendations for the definitions  
25 and standards described in section 6(a).

1       (2) Members of the Board who are not otherwise em-  
2 ployed by the Federal Government may be allowed travel  
3 expenses, including per diem in lieu of subsistence, as au-  
4 thorized by section 5703 of title 5, United States Code,  
5 for persons employed intermittently in Government serv-  
6 ice.

7       (d) ANNUAL REPORT.—Not more than 180 days  
8 after the initial meeting of the Board, and annually there-  
9 after, the Chairman of the Board shall submit to the Ad-  
10 ministrator a report that outlines the activities and rec-  
11 ommendations of the Board relating to the items described  
12 in section 6. The initial report shall include the rec-  
13 ommendations described in section 6(a).

14   **SEC. 6. REGULATION OF ENVIRONMENTAL MARKETING**  
15                                   **CLAIMS.**

16       (a) RECOMMENDATIONS BY THE BOARD.—Rec-  
17 ommendations by the Board to the Administrator, shall  
18 include definitions and standards to be used in regulating  
19 environmental marketing claims. In making such rec-  
20 ommendations, the Board shall consider the requirements  
21 for final regulations described in subsections (b) and (c),  
22 and shall consider available studies, standards, and other  
23 information that the Chairman of the Board determines  
24 to be appropriate.



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1 (b) FINAL REGULATIONS.—(1) The Administrator,  
2 after considering the recommendations of the Board de-  
3 scribed in subsection (a), shall, not later than 15 months  
4 after the date of enactment of this Act, issue proposed  
5 regulations and not later than 18 months after the date  
6 of the enactment of this Act, promulgate final regulations  
7 governing the use of environmental marketing claims, in-  
8 cluding statements to the effect that a product or package  
9 is—

- 10 (A) source reduced;
- 11 (B) refillable;
- 12 (C) reusable;
- 13 (D) recyclable;
- 14 (E) has a recycled content;
- 15 (F) compostable;
- 16 (G) ozone neutral;
- 17 (H) nontoxic; or
- 18 (I) otherwise related to an environmental im-  
19 pact or attribute.

20 (2) In promulgating the regulations described in  
21 paragraph (1), the Administrator shall ensure that an en-  
22 vironmental marketing claim shall be related to a specific  
23 environmental impact or attribute in such a manner as  
24 to ensure that such environmental marketing claims is not  
25 false, misleading, or deceptive and meets the requirements

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1 of paragraph (c)(2); except that this shall not preclude  
2 the use of general environmental seals of approval if the  
3 Administrator determines that such seals are awarded ac-  
4 cording to objective criteria that promote environmentally  
5 preferable products and packages.

6 (3) In promulgating the regulations described in  
7 paragraph (1), the Administrator shall ensure that an en-  
8 vironmental marketing claim has been substantiated on  
9 the basis of the best available scientific information.

10 (4) In promulgating the regulations described in  
11 paragraph (1), the Administrator shall assign a product  
12 to a category or subcategory for the purpose of such regu-  
13 lations according to the following criteria:

14 (A) the composition of the product; and

15 (B) the packaging of the product.

16 (5) In establishing product categories for the pur-  
17 poses of the regulations, as described in paragraph (1),  
18 the Administrator may establish a category for a specific  
19 type of product, or may assign a product to a general cat-  
20 egory on the basis of the function of the product.

21 (6) In promulgating the regulations described in  
22 paragraph (1), the Administrator shall ensure that envi-  
23 ronmental marketing claims shall make a clear distinction  
24 between the product and any accompanying packaging un-  
25 less the claim applies to both.

## 11

1       (7) The Administrator shall include the following re-  
2       quirements in the final regulations described in paragraph  
3       (1):

4               (A)(i) An environmental marketing claim relat-  
5       ing to "recycled content" shall be used only in con-  
6       nection with a product or package containing  
7       postconsumer materials if the percentage of recycled  
8       material is specified in the claim and, except as pro-  
9       vided in clause (ii), the post-consumer material shall  
10      be no less than 25 percent, by weight from the effec-  
11      tive date of the regulations until the year 2000 and  
12      no less than 50 percent by weight on or after the  
13      year 2000.

14              (ii) Notwithstanding clause (i), an environ-  
15      mental marketing claim relating to "recycled con-  
16      tent" may be used in connection with a product or  
17      package that contains a percentage of post-consumer  
18      materials that is less than the percentage specified  
19      in clause (i), if a manufacturer, retailer, or distribu-  
20      tor, or other person responsible for the use of such  
21      environmental marketing claim includes in such  
22      claim a sentence (in which the terms described in  
23      the regulation promulgated under section 6 are dis-  
24      played no more prominently than other words in the  
25      sentence) that states the percentage (by weight) of

## 12

1 post-consumer and secondary materials used in such  
2 product or package and no symbols are used in such  
3 claim.

4 (B) An environmental marketing claim relating  
5 to the "recyclable" nature of a product or package  
6 shall be used only in connection with a product or  
7 package for which a manufacturer, retailer, distribu-  
8 tor, or other person responsible for the use of such  
9 environmental marketing claim, is able to dem-  
10 onstrate, to the satisfaction of the Administrator,  
11 that such product or package shall be recycled, at a  
12 minimum rate of 25 percent per annum from the ef-  
13 fective date of the regulation until the year 2000,  
14 and at a minimum rate of 50 percent per annum on  
15 or after the year 2000.

16 (C) An environmental marketing claim relating  
17 to the "reusable" or "refillable" nature of a product  
18 or package shall be used only in connection with a  
19 product or package that is reused for the original  
20 purpose of the product or package, an average of 5  
21 times or more.

22 (D) No environmental marketing claim relating  
23 to the "biodegradable", "compostable",  
24 "decomposable", "degradable", "photodegradable"  
25 nature of a product, package or material, or any like

## 13

1 term or terms, shall be used in connection with a  
2 product, package or material unless a manufacturer,  
3 retailer, distributor or other person responsible for  
4 the use of such environmental marketing claim is  
5 able to demonstrate, to the satisfaction of the Ad-  
6 ministrator, that such product, package or  
7 material—

8 (i) will decompose completely and safely in  
9 such a waste management system or systems  
10 through natural chemical and biological proc-  
11 esses into basic natural constituents, containing  
12 no synthetic or toxic residues, within an amount  
13 of time compatible with such system or systems;

14 (ii) will not release or produce at any time  
15 toxic or synthetic substances that may be harm-  
16 ful to humans, other organisms or natural eco-  
17 logical processes, including during the manage-  
18 ment process and any subsequent application or  
19 use of products or by-products of the process,  
20 such as use of the product or by-product of  
21 composting as a soil amendment or mulch; and

22 (iii) shall be managed, at a minimum rate  
23 of 25 percent per annum from the effective date  
24 of the regulation until the year 2000 and at a  
25 minimum rate of 50 percent per annum on or

## 14

1           after the year 2000 of all such products, pack-  
2           ages or material, in a waste management sys-  
3           tem or systems which are protective of human  
4           health and the environment, and for which the  
5           Administrator determines the claim is a rel-  
6           evant and environmentally desirable and signifi-  
7           cant characteristic.

8           Any such environmental claim shall clearly specify  
9           the applicable management system or systems and  
10          specify that such claim applies only to products,  
11          packages or material that are managed in such a  
12          system or systems.

13          (8) In promulgating the regulations described in  
14          paragraph (1), the Administrator may authorize the use  
15          of an environmental marketing claim to be used in a retail  
16          outlet through a point-of-purchase display for any pack-  
17          age, product, or material for which it can be demonstrated  
18          that a recycling, reuse or composting program serves the  
19          community in which the retail outlet is located and meets  
20          the requirements of paragraph (7) for that claim. Such  
21          a claim shall not appear on the package, product or mate-  
22          rial itself and shall clearly indicate the specific program  
23          or programs which meet the requirements of paragraph  
24          (7). Such a claim shall not be used in connection with any  
25          package, product or material distributed in commerce in

## 15

1 any community not served by a program which meets the  
2 requirements of paragraph (7).

3 (c) **ADDITIONAL REGULATIONS.**—(1) The Adminis-  
4 trator may, at any time after the date of the promulgation  
5 of the regulations required under subsection (b), promul-  
6 gate such additional regulations or make changes in exist-  
7 ing regulations as the Administrator determines, on the  
8 basis of the criteria described in subparagraphs (A) and  
9 (B) of paragraph (2), to be necessary to carry out the  
10 purposes of this Act.

11 (2) In establishing and reviewing the regulations de-  
12 scribed in subsection (b), or in any additional regulations  
13 promulgated under this subsection, the Administrator  
14 shall determine whether the regulations—

15 (A) reflect the best available use and the best  
16 available technology that will encourage higher per-  
17 formance levels in products and packaging in meet-  
18 ing the objectives of reducing negative environmental  
19 impacts and improving environmental attributes; and

20 (B) reflect the most recent scientific and prac-  
21 tical knowledge of technological advances and im-  
22 provements in manufacturing techniques and waste  
23 management.

24 (3) Not later than 3 years after the date of the pro-  
25 mulgation of the final regulations described in subsection

## 16

1 (b) or any additional regulations promulgated under this  
2 subsection, and every 3 years thereafter, the Adminis-  
3 trator shall review such regulations.

4 (4)(A) An interested individual (including a rep-  
5 resentative of industry, an interested citizen, or a rep-  
6 resentative of an environmental organization), may peti-  
7 tion the Administrator to initiate rulemaking procedures  
8 with respect to promulgating additional regulations under  
9 this section.

10 (B) Not later than 60 days after receiving a petition  
11 described in subparagraph (A), the Administrator shall de-  
12 termine whether to accept or deny the petition and shall  
13 publish the petition in the Federal Register, along with  
14 an explanation of the reasons for such determination. If  
15 the administrator issues a decision accepting the petition,  
16 the Secretary shall issue a proposed regulation to take the  
17 action requested in the petition not later than 90 days  
18 after the date of such decision.

19 (d) LIMITATIONS—An environmental marketing  
20 claim:

21 (1) may be made two years after the enactment  
22 of this act only if the environmental characteristic  
23 made in the claim uses terms which are defined by  
24 regulations of the Administrator;



## 17

1           (2) may not state the absence of an environ-  
2           mental attribute unless—

3                   (i) the attribute is a usual characteristic of  
4                   the product or package, or

5                   (ii) the Administrator by regulation per-  
6                   mits such a statement on the basis of a finding  
7                   that such a statement would assist consumers  
8                   making value comparisons with respect to envi-  
9                   ronmental claims among products and packages  
10                  and the statement discloses that the environ-  
11                  mental attribute is not a usual characteristic of  
12                  the product or package;

13           (3) may not be made if the Administrator by  
14           regulation prohibits the claim because the claim is  
15           misleading in light of another environmental char-  
16           acteristic of the product or package.

17 **SEC. 7. CERTIFICATION.**

18           (a) **FILING OF A CERTIFICATION.**—Not later than 6  
19 months after the date of the promulgation of any regula-  
20 tion under section 6, any manufacturer or any other per-  
21 son who intends to use an environmental marketing claim  
22 for which the Administrator has promulgated a regulation  
23 shall first submit a certification to the Administrator that  
24 the environmental marketing claim intended to be used  
25 meets the requirements of this Act. Such certification shall

1 be in such form as the Administrator shall prescribe by  
2 regulation and shall contain such information as the Ad-  
3 ministrator determines to be appropriate.

4 (b) DISAPPROVAL OF CERTIFICATION.—The Admin-  
5 istrator may, at any time, disapprove the certification pro-  
6 vided under subsection (a) if the Administrator determines  
7 that the environmental marketing claim that the manufac-  
8 turer or other person intends to use does not meet the  
9 requirements of the regulations promulgated under section  
10 6 of this Act.

11 (c) RECERTIFICATION.—Any person using an envi-  
12 ronmental marketing claim shall resubmit a certification  
13 to the Administrator that the environmental marketing  
14 claim used meets the requirements of the Act if:

15 (1) changes have been made in the product or  
16 package that would affect its ability to meet the reg-  
17 ulatory requirements of the environmental marketing  
18 claim previously used for such a product or package,  
19 or;

20 (2) new regulations have been promulgated  
21 under this Act relating to the environmental claim  
22 being used.

23 Such recertification shall be submitted to the Adminis-  
24 trator within 6 months of the occurrence of either event  
25 described in paragraphs (1) and (2) of this subsection.

## 19

1 **SEC. 8. PROHIBITION.**

2 It shall be unlawful for any person to:

3 (a) fail or refuse to comply with—

4 (1) any regulation promulgated under sec-  
5 tion 6(b) of this Act; or

6 (2) any order issued by the Administrator  
7 to carry out any such regulation;

8 (b) use an environmental marketing claim for  
9 which the Administrator has issued a regulation  
10 under section 6 if—

11 (1) the person has failed to file a cer-  
12 tification as required by section 7; or

13 (2) the Administrator has disapproved a  
14 certification under section 7; or

15 (c) use an environmental marketing claim that  
16 is inconsistent with the requirements of section 6(d).

17 **SEC. 9. PENALTIES.**

18 (a) CIVIL.—(1) Any person who violates a provision  
19 of section 8 of this Act shall be liable to the United States  
20 for a civil penalty in an amount not to exceed \$25,000  
21 for each such violation. Each day such a violation contin-  
22 ues shall, for the purpose of this subsection, constitute a  
23 separate violation of section 8 of this Act.

24 (2)(A) A civil penalty for a violation of section 8 of  
25 this Act shall be assessed by the Administrator by an  
26 order made on the record after opportunity (provided in

1 accordance with this subparagraph) for a hearing in ac-  
2 cordance with section 554 of title 5, United States Code.  
3 Before issuing such an order, the Administrator shall give  
4 written notice to the person to be assessed a civil penalty  
5 under such order of the Administrator's proposal to issue  
6 such order and provide such person an opportunity to re-  
7 quest, within 15 days of the date the notice is received  
8 by such person, such a hearing on the order.

9 (B) In determining the amount of a civil penalty, the  
10 Administrator shall take into account the nature, cir-  
11 cumstances, extent, and the gravity of the violation, and  
12 with respect to the violator, ability to pay, effect on ability  
13 to continue to do business, any history of prior related  
14 violations, the degree of culpability, and such other mat-  
15 ters as the Administrator determines to be appropriate.

16 (3) Any person who has requested a hearing with re-  
17 spect to the assessment of a civil penalty in accordance  
18 with paragraph (2)(A) and who is aggrieved by an order  
19 assessing the civil penalty may file a petition for judicial  
20 review of such order with the United States Court of Ap-  
21 peals for the District of Columbia Circuit or for any other  
22 circuit in which such person resides or transacts business.  
23 Such a petition may only be filed within the 30-day period  
24 beginning on the date the order making such assessment  
25 was issued.

## 21

1       (4) If a person fails to pay an assessment of a civil  
2 penalty—

3           (A) after the order making the assessment has  
4 become a final order and if such person does not file  
5 a petition for judicial review of the order in accord-  
6 ance with paragraph (3); or

7           (B) after a court in an action brought under  
8 paragraph (3) has entered a final judgment in favor  
9 of the Administrator,

10 the Attorney General shall recover the amount assessed  
11 (plus interest at currently prevailing rates from the date  
12 of the expiration of the 30-day period referred to in para-  
13 graph (3) or the date of such final judgment, as the case  
14 may be) in an action brought in any appropriate district  
15 court of the United States. In such an action, the validity,  
16 amount, and appropriateness of such penalty shall not be  
17 subject to review.

18       (b) **CRIMINAL.**—Any person who knowingly or will-  
19 fully violates any provision of section 8 of this Act, shall,  
20 in addition to or in lieu of any civil penalty which may  
21 be imposed under subsection (a) of this section for such  
22 violation, be subject, upon conviction, to a fine of not more  
23 than \$25,000 for each day of violation, or to imprisonment  
24 for not more than 1 year, or both.

## 22

1       (c)(1) The authorized fines provided in subsections  
2 (a) and (b) shall be adjusted for inflation every 5 years  
3 as provided in this subsection.

4       (2) Not later than December 1, 1993, and December  
5 1 of each fifth calendar year thereafter, the Secretary shall  
6 prescribe and publish in the Federal Register a schedule  
7 of maximum authorized fines that shall apply for vio-  
8 lations that occur after January 1 of the year immediately  
9 following such publication.

10       (3) The schedule of maximum authorized fines shall  
11 be prescribed by increasing the amounts in each of the  
12 subsections referred to in paragraph (1) by the cost-of-  
13 living adjustment for the preceding 5 years. Any increase  
14 determined under the preceding sentence shall be rounded  
15 to—

16           (A) in the case of penalties greater than \$1,000  
17 but less than or equal to \$10,000, the nearest mul-  
18 tiple of \$1,000;

19           (B) in the case of penalties greater than  
20 \$10,000 but less than or equal to \$100,000, the  
21 nearest multiple of \$5,000;

22           (C) in the case of penalties greater than  
23 \$100,000 but less than or equal to \$200,000, the  
24 nearest multiple of \$10,000; and

## 23

1 (D) in the case of penalties greater than  
2 \$200,000 the nearest multiple of \$25,000.

3 (4) For purposes of this subsection:

4 (A) The term "Consumer Price Index" means  
5 the Consumer Price Index for all-urban consumers  
6 published by the Department of Labor.

7 (B) The term "cost-of-living adjustment for the  
8 preceding 5 years" means the percentage by which—

9 (i) the Consumer Price Index for the  
10 month of June of the calendar year preceding  
11 the adjustment; exceeds

12 (ii) the Consumer Price Index for the  
13 month of June preceding the date on which the  
14 maximum authorized fine was last adjusted.

15 **SEC. 10. STATE ENFORCEMENT.**

16 Proceedings for the enforcement, or to restrain vio-  
17 lations of section 8 may also be brought in the name of  
18 a State in which the product or package that is the subject  
19 matter of the proceedings is located. If a State intends  
20 to bring such a proceeding, the State shall notify the Ad-  
21 ministrator at least 30 days before such proceeding is  
22 brought.

## 24

1 **SEC. 11. CITIZENS SUITS.**

2 (a) **IN GENERAL.**—(1) Except as provided in sub-  
3 section (b), any person may commence a civil action  
4 against—

5 (A) any person who is alleged to be in violation  
6 of this Act (including the Government of the United  
7 States, to the extent allowable by law); or

8 (B) the Administrator to compel the Adminis-  
9 trator to carry out ministerial duties assigned to the  
10 Administrator under this Act.

11 (2) Any civil action under this subsection shall be  
12 brought in the United States district court of the district  
13 in which the alleged violation occurred or in which the de-  
14 fendant resides or in which the defendant's principal place  
15 of business is located. The district courts of the United  
16 States shall have jurisdiction over suits brought under this  
17 section, without regard to the amount in controversy or  
18 the citizenship of the parties. The district court shall have  
19 jurisdiction to order all necessary injunctive relief and to  
20 impose any civil penalty.

21 (b) **LIMITATIONS.**—(1) No civil action may be com-  
22 menced to restrain any violation of section 8 of this Act—

23 (A) before the expiration of 60 days after the  
24 plaintiff has given notice of such violation to—

25 (i) the Administrator; and



## 25

1 (ii) to the person who is alleged to have  
2 committed such violation;

3 (B) if the Administrator has commenced a pro-  
4 ceeding for the issuance of an order to require com-  
5 pliance with the regulation or requirement and is  
6 diligently pursuing such proceeding or has issued an  
7 order to carry out the regulation or requirement de-  
8 scribed in section 8 and is diligently pursuing the  
9 enforcement of such order.

10 (C) if the Attorney General has commenced a  
11 civil action in a court of the United States to require  
12 compliance with the regulation, requirement, or  
13 order described in subparagraph (B) and is dili-  
14 gently prosecuting such civil action.

15 (2) No civil action may be recommended against the  
16 Administrator under subsection (a)(1)(B) before the expi-  
17 ration of a 60-day period after the plaintiff has given no-  
18 tice to the Administrator of the alleged failure of the Ad-  
19 ministrator to perform an act or duty which is the basis  
20 for such action.

21 (c) INTERVENTION.—(1) If a proceeding or civil ac-  
22 tion described in subsection (b) is commenced by the Ad-  
23 ministrator or the Attorney General after the giving of no-  
24 tice by a person (other than the Administrator or Attorney

1 General) described in subsection (a), such person may in-  
2 tervene as a matter of right in such proceeding or action.

3 (2) In any action under this section, the Adminis-  
4 trator or the Attorney General, if not a party, may inter-  
5 vene as a matter of right.

6 (d) NOTICE.—Notice under this section shall be given  
7 in such a manner as the Administrator shall prescribe by  
8 regulation.

9 (e) ATTORNEYS FEES AND COURT COSTS.—(1) The  
10 court, in issuing any final order in any action brought pur-  
11 suant to subsection (a), may award costs of suit and rea-  
12 sonable fees for attorneys and expert witnesses if the court  
13 determines that such award is appropriate.

14 (f) CONSOLIDATION.—When two or more civil actions  
15 brought under subsection (a) involving the same defendant  
16 and the same issues or violations are pending in two or  
17 more judicial districts, such pending actions may be con-  
18 solidated and tried in accordance with section 1407 of title  
19 28, United States Code, and the rules promulgated pursu-  
20 ant to such section 1407.

21 **SEC. 12. PUBLIC INFORMATION CAMPAIGN.**

22 The Administrator shall conduct a public information  
23 and education campaign, including public service advertis-  
24 ing, in order to enable consumers to—

## 27

- 1           (1) recognize environmental marketing claims  
2       regulated under this Act and be able to distinguish  
3       them from other environmental marketing claims,  
4           (2) have information about the criteria used by  
5       the Administrator in establishing standards and  
6       definitions for environmental marketing claims, and  
7           (3) have a better understanding about the ef-  
8       fects that products and packages can have on the  
9       environment.

10 **SEC. 13. STATUTORY CONSTRUCTION.**

11       (a) **RIGHT TO SEEK ENFORCEMENT.**—Nothing in  
12 section 10 shall restrict any right which any person (or  
13 class of persons) may have under any other statute or  
14 under common law to seek enforcement of any regulation  
15 promulgated under section 6 of this Act.

16       (b) **ACTIONS AGAINST ADVERTISERS.**—Nothing in  
17 this Act shall be construed so as to alter the right under  
18 any other provision of law or under common law of a per-  
19 son or government to commence an action against an ad-  
20 vertiser related to the use of false or misleading environ-  
21 mental marketing claims.

22       (c) **STANDARDS.**—Nothing in this act shall be con-  
23 strued so as to prohibit a State from enacting and enforce-  
24 ing a standard or requirement with respect to the use of  
25 an environmental marketing claim that is more stringent

1 than a standard or requirement relating to an environ-  
2 mental marketing claim established or promulgated under  
3 this Act.

4 **SEC. 14. CONFORMING AMENDMENT.**

5 Section 11 of the Fair Packaging and Labeling Act  
6 (15 U.S.C. 1460) is amended—

7 (1) by striking “or” at the end of subsection  
8 (b);

9 (2) by striking the period at the end of sub-  
10 section (c) and inserting “, or”; and

11 (3) by adding at the end of the section the fol-  
12 lowing new subsection:

13 “(d) the Environmental Marketing Claims Act  
14 of 1990”.

15 **SEC. 15. AUTHORIZATION OF APPROPRIATIONS.**

16 For the purposes of carrying out the provisions of  
17 this Act, there are authorized to be appropriated  
18 \$10,000,000 for fiscal years 1992, 1993, and 1994.