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Flushing Away Ambiguity: Establishing a Standard for the Flushability of Pre-Moistened Nonwoven Wipes

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Flushing Away Ambiguity: Establishing a Standard for the Flushability of Pre-Moistened Nonwoven Wipes

*Patrick Van Burkleo**

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INTRODUCTION

As the Emmy-nominated SNL actor, podcaster, and comedian Bowen Yang once said “the sewers are so important . . . if the sewers go, everything goes.”¹ America’s infrastructure is long out of date which

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threatens the cornerstone of a functioning modern society.² As the end of the lifetime for many wastewater treatment facilities approaches, the use of flushable wipes creates additional stress on these systems.³ Flushable wipes are a warranted concern because of their propensity to clog municipal and private sewer and septic systems.⁴ Some of the wipes currently marketed as “flushable” do not dissipate at the same rate that toilet paper breaks down, and these wipes catch on obstructions in plumbing causing significant blockages.⁵ Flushable wipes that do not dissipate, mix with other substances in the wastewater system and congeal into fatbergs.⁶ These solid masses of feces, fats, and unflushable materials take on a concrete-like texture in the sewers, adhere to the walls of the pipes, and require extensive time and labor to remove.⁷

The main focus of this Comment is to provide municipalities and private citizens with avenues to recover from injuries caused by the clogging of their septic systems and providing manufacturers with a benchmark to allow them to make informed decisions in future litigation and corporate affairs by establishing a definition of the word “flushable.” This Comment illustrates that there is disagreement over the definition of

A huge thank you to the Volume XII board for helping build a beautiful JELR community and to the Junior Associates for carrying on the JELR legacy.

1. Las Culturistas, *Public Apology*, iHEART RADIO, at 1:24:00 (Aug. 24, 2022, 8:56 AM), <https://omny.fm/shows/las-culturistas-with-matt-rogers-and-bowen-yang/public-apology-w-matt-bowen> [<https://perma.cc/A56P-JWMT>].

2. *What Municipalities Do to Address Aging Water Infrastructure*, GENESIS WATER TECHS., <https://genesiswatertech.com/blog-post/what-municipalities-do-to-address-aging-water-infrastructure/> (last visited Apr. 6, 2024); David Sedlak, *How Development of America’s Water Infrastructure has Lurched Through History*, PEW CHARITABLE TRS., <https://www.pewtrusts.org/en/trend/archive/spring-2019/how-development-of-americas-water-infrastructure-has-lurched-through-history> [<https://perma.cc/MF9T-ELA2>] (last visited Apr. 6, 2024).

3. AM. SOC’Y OF CIV. ENG’RS, *Wastewater, in 2021 INFRASTRUCTURE REPORT CARD* 151, 153 (2021), <https://infrastructurereportcard.org/wp-content/uploads/2020/12/Wastewater-2021.pdf> [<https://perma.cc/GVP3-E2P9>].

4. Timothy Dale, *Are Flushable Wipes Really Flushable?*, SPRUCE, <https://www.thespruce.com/are-flushable-wipes-really-flushable-5191412> [<https://perma.cc/7HRE-6NYZ>] (last updated Jan. 10, 2024).

5. *Id.*

6. *Fatberg*, OXFORD ENG. DICTIONARY, <https://www.oed.com/view/Entry/59326664> [<https://perma.cc/C384-DE5R>] (last visited Mar. 17, 2024).

7. Jason Slotkin, *Behold the Fatberg: London’s 130-Ton, ‘Rock-Solid’ Sewer Blockage*, NPR (Sept. 12, 2017, 4:17 PM), <https://www.npr.org/sections/thetwo-way/2017/09/12/550465000/ behold-the-fatberg-london-s-130-ton-rock-solid-sewer-blockage> [<https://perma.cc/QD3H-T9N2>].

the term “flushable,” but the available avenues for recovery hinge on proving deception in marketing and—without a definition of the term “flushable”—related claims will either fail or cause splits amongst the circuits. The solution to this issue is creating a definition for the term “flushable” and applying it uniformly. The Federal Trade Commission’s (FTC) current definition of “flushable” is a clear standard that, when applied consistently, creates predictability, uniformity, and a marked threshold to which current and future products can be held.

Part I of this Comment explores the current state of wastewater infrastructure in the United States and Louisiana. It also explores the emergence of flushable wipes in the market and the scope of their impact on sewer and septic systems. It discusses the industries at play, including national and international nonwoven fabric associations, municipalities, and manufacturers and their input into establishing a definition for “flushable.” Part II of this Comment explores the currently available avenues to recovery for municipalities and private citizens, all of which hinge on proving deception and misrepresentation of the flushability of the product. It also explores the current attempts to remediate the problems by courts, Congress, federal agencies, and state legislatures. Further, Part II of this Comment evaluates the remedies proposed and demonstrates how including the FTC’s definition of “flushable” in the Green Guides will establish uniformity and predictability in the markets and courts.

I. BACKGROUND

A. *Current Events*

In 2017, London made a horrific discovery.⁸ Under the Whitechapel district in East London, an 800-foot, 130-ton mass stretched just below the surface.⁹ This mass of fats, oils, and grease (FOG), feces, flushable wipes and other non-flushable items aggregated to create this beast called a fatberg.¹⁰ This congealed mass took on a concrete-like consistency and adhered to the walls of London’s aged sewer system.¹¹ It took an eight-person team working with high-powered hoses almost a week to rid the sewer of the fatberg.¹² Thames Water, London’s water company, spends

8. Sharon Robinson-Calver, *Putting Fatberg on Display*, MUSEUM OF LONDON (Dec. 12, 2017), <https://www.museumoflondon.org.uk/discover/putting-fatberg-display> [<https://perma.cc/3M2L-W4HD>].

9. *Id.*

10. *Id.*

11. *Id.*

12. Slotkin, *supra* note 7.

roughly 1.3 million U.S. dollars a month removing blockages from the sewers.¹³ This is not the United Kingdom's first encounter with this grotesque problem; London's aging Victorian sewerage system has had routine fatbergs dating back to 2013.¹⁴

Coined in 2008 by U.K. artist Alistair Grant, "fatberg" has grown to describe a large mass of solid compacted waste found blocking a sewage system.¹⁵ These bergs consist of flushed non-biodegradable solids such as wet wipes and fat, oil, and grease deposits.¹⁶ The term "fatberg" has grown in usage since 2008. Fatbergs are a silent plague that has infected sewer systems around the world, and the United States is no stranger to the outbreak. In fact, Baltimore, Maryland and Macomb County, Michigan had notable fatbergs in 2017 and 2018 respectively.¹⁷

In recent years, the United States's municipal sewer system has become increasingly clogged.¹⁸ With the COVID pandemic requiring most people to stay at home for long periods of time, and as people more frequently sanitized and disinfected their homes, there was an increase in the use of flushable and non-flushable wipes.¹⁹ In fact, a manager of a wastewater reclamation facility in Des Moines stated that blockages and backups are up 50 percent.²⁰ Between April and June of 2020, the height of the stay-at-home phase of the early pandemic, Charleston, South Carolina saw clogs in their pump stations go from about two per month to 16 per month.²¹ The National Association of Clean Water Agencies (NACWA) estimates that United States municipalities spend at least 1

13. *Id.*

14. Robinson-Calver, *supra* note 8.

15. *Fatberg*, *supra* note 6.

16. Robinson-Calver, *supra* note 8.

17. Justin Moyer, *This 20-Foot Congealed 'Fatberg' That Clogged a Maryland Sewer Has Been Removed*, WASH. POST (Oct. 19, 2017, 12:17 PM), https://www.washingtonpost.com/local/this-20-foot-congealed-fatberg-that-clogged-a-maryland-sewer-has-been-removed/2017/10/19/a7a45744-b4d9-11e7-add3-da4b781e34b1_story.html [<https://perma.cc/72UA-26JP>]; Benjamin Raven, *Officials Remove Massive 6-Foot Tall 'Fatberg' from Metro Detroit Sewer*, MLIVE (Sept. 12, 2018, 1:50 PM), https://www.mlive.com/news/2018/09/fatberg_metro_detroit.html [<https://perma.cc/72UA-26JP>].

18. Gerald Porter Jr., *America's Obsession With Wipes Is Tearing Up Sewer Systems*, BLOOMBERG (Mar. 26, 2021, 6:00 AM), <https://www.bloomberg.com/news/articles/2021-03-26/pandemic-wipes-create-sewer-clogging-fatbergs> [<https://perma.cc/N3X8-X7BU>].

19. *Id.*

20. *Id.*

21. *Id.*

billion dollars annually on removing clogs in municipal water systems.²² Major municipalities across the country are beginning educational campaigns to make the public aware of these issues in efforts to prevent buildup of fatbergs in the wastewater system.²³

Louisiana has also encountered many issues. The City of Baton Rouge has raised the concern of flushable wipes and their impact on the wastewater treatment system. Baton Rouge mayor, Sharon Weston Broome, has posted multiple photos on Instagram showing the contents of the sewers.²⁴ These photos depict masses of human waste, wipes, and FOGs that clogged local municipal pipes:



25

22. *Id.*

23. *Id.*

24. Sharon Weston Broome (@mayorbroome), INSTAGRAM, <https://www.instagram.com/mayorbroome> [<https://perma.cc/2V8W-7LXQ>] (last visited Mar. 17, 2024).

25. *Id.*

Her caption on her August 11, 2022, post states:

Dumping fats, oils and grease, or FOG, down your drain can be detrimental to our parish's sewer system. . . . These blockages can cause sheer system issues that are unsightly, unsanitary, and cost time and money to clean. They also cause backups on the private side that can damage personal property.²⁶

On her July 16, 2022 post she stated, "Fats, oils, grease and 'flushable' wipes are clogging our sewer system. This costs taxpayers millions every year. Remember, can the grease, and throw away those wipes!"²⁷

To combat this problem, the City of Baton Rouge started the "What's Good" campaign.²⁸ With multiple billboards around the city that state, "wipes clog pipes" and "flushable wipes are not flushable," the city directs the public to the "What's Good" website.²⁹ Hosted by the City's Department of Environmental Services, this website works to educate the public about the issues the city faces and the magnitude of the problem.³⁰ The City of Baton Rouge has spent almost 1.6 billion dollars over the last 10 years on the wastewater system.³¹ The city attributes these costs to improving the environmental and public health and allowing continued economic growth in East Baton Rouge Parish.³²

Shreveport has also raised concerns about flushable wipes for years. In 2016, Shreveport began its "Can't Flush This" campaign.³³ This campaign worked to remind the public that they should not flush certain items such as paper towels, pharmaceuticals, diapers, feminine hygiene products, and kitty litter.³⁴ In 2020, Shreveport's water and sewage director advised the public, during the height of the toilet paper scarcity in

26. Sharon Weston Broome (@mayorbroome), INSTAGRAM (August 11, 2022), <https://www.instagram.com/p/ChIqRw0Ju9J/> [<https://perma.cc/RT4U-3MCJ>].

27. Sharon Weston Broome (@mayorbroome), INSTAGRAM (July 16, 2022), <https://www.instagram.com/p/CgFD7LfsOOg/> [<https://perma.cc/8SAX-JK7Q>].

28. *What's the Problem*, WHAT'S GOOD FOR THE E. BATON ROUGE PAR. SEWER SYS., <https://whatsgood.brla.gov/> [<https://perma.cc/5HBV-VRDA>] (last visited Mar. 16, 2024).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. Angela Thomas, *Shreveport Introduces 'Can't Flush This' Awareness Campaign*, KEEL (Dec. 1, 2016), <https://710keel.com/shreveport-introduces-cant-flush-this-awareness-campaign/> [<https://perma.cc/DWT4-LQKU>].

34. *Id.*

the early days of the COVID pandemic, not to flush anything other than toilet paper.³⁵ The director stated that flushing wipes, napkins and paper towels “can cause not only our customers [sic] very own line to clog up . . . but then when it gets into the mainline, they gather up, they get stuck on stuff and they build-up.”³⁶

During the COVID pandemic, New Orleans had to remind its residents about what should be flushed and what should not.³⁷ Because of the toilet paper shortages, New Orleanians resorted to using toilet paper alternatives and flushing items that were not considered flushable, such as paper towels and non-flushable wipes.³⁸ The Sewerage and Water Board of New Orleans said it dealt with more sewer backups than normal.³⁹ Jefferson Parish officials echoed the warnings from the New Orleans sewerage group, reminding that those in apartment buildings and other concentrated areas need to be especially careful.⁴⁰ New Orleans’s mayor, LaToya Cantrell, reminded residents that the city’s old pipes cannot handle non-flushable wipes and other products.⁴¹

Municipalities around the country and in Louisiana have recognized the severity of the fatbergs on wastewater systems. The enormous economic cost and the pressures on an already failing system are of grave concern to these municipalities and the existence of non-flushable wipes in the marketplace only adds to the fatberg problem.

B. Current Problem

i. Importance of Sewer Systems

Sewerage systems play a silent but vital role in society. The purpose of modern sewerage systems, other than controlling gasses, odors, and

35. *Don’t Flush Your Wipes Down the Toilet*, KSLA (Apr. 9, 2020, 5:52 AM), <https://www.ksla.com/2020/04/09/dont-flush-your-wipes-down-toilet/> [https://perma.cc/9ZCL-6G6A].

36. *Id.*

37. Jessica Williams, *New Orleans Sewers Backing Up As Residents Resort To Toilet Paper Alternatives, S&WB Says*, NOLA.COM (Mar. 20, 2020, 2:38 PM), https://www.nola.com/news/coronavirus/new-orleans-sewers-backing-up-as-residents-resort-to-toilet-paper-alternatives-s-wb-says/article_29fca3dc-6acb-11ea-b33f-c7e67e00e4d8.htm [https://perma.cc/9U29-5ZKM].

38. *Id.*

39. *Id.*

40. *Id.*

41. LaToya Cantrell (@MayorCantrell), TWITTER (Mar. 20, 2020, 9:53 AM), <https://twitter.com/mayorcantrell/status/1241015114205220866> [https://perma.cc/XE95-M3GZ].

general removal of unsightly matter, is the control of sanitation and disease reduction.⁴² Human waste carries diseases including typhoid, cholera, polio, and giardiasis.⁴³ Proper sewer systems prevent the spread of disease by removing harmful substances from wastewater.⁴⁴

When discussing the importance of wastewater systems, it is valuable to recognize what occurs in their failure. In the wake of Hurricane Katrina, the Category Four hurricane that battered the Gulf Coast in 2005, New Orleans faced myriad environmental and health concerns.⁴⁵ As floodwaters receded, health officials tested the sludge left on buildings, land, and pavement and found elevated levels of *E. coli* which is evidence of fecal bacteria.⁴⁶ Fecal bacteria was found in the sludge because the sewerage system backed up and flooded as the stormwater encroached into New Orleans.⁴⁷ While not a direct concern to human health, health officials recommended that the public limit exposure and to wash exposed skin with soap and water.⁴⁸ Additionally, because the wastewater treatment facilities were offline for an extended time, there were concerns that the system was not working as a whole.⁴⁹ The director of the National Center for Environmental Health and Agency for Toxic Substances and Disease Registry stated that raw sewage was dumped into the Mississippi River, which was an additional cause for concern.⁵⁰ For the refugees in the shelters around New Orleans in the immediate aftermath of the hurricane without flushable toilets, communicable diseases were an immediate concern for the health of the refugees.⁵¹ Compounded with a lack of drinking water, minimal sanitation, and the close quarters of the shelters, the failure of the wastewater treatment system created profound impacts.⁵² Hurricane Katrina was a perfect storm of disaster; however, it is clear that

42. Taylor & Yahner, *supra* note 2.

43. *Id.*

44. Birguy Lamizana, *Better Sewage Treatment Critical for Human Health and Ecosystems*, U.N. ENV'T PROGRAMME (Apr. 5, 2019), <https://www.unep.org/news-and-stories/story/better-sewage-treatment-critical-human-health-and-ecosystems> [<https://perma.cc/7PM3-J2BP>].

45. See John Manuel, *In Katrina's Wake*, 114 ENV'T HEALTH PERSPS. A32 (2006).

46. *Id.* at A36.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Katrina's Aftermath: Public Health Concerns (web article)*, BLOOMBERG SCH. OF PUB. HEALTH, JOHNS HOPKINS (Sept. 6, 2005), https://publichealth.jhu.edu/2005/katrina/katrina_health [<https://perma.cc/ELC7-2SF9>].

52. *Id.*

wastewater treatment systems are an integral part of modern society, and failure of that system can create dramatic effects and impact entire populations.

ii. Health of the Sewerage Systems

In its annual report, the American Society of Civil Engineers graded the United States wastewater treatment system a D+.⁵³ This report evaluated the capacity, condition, operation, maintenance, and funding of wastewater treatment facilities in the United States.⁵⁴ The United States has more than 16,000 wastewater treatment plants (WWTP) and they function at an average of 81 percent of capacity.⁵⁵ The report noted that 86 percent of expected population growth will occur in urban and suburban areas, thus increasing the burden on sewage systems.⁵⁶ As urban populations continue to grow, WWTPs are forced to assume a larger share of the nation's wastewater treatment demand.⁵⁷ Much of the current infrastructure is reaching the end of its lifetime.⁵⁸ The average lifespan of WWTP is 40 to 50 years, and many facilities were constructed in the 1970s after the passage of the Clean Water Act.⁵⁹ Across the country, the average age for drinking water and wastewater pipes is 45 years old, and some systems are close to a century old.⁶⁰ The expected lifespan for wastewater pipes is 50 to 100 years.⁶¹ As the current infrastructure continues to age, it is important to limit the burdens on the system until major repairs can be made.

There has been an interest in recent years to improve the function of these systems.⁶² Estimates show that, in 2019, utilities spent over 3 billion dollars to replace almost 4,700 miles of pipeline nationwide.⁶³ There is a network of over 800,000 miles of public sewers and 500,000 miles of

53. AM. SOC'Y OF CIV. ENG'RS, *supra* note 3, at 159.

54. *Id.* at 153–57.

55. *Id.* at 152.

56. *Id.* at 153; *see also* Kim Parker, et. al, *What Unites and Divides Urban, Suburban and Rural Communities*, PEW RSCH. CTR. (May 22, 2018), <https://www.pewresearch.org/social-trends/2018/05/22/what-unites-and-divides-urban-suburban-and-rural-communities> [<https://perma.cc/B3FS-AT83>].

57. AM. SOC'Y OF CIV. ENG'RS, *supra* note 3, at 153.

58. *Id.* at 152–53.

59. *Id.* at 153.

60. *Id.*

61. *Id.*

62. *Id.* at 153–54.

63. *Id.* at 154.

private sewers that connect private businesses and homes to the public sewer lines.⁶⁴ President Biden's Infrastructure bill, the American Jobs Plan, included a 111 billion dollar investment in water infrastructure.⁶⁵ The bill allocated 56 billion dollars via grants and low-cost flexible loans to the modernization of drinking water, stormwater, and wastewater.⁶⁶ However, in 2019, the total spent on water infrastructure was about 48 billion dollars, and the estimated investment needed was 129 billion dollars, which resulted in an 81 billion dollar gap in spending.⁶⁷ Should wastewater infrastructure continue to be underfunded, estimates show that by 2029, chronic service disruptions will cost American households about 378 million dollars in healthcare costs.⁶⁸

iii. Types of Sewerage Systems

Modern sewerage systems typically consist of two types: septic systems and municipal waste systems.⁶⁹ Septic systems treat wastewater on site and use natural biological methods to process the waste.⁷⁰ Septic systems are typically underground tanks that house and process the waste material.⁷¹ With a private septic system, a series of pipes draw the waste away from the house and into a septic tank.⁷² This tank is designed to separate the waste.⁷³ It allows larger waste, called sludge, to settle at the bottom and a layer of fats and other materials, called scum, to float on the top.⁷⁴ Between the scum and the sludge is the wastewater that flows into a leach field via a series of perforated pipes called soakers.⁷⁵ Septic systems use the naturally occurring microbiomes in soil of the leach field to process

64. *Id.* at 153.

65. *President Biden Introduces Plan for \$111 Billion in Water Infrastructure Investment*, US WATER ALL. (Mar. 31, 2021), <http://uswateralliance.org/news/president-biden-introduces-plan-111-billion-water-infrastructure-investment> [<https://perma.cc/7YFJ-X8SF>].

66. *Id.*

67. AM. SOC'Y OF CIV. ENG'RS, *supra* note 3, at 152.

68. *Id.* at 157.

69. *What's the Difference Between Septic and Sewer*, HOMESERVE (Jan. 17, 2021), <https://www.homeserve.com/en-us/blog/home-improvement/sewer-septic-system/> [<https://perma.cc/AWQ5-MY3A>].

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

the wastewater.⁷⁶ The microbes and oxygen found in the soil remove pathogens from the wastewater before it seeps into the groundwater.⁷⁷ Septic tanks require regular maintenance; the solid materials must be pumped out every three to five years depending on the size of the tank, system design, usage amount, and other factors.⁷⁸ Anaerobic bacteria will break down the sludge in the tank through anaerobic processes between maintenance.⁷⁹

The standard municipal sewer system carries wastewater away from the residence via a series of pipes to a centralized location for processing.⁸⁰ Sewer treatment facilities may contain a variety of mechanisms to process the waste material.⁸¹ These mechanisms may include a mechanical filter that removes large insoluble matter, a sand filter to separate particulate matter from the fluids, waste stabilization ponds, and chemical intervention; all of which work to remove pathogens and particulate matter from the fluid.⁸²

As the population of the United States continues to increase, there is an increasing burden on its infrastructure. The nation's largest 180 wastewater treatment facilities process over 10 million gallons of wastewater per day and are prone to sanitary sewer overflows.⁸³ Approximately 54.75 billion gallons of wastewater per year are treated by onsite septic wastewater treatment systems in the state of Louisiana.⁸⁴ The Environmental Protection Agency (EPA) estimates that 20 percent of the U.S. is on a septic tank.⁸⁵ The wastewater treatment infrastructure in the U.S. is a vast multifaceted network that is increasingly burdened by the increased population and failed upkeep.

The scale of the United States's wastewater treatment systems is profound. It is hard to fathom a facet of modern American society that is not touched by the wastewater system, and a systemic failure of this

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. Tom Frankel, *How Do Wastewater Treatment Plants Work?*, STAMFORD SCI. INT'L (Jan. 20, 2021), <https://www.ssiaration.com/how-do-wastewater-treatment-plants-work/#gref> [<https://perma.cc/W8Q6-PYT8>].

83. AM. SOC'Y OF CIV. ENG'RS, *supra* note 3, at 153.

84. *The Onsite Wastewater Program*, LA. DEP'T OF HEALTH, <https://ldh.la.gov/page/627> [<https://perma.cc/6AXJ-4FXB>] (last visited Mar. 16, 2024).

85. *About Septic Systems*, EPA, <https://www.epa.gov/septic/about-septic-systems> [<https://perma.cc/EF6X-37NH>] (last updated Aug. 7, 2023).

system will have catastrophic effects. Fatbergs act as an increased burden on an already taxed system.

iv. Wipes and their Rise to Prominence

Wet wipes were invented in 1957 by Arthur Julius and rose to popularity through a collaboration with Kentucky Fried Chicken.⁸⁶ Nice-Pak, the company Arthur Julius founded, went on to invent alcohol prep pads for healthcare use in 1963 and released the first thick baby wipes in 1983.⁸⁷

The wet wipes market accrued 27.7 billion dollars in 2023 and is expected to reach 36.56 billion dollars by the end of the decade.⁸⁸ North America is the largest market of wet wipes with 36 percent of the revenue share in 2022.⁸⁹ The Asian Pacific markets are the fastest growing, due to rapid urbanization of countries such as China, India, and South Korea.⁹⁰ Major players in the wet wipes industry include Clorox, KCWW, Unilever, Johnson & Johnson, Procter and Gamble, and WipesPlus.⁹¹ Flushable wipes, as a subsection of wet wipes, have grown in the United States to about 367 million dollars, as of 2013.⁹² Other types of products include makeup wipes, cleaning wipes, baby diaper wipes, and single-use, single-packaged hand wipes which are generally not intended to be flushed.⁹³

One of the defining characteristics of wet wipes is that they are nonwoven fabrics. Fabrics can be divided into two categories: woven and nonwoven.⁹⁴ Most traditional fabrics, such as cotton, twill, or silks, are

86. *Our Story*, NICE-PAK, <https://www.nicepak.com/our-story> [<https://perma.cc/5T2L-PRP6>] (last visited Mar. 16, 2024).

87. *Id.*

88. *Wet Wipe Market Size, Share & Trends Analysis Report by Product (Facial & Cosmetics, Baby, Hand & Body, Intimate), by Material (Non-woven, Woven), by Region, and Segment Forecasts, 2022 – 2030*, GRAND VIEW RSCH., <https://www.grandviewresearch.com/industry-analysis/wet-wipes-market-report> [<https://perma.cc/499F-CF4T>] (last visited Mar. 16, 2024).

89. *Id.*

90. *Id.*

91. *Id.*

92. Matt Flegenheimer, *Wet Wipes Box Says Flush. New York's Sewer System Says Don't.*, N.Y. TIMES (Mar. 13, 2015), <https://www.nytimes.com/2015/03/15/nyregion/the-wet-wipes-box-says-flush-but-the-new-york-city-sewer-system-says-dont.html> [<https://perma.cc/SW4T-LLLR>].

93. *Wet Wipe Market Size*, *supra* note 88.

94. *Know Your Fibers: Wovens vs. Nonwovens and Knit Fabrics*, BARNHARDT PURIFIED COTTON (Jan. 25, 2017), <https://barnhardt cotton.net/>

woven or knitted from yarn created from fibers.⁹⁵ Clothing, towels, and bedding are all examples of woven fabrics.⁹⁶ Generally, the production of woven fabrics includes harvesting fibers like wool, spinning them into yarn, and then weaving them on a loom to produce a sheet of fabric.⁹⁷

Nonwoven fabrics are sheets or web structures of fiber or filaments that are bonded together mechanically, thermally, or chemically.⁹⁸ These sheets are flat and porous and are made directly from separate fibers instead of converting the fibers to yarn first.⁹⁹ Nonwovens have a variety of properties including absorbency, cushioning, liquid repellency, softness, strength, and stretch.¹⁰⁰ Nonwoven fabrics are produced to manufacture coffee filters, dryer sheets, scouring pads, clothing, surgical gowns and sterile bandages.¹⁰¹ Single-use wipes are one of the major categories of nonwoven fabrics and include medical wipes, industrial wipes, household wipes, and bathroom wipes.¹⁰²

The International Water Services Flushability Group (IWSFG) is a group of water professionals seeking to provide clear guidance on what should and should not be flushed by establishing guidelines on flushable wipes.¹⁰³ The IWSFG works to protect customers, wastewater systems, their workers, and the environment.¹⁰⁴ IWSFG has three levels of membership: voting members, which are national water services associations; non-voting water services associates, which are state or regional water service associations; and non-voting other associates, which are other associations that do not represent water services.¹⁰⁵ Some members include the Water Services Association of Australia, Canadian Water and Wastewater Association, Japan Sewage Works Association,

blog/know-fibers-wovens-vs-nonwovens-knit-fabrics/ [https://perma.cc/8MBV-V3KM].

95. *Id.*

96. *Id.*

97. *Id.*

98. *About Nonwovens*, ASS'N OF THE NONWOVEN FABRICS INDUS., <https://www.inda.org/about-nonwovens/> [https://perma.cc/5B6K-E9FH] (last visited Mar. 16, 2024).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *About*, INT'L WATER SERVS. FLUSHABILITY GRP., <https://www.iwsfg.org/about/> [https://perma.cc/75MD-XPUH] (last visited Mar. 16, 2024).

104. *Id.*

105. *IWSFG Membership*, INT'L WATER SERVS. FLUSHABILITY GRP., <https://www.iwsfg.org/membership/> [https://perma.cc/Y87G-WSD5] (last visited Mar. 16, 2024).

California Association of Sanitation Agencies, the City of Sanford, Florida, and Verdant Water.¹⁰⁶

IWSFG provides publicly available specification (PAS) documents that describe the criteria a product should meet in order to be flushable.¹⁰⁷ The criteria that the PAS documents established are fivefold: environmental protection, toilet and drain line clearance, disintegration, settling, and bio-disintegration.¹⁰⁸ The IWSFG recommends that all five criteria must be met for the product to be marketed as flushable.¹⁰⁹ IWSFG's analysis works for both septic tank systems and a municipal wastewater treatment facility.¹¹⁰

IWSFG's first criterion, environmental protection, is based on the T 401 test method established by the Technical Association of the Pulp and Paper Industry (TAPPI) and the American National Standards Institute (ANSI).¹¹¹ The T 401 om-20 test method provides a procedure for the identification of the fibers present in a sample of paper or paperboard.¹¹² Using microscopy, an analyst determines if fibers are present in the sample based on the morphological characteristics of the fibers.¹¹³ Using this method, IWSFG states that should a fiber be identified as synthetic and plastic, then the percentage by weight of the plastic synthetic fiber must be under one percent.¹¹⁴

106. *Id.*

107. *Publicly Available Specification (PAS) 1:2020 Criteria for Recognition as a Flushable Product*, INT'L WATER SERVS. FLUSHABILITY GRP. (2020), <https://www.iwsfg.org/wp-content/uploads/2021/06/IWSFG-PAS-1-Criteria-for-Recognition-as-a-Flushable-Product-2.pdf> [<https://perma.cc/ZVL6-PG3U>].

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* TAPPI establishes peer-reviewed standards for the paper and pulp industry to maximize performance. *About Us*, TAPPI, <https://www.tappi.org/menus/functional-navigation/About-Us/> [<https://perma.cc/JR7H-YKKD>] (last visited Apr. 2, 2024). The American National Standards Institute (ANSI) is a non-profit organization that coordinates the voluntary standards and conformity assessment systems of the United States. *About*, AM. NAT'L STANDARDS INST., <https://ansi.org/about/introduction> [<https://perma.cc/W6LA-S3WC>] (last visited Mar. 16, 2024).

112. *Fiber Analysis of Paper and Paperboard, Test Method TAPPI/ANSI T 401 om-20*, TAPPI, <https://imisrise.tappi.org/TAPPI/Products/01/T/0104T401.aspx> [<https://perma.cc/986Q-59FP>] (last visited Mar. 16, 2024).

113. *Id.*

114. *Publicly Available Specification (PAS) 1:2020 Criteria for Recognition as a Flushable Product*, *supra* note 107.

When analyzing the toilet and drain line clearance, the products must be tested with INDA/EDANA's toilet and drain line clearance test.¹¹⁵ This test, established by INDA/EDANA, works to simulate two days of normal toilet use by a family of four.¹¹⁶ Each test, which should be repeated three times, consists of 35 toilet flushes and using various combinations of flushes with water only, flushes with wipes and toilet tissue, and flushes with wipes, simulated fecal material and toilet tissues.¹¹⁷ The test runs until the material that was flushed in the 35th flush exits the drain line.¹¹⁸ In order for the wipe to pass the test, no more than one of the flushes containing nonwoven wipes should be associated with a clog that requires use of a plunger to clear product and excess water from the bowl and trap.¹¹⁹

Under the third criterion, disintegration, the IWSFG uses their Slosh Box test method.¹²⁰ This test, outlined in PAS 3:2020 Disintegration Test Methods–Slosh Box, uses a box with four liters of water that sloshes back and forth at 11 degrees from horizontal at 18 revolutions per minute.¹²¹ After a designated period of time the contents are transferred through a 25-

115. *Id.* The Association of the Nonwoven Fabrics Industry (INDA) is a group that works to achieve business growth for the nonwovens/engineered fabrics industries. Founded in 1968, INDA works with its member organizations to connect, innovate, and develop their businesses. Other organizations spun out from the INDA group including a European (EDANA) and several Asian Nonwoven Associations. Major players of INDA include Nice-Pak (Robert P. Julius, CEO, received the Lifetime achievement award in 2019), Kimberly-Clark (Robert Brock, Jay Sommers, Ann McCormack, and Bryan D. Haynes received the Lifetime technical achievement awards. *INDA Hall of Fame, ASS'N OF THE NONWOVEN FABRICS INDUS.*, <https://www.inda.org/about-inda/inda-hall-of-fame/> [<https://perma.cc/KGR3-YG4S>] (last visited Mar. 16, 2024).

116. INDA & EDANA, GUIDELINES FOR ASSESSING THE FLUSHABILITY OF DISPOSABLE NONWOVEN PRODUCTS (2018), https://www.edana.org/docs/default-source/product-stewardship/1-guidelines-for-assessing-the-flushability-of-disposable-nonwoven-products-ed-4-ex-cop.pdf?sfvrsn=a23eca32_2 [<https://perma.cc/S7LY-M2AB>].

117. *Id.*

118. *Id.*

119. *Id.*

120. *Publicly Available Specification (PAS) 1:2020 Criteria for Recognition as a Flushable Product*, *supra* note 107.

121. *Publicly Available Specification (PAS) 3:2020 Disintegration Test Methods*, INT'L WATER SERVS. FLUSHABILITY GRP. (2020), <https://www.iwsfg.org/wp-content/uploads/2021/06/IWSFG-PAS-3-Slosh-Box-Test-2.pdf> [<https://perma.cc/YA23-YQ6N>].

millimeter sieve.¹²² The sieve is examined for snagged residuals.¹²³ In order to pass the IWSFG standards, more than 80 percent of the total initial dry mass of the sample must pass through the sieve after thirty minutes of sloshing.¹²⁴

The fourth criterion evaluates the settlement of the wipes using INDA's 2018 FG 504.R1(18): Settling Test.¹²⁵ This test involves a 20-centimeter column full of tap water where individual wipes are flushed down a drain line before being added to a beaker with one liter of water.¹²⁶ The contents are poured into the column to be observed over 24 hours to determine the settling rate.¹²⁷ Passing the test requires meeting three criteria.¹²⁸ First, in at least 90 percent of the tests, the product must settle at an average velocity of one millimeter per second over the 1,150 millimeter distance.¹²⁹ Second, in the successful tests from step one, the product must not become sufficiently buoyant to rise more than 300 millimeters from the bottom within 24 hours.¹³⁰ And finally, at least 90 percent of all specimens should pass both tests.¹³¹

Finally, the IWSFG evaluates the bio-disintegration of the product using INDA's 2018 FG 506.R1(18): Anaerobic Bio-disintegration Tests.¹³² This test measures the mass of a wipe retained on a one-millimeter sieve after being incubated in anaerobic sludge for 28 days at 35 degrees Celsius.¹³³ After the incubation period, the contents are passed through a sieve, dried, and weighed.¹³⁴ In order to pass, the percentage of the initial dry mass of the test specimen must be greater than 95 percent.¹³⁵

122. *Id.*

123. *Id.*

124. *Id.*

125. *Publicly Available Specification (PAS) 1:2020 Criteria for Recognition as a Flushable Product*, *supra* note 107.

126. INDA & EDANA, *supra* note 116.

127. *Id.*

128. *Publicly Available Specification (PAS) 1:2020 Criteria for Recognition as a Flushable Product*, *supra* note 107.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. INDA & EDANA, *supra* note 116.

134. *Id.*

135. *Id.*

C. Current Remedies

Once a municipality or private citizen has incurred an injury, the avenues for recovery can be quite broad. Previous suits filed have included state actions for false advertising, unfair trade practices, negligent misrepresentation, products liability, and payment of an unjustified premium for a product misrepresented. The FTC, a federal agency, also creates pathways for recovery for injuries resulting from unfair trade practices.

i. In Louisiana

In Louisiana, there are multiple possible avenues that municipalities and private citizens can use to hold manufacturers liable for the damages caused by the non-flushable wipes. One possibility is to bring an action under the Louisiana Product Liability Act (LPLA).¹³⁶ This Act was enacted in 1988 to create an exclusive avenue for holding manufacturers accountable for the damages caused by their products.¹³⁷ To successfully bring a claim under the LPLA, a plaintiff must prove: (1) that the defendant is the manufacturer of a product; (2) the defect is the cause of the damage; (3) the product must be unreasonably dangerous; (4) the product was used within the reasonably anticipated use; and (5) there was an injury.¹³⁸ To satisfy the unreasonably dangerous element, a product must be either dangerous in construction or composition, dangerous in design, the product provided inadequate warning, or because of a nonconformity to express warranty.¹³⁹

Another avenue to bring an action in Louisiana would be through the various duty to inform laws in place.¹⁴⁰ Negligent misrepresentation is a tort that is used to protect parties from an adverse party who conceals information or fails to relay correct information when there is a duty to supply correct information. The elements of negligent misrepresentation include (1) a duty to inform; (2) breach of that duty; and (3) an injury caused by the breach because of a reasonable reliance on the misrepresentation.¹⁴¹

136. LA. REV. STAT. § 9:2800.52 (1988).

137. *Id.*

138. *Id.*

139. *Id.* at §§ 9:2800.55–58.

140. Leon Rittenberg, *Louisiana's Tenfold Approach to the Duty to Inform*, 66 TUL. L. REV. 151 (1991).

141. *Kadlec Med. Ctr. v. Lakeview Anesthesia Ass'n*, 527 F.3d 412, 418 (5th Cir. 2008).

The general law of sale also provides a route for recovery via Louisiana Civil Code article 2475.¹⁴² This article states that a seller is bound to warrant the buyer that the thing sold is fit for its intended use.¹⁴³ Redhibition is the warranty of defects in the thing sold and that the buyer would not have bought the thing had they known of the defect.¹⁴⁴ The elements of redhibition are (1) that the defect renders the thing useless or so inconvenient that the buyer would not have bought the thing at all or for a lesser price; (2) the defect was hidden; and (3) the defect existed at the time of delivery.¹⁴⁵

These laws are just a few of the laws currently available for plaintiffs to use; however, there is a major concern that renders these laws useless: the definition of “flushable” in the warranty or the definition of “flushable” in determining the defect. If the buyer and seller have differing definitions of the term “flushable,” then the breach of warranty is the focal point of the lawsuit. Without a standard for the flushability of these wipes, the warranty is ambiguous. And with multiple suits across the country, a circuit split could quickly arise resulting in frustration for both the consumer and the manufacturer.

ii. Via the FTC

In order to address the growing concerns of monopolies, Congress passed the FTC Act and the Clayton Antitrust Act in late 1914.¹⁴⁶ Congress was concerned with the slow-moving courts providing remedies for these monopolies and wanted to take a proactive approach.¹⁴⁷ The passing of the FTC Act was fueled by the U.S. Supreme Court’s decisions in *Standard*

142. LA. CIV. CODE art. 2475 (1995).

143. *Id.*

144. LA. CIV. CODE art. 2520 (1995).

145. *Id.*

146. As the United States began to move into the 20th Century, there was growing concern with monopolies of major corporations and unfair competition. This Progressive Era was a reaction against the Gilded Age, where there was rapid economic growth. The Progressive Era, which ranged from the 1890s to the late 1910s, was a period of social activism that focused on direct democratic principles which included promoting equal competition across industries. This period brought about the FDA, the Clayton Antitrust Act, Women’s Suffrage, and the 16th, 17th, 18th, and 19th amendments. *Progressives and the Era of Trustbusting*, CONST. RTS. FOUND., <https://www.crf-usa.org/bill-of-rights-in-action/bria-23-1-b-progressives-and-the-era-of-trustbusting.html> [<https://perma.cc/LDC6-PYQE>].

147. Democratic Party Platform of 1912, Am. Presidency Project (June 25, 1912), <https://web.archive.org/web/20140301022828/http://www.presidency.ucsb.edu/ws/?pid=29590> [<https://perma.cc/3796-UGTG>].

Oil Co. of New Jersey v. United States and *United States v. American Tobacco Co.* in 1911.¹⁴⁸ In these cases, the Court found that these organizations were guilty of monopolizing the market and divided these businesses into separate competitors.¹⁴⁹

In the FTC Act, Congress established an independent agency empowered to prevent persons, partnerships, or corporations from using unfair methods of competition or deceptive acts in or affecting commerce.¹⁵⁰ The FTC Act grants the FTC the ability to serve a complaint against a party it has reason to believe is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce.¹⁵¹ This complaint includes a notice of a hearing where parties show cause why an order should not be entered into.¹⁵² Upon a showing of good cause, the adverse party may intervene and appear in a proceeding where testimony is reduced to writing.¹⁵³ Should the Commission find that the actions by the party violate the FTC Act, the Commission will produce a report of its findings and will issue an order requiring that the party cease from using such method, act, or practice of competition.¹⁵⁴

The FTC can issue penalties for violation of an order.¹⁵⁵ Any party who violates an order after it has become final shall pay a penalty to the United States of no more than 46,517 dollars per violation.¹⁵⁶ The violations are counted daily, such that each subsequent day out of compliance is treated as a separate violation.¹⁵⁷ The courts take into account the degree of culpability, any history of prior conduct, the ability to pay, the effect on ability to continue to do business, and other matters as justice requires when determining the amount of the penalty.¹⁵⁸

148. *Standard Oil Co. of N.J. v. U.S.*, 221 U.S. 1 (1911); *U.S. v. Am. Tobacco Co.*, 221 U.S. 106 (1911).

149. *Id.*

150. 15 U.S.C. § 45(a)(2).

151. *Id.* at (b).

152. *Id.*

153. *Id.*

154. *Id.*

155. *Notices of Penalty Offenses*, FED. TRADE COMM'N, <https://www.ftc.gov/enforcement/penalty-offenses> [<https://perma.cc/DKD5-5B6P>] (last visited Oct. 12, 2022).

156. *Id.*

157. 15 U.S.C. § 45(m)(C).

158. *Id.*

The FTC recognizes that American consumers are increasingly interested in buying environmentally friendly products.¹⁵⁹ Companies respond to this interest by claiming products are “green,” but sometimes, there is a disparity between the manufacturers’ intent of “green” and consumers’ understanding of “green.”¹⁶⁰ In order to provide clarity on this matter, the Green Guides were first created in 1992 and have been revised three times since, in 1996, 1998, and 2012.¹⁶¹ The aim of the Green Guides is to provide corporations with general principles that apply to environmental marketing claims.¹⁶² Further, the Green Guides state how consumers are likely to interpret marketing claims and how companies can substantiate or qualify their claims to avoid deceiving the consumers.¹⁶³

The Green Guides assist companies by providing guidelines to help avoid deceptive trade practices.¹⁶⁴ When determining if an advertisement is deceptive, marketers are tasked with identifying all express and implied claims that their advertising conveys.¹⁶⁵ With environmental marketing, a reasonable basis of support of the claims generally requires reliable scientific evidence which consists of tests, research, and studies that are accepted by the scientific community.¹⁶⁶ One general principle that the Green Guides focus on is the overstatement of environmental attributes.¹⁶⁷ The marketing should not “overstate, directly or by implication, an environmental attribute or benefit.”¹⁶⁸ The Guides also state that unqualified general environmental benefit claims can be difficult to interpret and convey a wide range of meanings.¹⁶⁹ The general example of this misinterpretation is the use of “eco-friendly,” which conveys that the

159. *Environmentally Friendly Products: FTCs Green Guides*, FED. TRADE COMM’N, <https://www.ftc.gov/news-events/topics/truth-advertising/green-guides> [<https://perma.cc/V7FU-6JQV>] (last visited Mar. 6, 2024).

160. *Id.*

161. *Id.* On December 20, 2022, the Federal Trade Commission requested public comment on the Green Guides as part of the FTC’s decennial regulatory review schedule. *Guides for the Use of Environmental Marketing Claims*, 87 Fed. Reg. 77,766 (proposed Dec. 20, 2022).

162. *Environmentally Friendly Products: FTCs Green Guides*, *supra* note 159.

163. *Id.*

164. *FTC Guides for the Use of Environmental Marketing Claims*, 16 C.F.R. § 260 (2012).

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

product has environmental benefits but is generally meaningless.¹⁷⁰ The Guides stated that such a term could be substantiated if a qualifier such as “made with recycled materials” was prominently marketed or if the producer could substantiate that the entire product was made from recycled materials.¹⁷¹ The Green Guides continue by categorizing the common types of claims and the ways to substantiate them, including “compostable claims,” “ozone-safe and ozone-friendly claims,” and “recyclable claims.”¹⁷² The “recyclable claims” section states that it is “deceptive to misrepresent, directly or by implication, that a product or package is recyclable.”¹⁷³ It should not be labeled “recyclable” unless it can be “collected, separated, or otherwise recovered from the waste stream through an established recycling program for reuse or use in manufacturing or assembling another item.”¹⁷⁴

The Green Guides serve as a single reference point where manufacturers of “green” products can look to ensure that the products they make are not marketed in a deceptive way. The Green Guides can be expanded and furthered by the addition of more “green” marketing claims such as the flushability of wipes.

D. Current Movement in the System

i. On a Federal Level

Congress attempted to rectify the definition of flushable by proposing legislation. While none of these bills were signed into law, it is clear that the federal government is aware of the concerns with flushable wipes and is exploring opportunities to remedy them. The first bill introduced was the Wastewater Infrastructure Pollution Prevention and Environmental Safety Act (WIPPEs Act).¹⁷⁵ Representative Lowenthal and McClain introduced this bill to the Committee on Energy and Commerce on July 21, 2021.¹⁷⁶ This Act required the FTC, within two years of the bill’s enactment, to issue, along with the EPA, regulations on the labeling of moist individual wipes with “Do Not Flush” on the packaging.¹⁷⁷ This Act

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. Wastewater Infrastructure Pollution Prevention and Environmental Safety Act, H.R. 4602, 117th Cong. § 1 (2021).

176. *Id.*

177. *Id.*

would also create a public outreach campaign to educate consumers on the presence of the label, to effect consumer behavior, and to explain the adverse impacts these products will have on the wastewater treatment system should they be flushed.¹⁷⁸

The second bill introduced was the Protecting Infrastructure and Promoting Environmental Stewardship Act or PIPES Act.¹⁷⁹ This Act charged the EPA with publishing a rule in the Federal Register that establishes a standard for flushability.¹⁸⁰ The Act required the EPA to base its definition on the International Water Services Flushability Group's report titled "Publicly Available Specification (PAS) 1:2020 Criteria for Recognition as a Flushable Product" and with the consideration of the environmental impact, toilet and drain clearance ability, disintegration, settlement patterns in waste systems, and the biodegradation of the products.¹⁸¹ This Act would also create labeling guidelines for these products under the FTC.¹⁸²

Congress did not pass legislation directly governing the flushability of wipes, but in the summer of 2022, Congress passed the Financial Services and General Government Appropriations Bill.¹⁸³ The Appropriations Committee, in their recommendations, charged the FTC with investigating the marketing claims of flushable wipe manufacturers.¹⁸⁴ The Committee expressed its concern about the flushability of wipes and recognized the immense damage these wipes can cause, especially the expensive repairs to municipal sewer pipes and wastewater treatment equipment.¹⁸⁵ This is a direct charge of Congress to an agency to investigate this issue, and if necessary, propose regulations.

In May 2015, the FTC and Nice-Pak, a manufacturer of generic flushable wipes to be white-labeled by private labels, reached a settlement to substantiate their advertisements that their products were flushable.¹⁸⁶

178. *Id.*

179. Protecting Infrastructure and Promoting Environmental Stewardship Act, H.R. 6591, 117th Cong. § 1 (2021).

180. *Id.*

181. *Id.*

182. *Id.*

183. Financial Services and General Government Appropriations Bill, H.R. 4345, 117th Cong. (2022).

184. *Id.*

185. *Id.*

186. *Wet Wipe Manufacturer Agrees to Substantiate "Flushability" Advertising Claims Under Settlement with FTC*, FED. TRADE COMM'N (May 18, 2015), <https://www.ftc.gov/news-events/news/press-releases/2015/05/wet-wipe-manufacturer-agrees-substantiate-flushability-advertising-claims-under-settle>

The FTC alleged that the wipe manufacturer represented that their products were “safe for sewer systems,” “safe for septic systems,” “break apart shortly after flushing,” and were “safe to flush.”¹⁸⁷ The FTC claimed that Nice-Pak’s tests did not reflect real-world household plumbing or septic conditions.¹⁸⁸ In this settlement, the FTC ordered Nice-Pak to not make any representation over the flushability of the wipes or their safety in sewer and septic systems.¹⁸⁹ The FTC ordered that any tests, analysis, research, studies or other evidence to substantiate the claims of flushable must “demonstrate that the Covered Product disperses in a sufficiently short amount of time after flushing to avoid clogging, or other operational problems in, household and municipal sewage lines, septic systems, and other standard wastewater equipment.”¹⁹⁰

ii. State Approach

Multiple states have attempted to circumvent the definition of “flushable” by creating blanket standards on labeling. Their aim is to avoid the difficult task of creating a definition of “flushable” by requiring manufacturers to print “Do Not Flush” on the packaging. Wipe manufacturers have mostly supported these laws.¹⁹¹

Illinois created the Wipes Labeling Act that went into effect July 1, 2022.¹⁹² This piece of legislation covered premoistened nonwoven disposable wipes likely to be used in a bathroom and with a significant potential to be flushed.¹⁹³ It requires manufacturers to include a label with the phrase “Do Not Flush” on the packaging with specifications for the size, color contrast, and placement on the packaging.¹⁹⁴ This Act also gives

ment-ftc [<https://perma.cc/9NUJ-UFUL>]; A white-label product is a product that is produced by one company that is sold to another company to rebrand as their own. Jason Gordon, *White Label Product - Explained*, BUS. PROFESSOR LLC. (Dec. 15, 2021), https://thebusinessprofessor.com/en_US/sales/white-label-product-definition [<https://perma.cc/WJ4Q-NRFS>].

187. *Id.*

188. Complaint at 2, *In re Nice-Pak Products, Inc.*, FTC Docket No. C-4556 (Oct. 30, 2015) (available at <https://www.ftc.gov/system/files/documents/cases/150518nice-pakcmpt.pdf> [<https://perma.cc/9ENE-BWT4>]).

189. *Id.* at 3.

190. *Id.*

191. *California Wipes Labeling Bill Becomes Law*, NACWA (Oct. 14, 2021), <https://www.nacwa.org/news-publications/news-detail/2021/10/14/california-wipes-labeling-bill-becomes-law> [<https://perma.cc/64WL-2GFD>].

192. S.B. 0294, 102nd Gen. Assemb., Reg. Sess. (Ill. 2022).

193. *Id.*

194. *Id.*

the jurisdictional wastewater authorities the capacity to enforce this action with penalties including 2,000, 5,000, and 10,000 dollar penalties.¹⁹⁵ However, the Illinois legislature specifically stated, in Section 5, that it is not the intent of this legislation to address standards for flushability.¹⁹⁶ The Oregon legislature passed an almost identical bill to the Illinois bill.¹⁹⁷ The Oregon bill covers wipes marketed as baby or diapering wipes.¹⁹⁸ It also covers premoistened nonwoven disposable wipes that are likely to be used in or near a bathroom with significant potential to be flushed.¹⁹⁹ While the Oregon bill does not explicitly state that it is not addressing standards of flushability, there is nothing in the bill that is likely to be construed as establishing standards for flushability.

Washington state passed House Bill 2565, which was signed into law by the governor to take effect on July 1, 2022.²⁰⁰ This bill covers only the premoistened wipes constructed from nonwoven sheets and marketed for diapering, personal hygiene, or household hard surface cleaning purposes.²⁰¹ This Act created an exclusion for some wipes, specifically:

[a]ny wipe product designed or marketed for cleaning or medicating the anorectal or vaginal areas on the human body and labeled “flushable,” “sewer safe,” “septic safe,” or otherwise indicating that the product is appropriate for disposal in a toilet including, but not limited to, premoistened toilet tissue.²⁰²

The Act only focuses on items like make-up wipes and household sanitizing wipes. This Act completely fails to address the root of the problem, namely the wipes that are flushed in significant quantities that do not dissipate in a sufficiently short amount of time to avoid clogs. Similar to the Illinois bill, this piece of legislation specifically states that it does not address standards for flushability.²⁰³

California has a unique approach to its legislation. California’s bill includes almost identical language to Illinois and Oregon’s but goes further to create a collection study to gain an understanding of consumer

195. *Id.*

196. *Id.*

197. H.B. 2344, 81st Leg. Assemb., 2021 Reg. Sess. (Or. 2021).

198. *Id.*

199. *Id.*

200. H.B. 2565, 66th Leg., 2020 Reg. Sess. (Wa. 2020).

201. *Id.*

202. *Id.*

203. *Id.*

behaviors regarding the flushing of premoistened nonwoven disposable wipes.²⁰⁴

The District of Columbia passed a bill that regulates the labeling of these wipes. This bill, passed in 2016, prohibits a manufacturer of nonwoven disposable products from labeling them as “safe to flush, safe for sewer systems, or safe for septic systems, unless the nonwoven disposable product is flushable.”²⁰⁵ This bill specifically targeted the definition of flushable that many states tried to avoid. There was pushback from Kimberly-Clark Corp., who filed suit protesting this law. The court analyzed the First Amendment compelled speech implications of this bill and eventually struck down this bill as unconstitutional.²⁰⁶

iii. In the Courts

Courts have struggled with how to confront the definition of “flushability” because there is no established standard. The courts have no legislative standard to use as a measuring stick for the flushability of nonwoven premoistened wipes. Because of the recent emergence of this problem, there are few cases before the courts and those that were brought settled before the court reached a holding.

In *Davidson v. Kimberly-Clark Corporation*, a consumer brought an action on behalf of herself and others alleging that Kimberly-Clark falsely advertised their wipes as “flushable,” thus violating the California Consumer Legal Remedies Act, False Advertising Law, and Unfair Competition Law.²⁰⁷ The appellate court, upon reviewing the dismissal of the complaint because of failure to allege fraud under FRCP 9(b), stated that the allegations must be construed in the light most favorable to the plaintiff.²⁰⁸ The plaintiff alleged that flushable means “suitable for being flushed” and dispersed in a short amount of time.²⁰⁹ The court stated that

204. A.B. 818, 2021 Leg., 2021–2022 Reg. Sess. (Cal. 2021).

205. Nonwoven Disposable Products Act of 2016, 64 D.C. Reg. 174 (Mar. 11, 2017).

206. The D.C. District Court found that the three-part test that was established by the D.C. bill to be unconstitutional on First Amendment compelled speech grounds. The discussion of compelled speech is outside the bounds of this Comment’s parameters. Another journal comment can be dedicated to the extent to which corporate compelled speech is relevant and the scope of that doctrine. This comment specifically is focused on establishing a definition of flushability and not the First Amendment’s application.

207. *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 961 (2020).

208. *Id.*

209. *Id.*

this definition is supported by dictionary definitions and the defendant's own claims that its wipes "break up when moving through the system after flushing."²¹⁰

In *City of Wyoming v. Procter & Gamble Company*, a group of municipalities in Minnesota and Wisconsin brought an action against a group of manufacturers of "flushable" hygienic wipes seeking relief for costs and damage to sewer systems and water treatment facilities.²¹¹ These municipalities brought actions for breach of implied warranty of merchantability, breach of express warranty, and violations of the following acts: Minnesota's Unlawful Trade Practices Act, Minnesota's False Advertising Act, Minnesota's Prevention of Consumer Fraud Act, Minnesota's Uniform Deceptive Trade Practices Act, Wisconsin's Trade Practices Act, and Wisconsin's public nuisance laws.²¹² While the suit settled in 2019, the court ruled on the defendant's motion to dismiss.²¹³ The following claims survived the motion to dismiss: breach of implied warranty of merchantability, various unlawful and deceptive trade practices acts, false advertisement, and public nuisance claims.²¹⁴

In *Kurtz v. Kimberly-Clark Corporation*, consumers brought actions alleging that the manufacturers falsely labeled their wipes as flushable.²¹⁵ This opinion shows the magnitude of the problem because it directly discussed the various views on the definition of flushable. In this case, the plaintiffs stated they would regard a product as flushable should it not cause any problems to any part of their wastewater system.²¹⁶ If the product clears the pipes within their property, that would be considered "flushable."²¹⁷ A witness for the plaintiffs, an environmental engineer who consults for wastewater districts, had a narrower definition: A product is flushable when it does not cause impairments of the function or damage to a plumbing system, its sewerage system, or the treatment system.²¹⁸ The plaintiffs' counsel proposed a reasonable time and reasonable consumer standard to determine what is considered flushable.²¹⁹ The defendant's definitions of "flushable" were much broader; the defendant's expert

210. *Id.*

211. *City of Wyo. v. Procter & Gamble Co.*, 210 F. Supp. 3d 1137, 1144 (2016).

212. *Id.*

213. *Id.*

214. *Id.*

215. *Kurtz v. Kimberly-Clark Corp.*, 321 F.R.D. 482, 492 (2019).

216. *Id.* at 520.

217. *Id.*

218. *Id.*

219. *Id.*

stated that if the wipe leaves the property via the pipes without issue it would be considered flushable.²²⁰ He even posited that paper towels, golf balls, wristwatches, and matchbox cars are all flushable.²²¹ The defendant's counsel stated that flushability is a subjective inquiry and is unique to each consumer.²²² The court recognized that these manufacturers use the INDA standards to determine flushability.²²³ INDA states a product must:

clear toilets and properly maintained drainage pipe systems when the supplier's recommended usage instructions are correctly followed; pass through wastewater conveyance systems and is compatible with wastewater treatment, reuse and disposal systems without causing system blockages, clogging or other operational problems; and is unrecognizable in effluent leaving onsite and municipal wastewater treatment systems and in digested sludge from wastewater treatment plants that are applied to soil.²²⁴

The court also looked at dictionary definitions and recognized a lack of consumer surveys that evaluate the general understanding of the term.²²⁵

It is clear from these cases that the courts are unclear as to how to proceed. All of these cases have either been settled or are in the middle of proceedings, so there is no court-created definition. Instead of letting courts split on this matter, it is simpler for judges to have a bright-line rule to apply to these cases.

II. ANALYSIS

There is a gap in the legal system when defining the flushability of pre-moistened, nonwoven wipes. Congress attempted to pass legislation on this matter and has failed.²²⁶ The states specifically avoided defining "flushable" in their legislation.²²⁷ The courts have yet to come up with a definition because the cases settle before judgments can be rendered.²²⁸ Thus, a gap in the law remains.

220. *Id.* at 521.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* at 523.

225. *Id.*

226. *See* discussion *supra* Section I.D.i.

227. *See* discussion *supra* Section I.D.ii.

228. *See* discussion *supra* Section I.D.iii.

The best solution to cure this gap is for the FTC to adopt their definition of “flushable” from the Nice-Pak consent decree and add it to the Green Guides. This will formally define “flushable” as a product that “disperses in a sufficiently short amount of time after flushing to avoid clogging, or other operational problems in, household and municipal sewage lines, septic systems, and other standard wastewater equipment.”²²⁹

A. *Evaluating the Interests*

When evaluating the scope of the definition, it is important to understand the parties involved and their interests in the matter. The main contention is the scope of the definition of “flushable.” Every party with an interest in this scope has a vastly different definition of the term which causes contention during litigation.²³⁰ Recognizing the interests at play and working to balance them is an important step in the process. The parties with an interest in the flushability of wipes are private citizens with septic tanks, private citizens with municipal wastewater access, manufacturers of wipes, private wastewater treatment companies, municipalities, and the State.

Private citizens with septic tanks have a high interest in the definition of “flushable”. Septic tanks require regular maintenance by the homeowner and can be costly.²³¹ A septic tank owner wants a wipe that truly dissipates after being flushed to lower their maintenance costs. Wipes that do not dissipate in a short amount of time will build up in the septic tank and will require more frequent pumping. This concern for the health of the septic systems implies the desire for a very narrow definition of “flushable.”

Private citizens with municipal wastewater access have a moderate interest in the definition of “flushable”. While they do not have to regularly maintain the system, the impacts can be significant if a problem occurs. A minor clog would require hiring a plumber to clear the lines, which can be costly and inconvenient. A more significant clog can back up waste into the home and cause water damage to the property. This concern for the interests of the private citizens with municipal wastewater access implies the desire for a narrow definition of “flushable.”

Manufacturers of the wipes want an incredibly broad definition of “flushable.” A broad definition will lower the manufacturers’ research and

229. Analysis of Proposed Order to Aid Public Comment, In re Nice-Pak Products, Inc. (May 18, 2015) (No. 132-3272).

230. See discussion *supra* Section I.D.iii.

231. See discussion *supra* Section I.B.iii.

development costs because they will not have to reformulate their products. A broad definition of flushable will allow manufacturers to convert some non-traditionally flushable products into flushable wipes. For example, Lysol could use the same wipes with a different liquid component and sell a wipe that is considered flushable. If almost anything can be flushed—including wristwatches and matchbox cars—then there is nothing to stop manufacturers from producing wipes with no dissipation quality. A broad definition will allow consumers to flush wipes that harm the system; this goes too far.

Privately owned wastewater treatment centers want a narrow definition. A broad definition of “flushable” will cause damage to the system and effectively lower profits. The municipality has a great interest in defining “flushable” narrowly. A broad definition will cause damage to the system by allowing products that do not dissipate into the wastewater system. Should the city’s wastewater system start to fail, and at an accelerated rate due to the stress on the system, the city will raise taxes to repair the system.

Finally, the state has an interest in a holistic way. The state’s interest in the quality of life of its citizens is impacted if the sewer systems begin to fail and disease becomes a problem. Failing infrastructure quickly can become a health and safety issue where the State will have to intervene through expensive measures: declaring a state of emergency, use of the Federal Emergency Management Agency, or extensive repairs to the system. The public wastewater treatment centers are public property and continuous upkeep will require the state to spend money repairing and remedying the infrastructure, likely resulting in raising taxes. Additional burdens on the wastewater system by fatbergs and undispersed wipes will have profound effects without the safeguards created by a narrow definition of “flushable.”

B. Importance of Standardization

Standardization is important for many reasons. The federal and state legislatures failed to act by mandating a standard, the courts failed to create a definition, and there is increasing pressure on the country’s infrastructure. It is clear there is a need for action on this gap in the law. The FTC’s creation of the definition of “flushable” in the Nice-Pak order was appropriate and must be applied broadly. If the FTC published its definition of “flushable” in the Green Guides, it would serve as a beacon standard for courts, manufacturers, and legislatures.

It is clear from the jurisprudence that courts are unsure as to how to evaluate the flushability of nonwoven wipes.²³² And rather than equity of the Chancellor's foot kind, the FTC's definition published in the Green Guide provides the courts with a standard to use when adjudicating claims. Causes of action, such as products liability or negligent misrepresentation, hinge on the warranty that the manufacturer provides. Without a proper guidepost, courts around the country will independently establish definitions of flushability with varying results. Without a defined standard for this term, a circuit split will likely occur.

In a hypothetical suit, a plaintiff brings a products liability action against the manufacturer of the "flushable" wipes. The plaintiff used the wipes as directed, flushed them down the toilet, and, after multiple uses, a clog formed and flooded the bathroom. When evaluating the elements of this tort, it is apparent that some are satisfied easily. The defendant is considered a manufacturer of the product at issue, there is an injury, and the product was used within its reasonably anticipated use. The causation and the unreasonably dangerous elements remain and will require debate. The FTC definition will gap fill the unreasonably dangerous element by providing guideposts to the express warranty.

Similarly, for a negligent misrepresentation claim, the entire case will hinge on the representation of the flushability of the product. The product claims to be flushable and instead of the court manufacturing its own definition, the FTC's definition will provide guideposts. The product is claimed to be flushable, and if the product does not adhere to definition provided by the FTC, then the claim is a misrepresentation.

And for the redhibition analysis, the Green Guides' standard for flushability will advise the court on the scope of the defect. If the wipe fails to meet the standard provided by the FTC, then it would be classified as defective.

This standard will not only benefit the judges in their adjudication of cases, but it will provide predictability to the parties in the suit. Consumers benefit from a uniform definition in two ways: predictability in litigation and predictability in the use. In predictability in litigation, consumers will bring actions knowing the likelihood of the outcome. Without a definition, plaintiffs go into litigation with no expectation of the success of their case. This is likely to disincentivize parties bringing suits, which is a bad policy to adopt. Similarly, manufacturers are likely to settle cases if they know that they failed to uphold the standard established by the FTC. Costs of litigation are ever growing, and the settlement of cases is helpful for judicial economy.

232. See discussion *supra* Section I.D.iii.

Establishing a standard in the FTC Green Guides will greatly impact the manufacturers. This new FTC standard will put the manufacturers on notice as to the public's interpretation of the term "flushable," and in order to prevent unfair trade practices, the manufacturers will have to change their marketing of wipes.

There is some concern that, with the implementation of the standard, manufacturers will simply remove the term "flushable" from their packaging and continue to sell products that should not be flushed. The public will likely continue to purchase and flush these wipes out of habit, which will continue to harm the wastewater treatment systems by contributing to fatbergs. The manufacturers will claim that they do not advertise these wipes to be flushable and thus should not be liable for the damages that the wipes cause. Plaintiffs could argue that these products are fundamentally similar to the products that were previously marketed as flushable, and the manufacturers are aware of the common use of the wipes, and thus, should still be liable. However, this result is better served by expanding state laws such as those passed by Illinois, Oregon, and California. Because these wipes are no longer considered flushable, they should be marked with the "Do Not Flush" logos as required by those state laws.

Similar to EPA regulations of fuel emissions, establishing a flushability standard will push wipe manufacturers to make a product that is both user and environmentally friendly. When the Obama administration discussed fuel efficiency standards, there was initial pushback from the major auto manufacturers. They claimed that it would raise vehicle costs and that there was little demand for electric vehicles.²³³ However, auto manufacturers have backed the EPA in a recent suit about the heightened standards of fuel emissions.²³⁴ The auto manufacturers stated that the EPA standards to reduce vehicle emissions by 28.3 percent through 2026 may challenge the industry but provide the automakers with important flexibilities.²³⁵ Manufacturers are usually resistant to agency regulations; however, sometimes manufacturers welcome regulation. Like the auto manufacturers welcoming the EPA regulation, many wipe manufacturers joined the bills proposed by the states.²³⁶

233. David Shepardson, *Automakers Raise Concerns over Obama Administration Fuel Rules*, REUTERS (Sept. 21, 2016, 6:41 PM), <https://www.reuters.com/article/usa-autos-emissions/automakers-raise-concerns-over-obama-administration-fuel-rules-idUSL2N1BX2R7> [<https://perma.cc/H5MD-F272>].

234. *Id.*

235. *Id.*

236. *See* discussion *supra* Section II.D.ii.¶1.

Because of the current ambiguity of the definition of “flushable,” manufacturers are susceptible to litigation. With this established standard, manufacturers will have a measuring stick to which they can hold their product. During the research and development process, manufacturers will determine if their product qualifies as flushable before sending them to market. Today, there is a trial-and-error lawsuit approach to determine the liability and the extent of the warranty of the marketing. Instead of spending resources on this whack-a-mole legal strategy, the manufacturers can invest in the research and development of a higher quality product.

If the standards for flushability vary across the country, from legislation or by action of the courts, manufacturers will have to adjust their business model to account for these standards. Manufacturers may create various products with varying standards for the corresponding different markets. This would be logistically difficult and quite expensive for the manufacturers. Or in the alternative, manufacturers may discontinue products for the markets in which the products do not meet the standards, thus limiting sales and consumer access to products. A unifying standard would allow manufacturers to market their products across the country without repackaging or reformulating for each state.

Legislatures benefit from a national standard for the term “flushable” by crafting the labeling laws around this standard. The states that have acted—Oregon, Illinois, California—have specifically avoided defining “flushable” in their policies. The states will then be relieved from bearing that burden because the FTC has taken that on. States will tailor the “Do Not Flush” labeling laws around this standard. With a defined standard from the federal agency, states can create laws mandating “Do Not Flush” labels if the products do market as “flushable,” instead of having carve outs for wipes labeled as “flushable.”

For example, the Washington state bill creates an exclusion for wipes that are designed for cleaning or medicating the anorectal or vaginal areas that are labeled as flushable.²³⁷ Updated legislation might specifically reference the FTC definition and make the only exclusion be the wipes that satisfy the FTC definition. This bill might read: “Any premoistened nonwoven wipe that is not labeled as ‘flushable’ or fails to meet the Green Guides standard for flushability must be affixed with the ‘Do Not Flush’ logo.”

A single standard will relieve the states from creating conflicting standards. If the states assume that burden, then disparate definitions across the country will emerge. Some states, likely the more conservative pro-business states, will have incredibly broad definitions to allow the

237. See discussion *supra* I.D.ii.

manufacturers to sell their current products. While other, more liberal states, will create definitions that are so narrow that it will effectively ban wipes. There is a demand for flushable wipes; people find them comfortable, easy to use, and affordable. Wipes should not be construed to be inherently dangerous if they dissipate in a sufficient amount of time to prevent clogs. Some states may go too far and completely ban wipes from sale. Establishing a standard at the national level will create uniformity across the states, providing the consumers and manufacturers with predictability.

Consumers will also have the benefit of predictability of use. Most consumers do not think about the flushable nature of wipes because they assume the wipes are actually flushable. Consumers see marketing that says that a product is “flushable,” and they assume that there will not be adverse effects to using the product. A uniform federal standard will allow consumers to know that the product they are buying is safe for their plumbing and the entire wastewater treatment system. The aim of the Green Guides is to avoid deception of the consumer by vague marketing of products. While the consumer may never know the actual definitions of the terms in the Green Guides, it continues to protect the consumer. Agency action in unfair trade practice works behind the scenes to protect the consumer without much knowledge by the public. For example, the average grocery shopper does not know that there are standards as to what can be labeled “peanut butter.” In the famous Peanut Butter Case, where the Food and Drug Administration (FDA) spent 12 years debating the amount of peanut product that must be present to be labeled “peanut butter,” consumers benefited from the work of agency action.²³⁸ Prior to the FDA mandating that peanut butter must contain 95 percent peanut, there were products that only had 75 percent peanut which the public began calling “peanut-flavored face cream.”²³⁹ Today, consumers can be confident that the peanut butter on the shelves is actually made with peanuts and not cut with filler ingredients.

The burden on safety and efficacy of products should not be on the consumer but should instead lie with the manufacturer. The consumer should not bear the burden of understanding the flushability standards of the various brands of flushable wipes; consumers want reliable and simplified standards. Consumers assume that the products are generally the same and then rely on personal preference as to brand, scent, flavor,

238. Matthew Blitz, *Why Midcentury Lawyers Spent 12 Years Arguing About Peanut Butter*, ATLASOBSCURA (Oct. 14, 2015), <https://www.atlasobscura.com/articles/peanut-butter-history-scandal> [<https://perma.cc/A8ZS-ACNW>].

239. *Id.*

etc. to make their decisions. Just like peanut butter, consumers assume that each brand of peanut butter is made up of peanuts and then have a personal preference to choose either Jif or Skippy.

The FTC's definition is the most appropriate choice because it functions to solve the major problem at hand: the flushing of wipes that do not dissipate in enough time such that it causes strain on the wastewater treatment system. This definition is appropriate for textual reasons as well as for reasons of judicial economy and predictability.

Textually, the FTC's standard works to alleviate stress on the overtaxed wastewater treatment system. It does so by focusing the clogging or other operational problems on the household sewer lines as well as the municipal sewage lines and other wastewater equipment. In the *Kurtz* case, the manufacturer claims that a wipe is considered flushable if it left the consumer's property.²⁴⁰ The consumer-plaintiffs have a much broader definition, thus creating an impasse in the legal system. The FTC's standard includes focus on the larger wastewater treatment system because it recognizes the impact that wipes can have on the system in the aggregate. This definition extends liability to the manufacturer for "operational problems [. . .] in household and municipal lines, septic systems, and other standard wastewater equipment."²⁴¹

This definition allows the court to determine "a sufficiently short amount of time" as a matter of fact. The time from flushing to dispersal may vary in different scenarios because of factors such as temperature, water quality, and quality of the infrastructure. This analysis will need to be performed by an expert witness and go to the jury to weigh the credibility of the work. It is improper for an agency to enact a strict black letter rule with a definite time frame for the dispersal of the wipes. Science and law both tend to avoid standards defined so strictly.

The FTC standard no doubt raises additional concerns around its interpretation. Manufacturers may assert that an individual wipe which does not disperse over time will not have a meaningful impact on the system, and the courts have discretion with this standard. Courts will determine the breadth of subjective terms such as "operational problems" and "sufficiently short amount of time." The standard welcomes discussion around these terms. These terms are purposefully ambiguous and allow the courts to fill in gaps in their interpretation but constrains the breadth of the overall definition of "flushable." As discussed in the *Kurtz* case, the definitions proposed by the plaintiff and defendant are so vastly

240. See *Kurtz v. Kimberly-Clark Corp.*, 321 F.R.D. 482, 520 (2019).

241. Analysis of Proposed Order to Aid Public Comment, In re Nice-Pak Products, Inc. (May 18, 2015) (No. 132-3272).

different that it is almost impossible to reach common ground between the parties.²⁴² The FTC definition allows the parties to have debate around the extent of the operational problems or the amount of time is considered acceptable for dispersion. The definition, however, limits the scope of the discussion because it establishes boundaries for debate.

The standardization of the definition of “flushable” is important when evaluating legal principles such as judicial economy and predictability. Judicial economy is the principle that efficiency in the courts is desired for a productive legal system.²⁴³ Factors of judicial economy can include the number of cases in front of a judge, the complexity of the cases, the distribution of cases in a system, etc., or repetitive cases determining similar issues. Some of these repetitive concerns can be cured by res judicata or precedent; however, repetitive cases trying similar issues will cause problems within the judicial system. Establishing a standard with the FTC will prevent unnecessary litigation, thus freeing up valuable court dockets. Without this standard, every jurisdiction will have to independently establish their own definition. With the FTC standard, the adjudication of claims is quick and much more efficient; the courts will only have to weigh the factual data instead of establishing a legal standard first. The FTC standard can allow some cases to be dismissed at the summary judgment stage of litigation.

Predictability in the legal system is incredibly important.²⁴⁴ Both plaintiffs and defendants want to have a reasonable idea of the basis of law

242. See Kurtz, 321 F.R.D. at 520.

243. See generally, FTC v. Superior Ct. Trial Laws. Ass’n, 493 U.S. 411 (1990) (discussing per se rules for antitrust cases for a purely efficiency purpose); United Mine Workers of Am. v. Gibbs, 383 U.S. 715 (1966) (discussing the justification for supplemental jurisdiction lies in considerations of judicial economy); Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343 (1988) (discussing how federal courts should consider judicial economy, convenience, fairness and comity in exercising jurisdiction); Jed Handelsman Shugerman, *Affirmative Duties and Judges’ Duties*: United States v. Stockberger, 120 HARV. L. REV. 1228 (2007) (discussing tort law and its privilege of judicial economy over social welfare).

244. See generally, Crawford-El v. Britton, 523 U.S. 574, 610 (1998) (dissent discusses the importance of predictability in the civil rights claim); Tome v. U.S., 513 U.S. 150 (1995) (opinion discusses the predictability of the suggested rules of the Advisory Committee); Dominic Iannicola, *People v. Constitution: The Congressional Term limit Debate and a Constitutional Definition of Qualification*, U. ILL. L. REV. 683 (1994); Michael Gershoni, *An Argument Against Reinventing the Wheel: Using and Obviousness Analysis to Bring Consistency and Clarity to Patent Eligibility Determinations of Software Patents*

of a case before the case is tried. Establishing a standard for the flushability of nonwoven wipes will allow plaintiffs to decide if they have the requisite facts to bring a products liability or negligent misrepresentation case. Predictability in their case will prevent unnecessary litigation and costs for all parties. Similarly, the defendants will know the burden of proof they are required to meet when determining liability. Defendants will settle cases before trial because they know the standard and will determine if they have a defensible claim.

The FTC established a standard when determining the Nice-Pak case and a broader application of that standard will allow the agency to function at a greater capacity. The FTC's goal is to ensure fair competition in the marketplace, and a uniform definition will create a measuring stick that the agency will use. Implementation of a definition will allow the FTC to pursue more actions against manufacturers who use the term "flushable" on their packaging. The FTC was charged by Congress to investigate the marketing of flushable wipes and adopting the Nice-Pak definition and pursuing actions based on that definition will fulfill this Congressional duty.²⁴⁵ The FTC already created a standard for the Nice-Pak case, and the broad application of this standard will be simple and beneficial.

C. Categories

Once the FTC definition is established, the nonwoven wipes on the market can be classified into three categories: (1) wipes not intended to be flushed that do not pass the FTC definition; (2) wipes intended to be flushed that do pass the FTC definition; and (3) wipes intended to be flushed that do not pass the FTC definition.

The majority of the premoistened nonwoven wipes on the market can be categorized as wipes that were not manufactured to be flushed and do not pass the FTC definition of flushability. This group of wipes include makeup wipes, disinfectant wipes, medical gauze, and individually packaged hand wipes. These products are not marketed as flushable and should never be flushed down the toilet.

These wipes are regulated by the recent laws passed in Illinois, Oregon, and California. The large and clearly distinguishable labels advise users not to flush the product and are appropriate for these products. The state laws provide ample notice to consumers warning them of the dangers of flushing these truly non-flushable products.

After Alice Corp., 44 AIPLA Q.J. 295 (2016) (discussing how a proposed definition "injects both efficiency and predictability" into patent determinations).

245. See discussion *supra* Section I.D.i; Financial Services and General Government Appropriations Bill, H.R. 4345, 117th Cong. (2022).

The next category of wipes is described as those that are manufactured to be flushed and do pass the FTC definition of flushability. These products are the important few that are designed to be flushed and pass the FTC's definition of flushable. The manufacturers that put further research and development into their product to make them truly flushable will then flood the market with their superior product.

One example of new research and development is Nice-Pak's new "Nice 'N Clean SecureFLUSH technology" wipe. This product was released in December 2021 and claims to "break apart 5x faster than toilet paper."²⁴⁶ The Nice 'N Clean wipes claim to be flushable for well-maintained sewer and septic systems but are not recommended for basement pump systems.²⁴⁷ Nice-Pak claims that their new wipes break apart five times faster than the leading brand of two-ply toilet paper and are designed to provide an "advanced level of security to help eliminate the fear of clogged plumbing."²⁴⁸ Such a product will likely pass the FTC's definition of "flushable" and labeled as "flushable."

The final category of wipes cause the most harm and need to be relabeled. The pre-moistened wipes, when tested, failed to meet the FTC's definition of "flushable" but are labeled as such. The labels deceive the consumer and risk injury to the sewer and septic systems. FTC action is needed to investigate these claims and require substantiation from the manufacturers. Until the wipes satisfy the standard, they are banned from using the term "flushable" in their marketing because of the unfair marketing.

III. CONCLUSION

The aim of this Comment is to provide municipalities and private citizens with the ability to recover for injuries that may occur due to the wipes accumulating in the wastewater treatment systems. This is done by exposing the gap that currently exists in the legislature and courts and suggesting a definition for the term "flushable." Without this standard, consumers are deceived into buying a product that does not work as advertised, and courts are unable to uniformly adjudicate any claims that arise from this deception.

246. *Nice-Pak Unveils Flushable Wet Wipes That Breaks Apart 5x Faster Than Toilet Paper*, NICE-PAK (Nov. 30, 2021), <https://www.nicepak.com/newsroom/nice-pak-unveils-flushable-wet-wipes-that-break-apart-5x-faster-than-toilet-paper> [https://perma.cc/EZ7Q-E3VP].

247. *Id.*

248. *Id.*

Using the FTC's definition of "flushable," as established in the Nice-Pak consent decree, the market will become uniform and predictable. This will greatly benefit the consumer use wipes, provide a uniform standard for manufacturers, and allow the courts to have predictability in the adjudication of claims.

Premoistened, nonwoven wipes are a luxury item that consumers want to use. However, to be used properly, it is imperative that the wipes are labeled appropriately. Wipes that are intended to be flushed and adhere to the FTC's standard for flushability are free to be labeled as "flushable." All other premoistened nonwoven wipes are barred from the use of the term "flushable," thus legitimizing the labeling of these products. This standard will push manufacturers to produce wipes that are safe for the failing wastewater infrastructure.

This Comment works to legitimize the label of "flushable." With a standard definition and enforcement, consumers and manufacturers will have clarity as to the efficacy of the products and the expectation during litigation.