

GREENWASHING

AVOIDING GREENWASHING: THE BRAVE NEW WORLD OF ENVIRONMENTAL MARKETING CLAIMS

By Peter Hsiao, Robert Falk,** Brooks Beard,*** and Jamon Bollock*****

In recent marketing campaigns, green is the new black. Simply watching television commercials or making a routine trip to the grocery store presents consumers with a plethora of supposedly environmentally friendly products to buy. Companies tout the environmental attributes of their goods or services in response to growing demand from customers who want to support more ecologically sustainable practices, while retailers have launched or promoted “green” product lines.

This rush to market more environmentally friendly products and services is the result of growing consumer demand. In fact, government surveys have shown that eighty-two percent of consumers have changed their purchasing decisions based on concerns about the environment, and thirty percent of consumers have purchased a product specifically because of an environmental claim made in an advertisement or on a label.¹ A recent *USA Today*/Gallup poll also found that eight in ten Americans believe a company’s environmental record should be an important factor in deciding whether to buy its products.

* *Peter Hsiao is a partner and member of the CleanTech Group at Morrison & Foerster LLP. Mr. Hsiao was formerly Chair of the Environmental Law Section of the State Bar of California, and the senior environmental trial lawyer for the U.S. Department of Justice at the U.S. Attorney’s Office in Los Angeles. He is the editor and co-author of the California Environmental and Natural Resources Law Handbook. Morrison & Foerster LLP, 555 West Fifth Street, Suite 3500, Los Angeles, CA 90013; Tel: (213) 892-5731; Fax: (213) 892-5454; E-mail: phsiao@mof.com.*

** *Robert Falk is a partner and member of the CleanTech Group at Morrison & Foerster LLP and the Chair of the firm’s Land Use & Environmental Law Group. Mr. Falk was formerly the Chair of the ABA Standing Committee on Environmental Law and is listed in the 2006 and 2007 editions of The Best Lawyers in America as a leader in the field of environmental law. Morrison & Foerster LLP, 425 Market Street, San Francisco, CA 94115; Tel: (415) 268-6294; Fax: (415) 268-7522; E-mail: rfalk@mof.com.*

*** *Brooks Beard is a partner in the litigation practice group at Morrison & Foerster LLP and is a member of the firm’s CleanTech Group. As a member of the firm’s CleanTech Group, Mr. Beard focuses on green marketing, false advertising, and IP litigation matters. Morrison & Foerster LLP, 425 Market Street, San Francisco, CA 94115; Tel: (415) 268-7339; Fax: (415) 268-7522; E-mail: bbeard@mof.com.*

**** *Jamon Bollock is an associate in the San Francisco Office of Morrison & Foerster LLP. Mr. Bollock was formerly a trial lawyer for the U.S. Department of Justice in the Environment & Natural Resources Division. Morrison & Foerster LLP, 425 Market Street, San Francisco, CA 94115; Tel: (415) 268-6298; Fax: (415) 268-7522; E-mail: jbollock@mof.com.*

The authors wish to acknowledge the significant contribution to this article of Robert Reinhard, an environmental analyst at the firm.

1. Federal Trade Commission Report to Congress Pursuant to the Federal Trade Commission Act Amendments of 1994, 1995 WL 93738 (Feb. 1995).

Although most companies undoubtedly attempt to market products and services accurately while extolling their purported environmental virtues, some have been accused of taking advantage of consumers' growing "eco-consciousness" by exaggerating the environmentally beneficial qualities of those products and services. Many more are said to have not provided consumers with sufficient information regarding the overall environmental costs and benefits involved in the manufacture and distribution of the products for which "green" claims are being made—often referred to as "life cycle assessment." Such accusations are increasingly being referred to as "greenwashing"—that is, deceptive or misleading statements to consumers about the environmental practices of a company or the environmental benefits of a product or service. These practices may soon give rise to increased government enforcement of false advertising and securities statutes, and raise the potential for a new genre of consumer and class action litigation.

THE FEDERAL AGENCIES TAKE NEW ACTION TO
REGULATE GREEN MARKETING

One sure barometer of this trend is that the U.S. Federal Trade Commission (FTC) has recently accelerated its review of its decade-and-a-half-old *Guides for the Use of Environmental Marketing Claims* (Eco-Advertising Guidelines).² This guidance document provides general guidelines for the application of Section 5 of the FTC Act, which prohibits deceptive acts and practices in or affecting commerce, to claims involving the environmental benefits of a product. Under Section 5, as interpreted by the Eco-Advertising Guidelines, marketing claims must be accurate, specific, not generalized, and supported by competent and reliable scientific evidence. Moreover, the FTC evaluates environmental claims from the consumer's perspective. Regardless of what the company making the claim meant, if consumers are misled or deceived, the claim will likely violate the FTC Act.³

As currently constructed, the Eco-Advertising Guidelines provide illustrations of how the uses of particular environmental claims such as "biodegradable" and "recyclable" could conform to or run afoul of the more general requirements of Section 5. They also discourage the use of broad unqualified statements suggesting that a product or service is "environmentally friendly," and reiterate the need for environmental marketing claims to be substantiated.

In general, according to the Eco-Advertising Guidelines, a claim should not overstate a product's benefits to the environment. The Guide-

2. 16 C.F.R. Part 260.

3. In addition to the FTC Act, companies making false, deceptive, or misleading environmental claims may be subject to liability under the Lanham Act, 15 U.S.C. §§ 1051 *et seq.*, as well as mini FTC acts at the state level, such as California's Business and Professions Code section 17500 *et seq.*, which prohibits "untrue or misleading" statements.

lines then outline more specific standards for the use of particular terms. To illustrate:

- A label may not boast that the product contains “50% more recycled content than before” if the amount of recycled product increased from two percent to three percent because such a claim gives a false impression that the product contains a significant amount of recycled material.
- Comparative claims such as “20% more recycled content” or “less waste than the leading national brand” must be substantiated and make clear the basis of the comparison. And claims involving whether a product is recyclable must contain appropriate qualifying language, such as a statement that “This bottle may not be recyclable in your area.”
- A claim that a substance contains no CFCs would be misleading if it contains any ozone-depleting substances or any substance that contributes to atmospheric pollution in general, such as VOCs, because the claim implies that the product will not adversely affect the atmosphere.
- Unqualified, generalized claims of environmental benefit like “environmentally friendly,” “green,” “good for the earth,” or “environmentally safe,” as well as vague brand names like “Eco-Safe” or “Earth Smart” are disapproved of because they are difficult for consumers to interpret and convey a broad range of meanings depending on the context in which they are used.

To support an environmental claim, the Eco-Advertising Guidelines require that any party making a claim about an attribute of a product, packaging, or service must “possess and rely upon a reasonable basis,” consisting of “competent and reliable evidence,” to substantiate the claim.⁴ Substantiation will often require scientific evidence in the form of tests or research studies, for example. The party must rely on that evidence at the time the assertion is made, and cannot attempt to manufacture the substantiation later. Anecdotal evidence from consumers, articles in the popular press, and sales materials from suppliers are not sufficient to substantiate an environmental claim.⁵

As guidance to the regulated community, the examples provided in the Eco-Advertising Guidelines are not themselves enforceable as federal law (although they do have the force of state law when incorporated into state statutes, see discussion below). Rather, the FTC relies upon the guidance in bringing enforcement actions for deceptive environmental marketing claims. More than thirty enforcement actions have been filed against advertisers, marketers, and producers for deceptive or unsubstantiated marketing claims. In its enforcement actions, the FTC has challenged claims related to pesticide use, chemical use, and energy savings. Most of these claims were challenged for the lack of sufficient substantia-

4. 16 C.F.R. § 260.5.

5. *Id.*

tion. Consequently, nearly all of the consent orders issued by the FTC so far called only for the company to cease making unsubstantiated claims in the future and did not impose penalties or other sanctions.

In January 2008, the FTC announced its intention to revisit and potentially update the Eco-Advertising Guidelines in the wake of the explosion of so-called “green” claims that have recently appeared. This new generation of “green” claims includes uses of terms such as “sustainable,” “carbon neutral,” “nano-technology,” and “low-emission.” Currently, there are no agreed-upon standards for using these terms, presenting a regulatory gray area for advertisers.

In evaluating whether to revise the Eco-Advertising Guidelines, the FTC also plans to consider an area that did not even exist when they were originally formulated in 1992—carbon offsets. In the past few years, consumers have attempted to make carbon-neutral purchases, or even purchase a new commodity called carbon “offsets,” in order to reduce their “carbon footprints” to help address climate change. In fact, the voluntary carbon offset market more than tripled in value between 2006 and 2007, with the total value of offsets sold in both the over-the-counter market and on the Chicago Climate Exchange increasing from \$97 million in 2006 to \$331 million in 2007.⁶ The average price paid to offset one metric ton of greenhouse gases also jumped forty-nine percent in the same period.⁷ This sector has the potential to expand even further given that the voluntary market makes up only approximately two percent of the internationally regulated carbon markets, which had a combined value of over \$60 billion in 2007.⁸

Attempting to capitalize on this area of consumer interest, local utilities, car-rental companies, and online marketers have begun to sell carbon offsets, the proceeds of which are supposed to finance projects to reduce greenhouse gas emissions by planting trees, converting methane to less harmful gases, or increasing recycling, among other things. Other companies have begun to sell renewable energy certificates, called “RECs,” the proceeds of which are purported to be used to finance alternative energy projects, such as solar or wind farms.⁹ The market for carbon offsets and RECs has grown so fast, however, that without regulation and standards, it is difficult to have confidence that consumers are actually getting the types and magnitude of climate change benefits for which they are supposedly paying.

6. *Voluntary Carbon Market Tripled In 2007, Hit \$331M*, ENVIRONMENTAL LEADER (May 14, 2008), available at <http://www.environmentalleader.com/2008/05/14/voluntary-carbon-market-tripled-in-2007-hit-331m/>.

7. *Id.*

8. *Id.*; *Global Carbon Trading Way Up*, ENVIRONMENTAL LEADER (Jan. 21, 2008), available at <http://www.environmentalleader.com/2008/01/21/global-carbon-trading-way-up/>.

9. See Steven Mufson, *Green Market Review Is Put on Fast Track at FTC*, WASH. POST, Nov. 27, 2007, at D1.

In this area especially, the FTC has previously been a reluctant player. In fact, after the House Select Committee on Energy Independence and Global Warming held hearings on carbon offsets last summer, Chairman Representative Edward J. Markey wrote the FTC warning that “[a]s the opportunity to profit in this sector attracts more players, the potential for marketing claims to misleadingly portray the offset products in question also grows.”¹⁰ According to Representative Markey, the integrity of the offset market requires new guidelines to prevent “scam artists” from taking advantage of consumers.¹¹

Members of the House Committee on Energy and Commerce expressed similar concerns in a strongly worded letter to the Government Accountability Office in January 2008. According to members of the Committee, the carbon offsets market, with sales that are “expected to increase steeply in coming years,” is a “ripe target for hucksters.” “We don’t want carbon offsets to become the 21st Century version of snake oil and patent medicine,” they wrote before asking the GAO to conduct a thorough investigation of the market.

In response to this growing pressure, the FTC has begun holding a series of public workshops. The first workshop, held on January 8, 2008, dealt with carbon offsets and RECs. The second hearing, held on April 30, 2008, dealt with “green” marketing claims in advertising. The purpose of the public meetings, according to former FTC Chairman Deborah Majoras,¹² is to consider whether the FTC should revise the Eco-Advertising Guidelines to help consumers make educated decisions in response to both the increased use of environmental marketing terms and the use of new terms, including not only “carbon neutral,” “carbon offsets,” and “RECs,” but also “sustainable,” “biobased,” “life cycle,” and “cradle-to-cradle.” Bringing reliability and confidence to claims for carbon offsets and RECs seems to provide the FTC with the biggest regulatory challenges, however, because carbon offsets and RECs do not currently offer consumers a way to verify the offsetting benefit of their purchase.

STATES TAKE ACTION TO CONTROL GREEN MARKETING CLAIMS

State enforcement agencies are also taking action to strengthen their regulation of environmental marketing claims. On the federal level, ten state attorneys general formally requested that the FTC establish guidelines for the sale of carbon offsets.¹³ “The lack of common standards and definitions, along with the intangible nature of carbon offsets, makes it

10. *Id.*

11. *Id.*

12. On March 30, 2008, William E. Kovacic was designated to serve as Chairman of the FTC. A former law professor at George Washington University Law School, Mr. Kovacic served as the FTC’s General Counsel from 2001 through 2004 and as a Commissioner from January 2006 until his recent appointment as Chair.

13. *See* http://ag.ca.gov/cms_attachments/press/pdfs/n1520_carbon_offset_letter.pdf.

difficult if not impossible for consumers to verify that they are receiving what they paid for and creates a significant potential for deceptive claims,” the attorneys general wrote.¹⁴

In addition to participating in the federal rulemaking process, several states already regulate the use of certain environmental terms, using the FTC’s current Eco-Advertising Guidelines as a foundation. New York, Rhode Island, and Minnesota regulate the use of certain environmental terms such as “biodegradable,” “photodegradable,” “recyclable,” “recycled,” “reusable,” and “ozone friendly.” Other states, including California, Maine, Wisconsin, Michigan, and Indiana, adopted legislation incorporating the FTC’s current Eco-Advertising Guidelines in whole or in part.

In California, the Environmental Advertising Claims Act gave legal force to the FTC’s Eco-Advertising Guidelines by making any statement that fails to comply with them an unlawfully deceptive claim pursuant to California law.¹⁵ The statute further requires that any party who claims through an advertisement or on a label that a product “is not harmful to, or is beneficial to, the natural environment” by using terms such as “environmentally friendly,” “ecologically sound,” “environmentally safe,” “green product,” or any other similar term, must maintain and make available written records regarding its substantiation for the claim, including documentation concerning any adverse impacts the manufacture, distribution, and use of the product impose on the environment.¹⁶ The party must also maintain records regarding whether specific terms used within the claim comply with the parameters set forth for them in the FTC’s Eco-Advertising Guidelines.¹⁷

Failure to comply with the California statute may trigger civil penalties under the State’s broad Unfair Competition Law, or even potential criminal penalties, including fines and imprisonment.¹⁸ Enforcement is largely up to the California Attorney General, district attorneys, and other public prosecutors, however, because Proposition 64, passed by voter initiative in 2004, virtually eliminated the ability of citizens to bring private enforcement actions absent their meeting class certification requirements. The potential for such class actions cannot be ruled out, particularly since public prosecutors have shown little eagerness to enforce this set of statutory provisions to date.

In another evolving trend, recent legislation suggests that, as with global warming and greenhouse gas regulation generally, if the federal government fails to move quickly to address “greenwashing” and related “full” environmental disclosure concerns, the states will move ahead of their own accord. On February 1st, the California State Senate passed S.B.

14. *Id.*

15. CAL. BUS. & PROF. CODE § 17580.5(a).

16. CAL. BUS. & PROF. CODE § 17580.

17. *Id.*

18. CAL. BUS. & PROF. CODE § 17581.

509, a measure aimed at addressing growing concerns over hazardous materials in household products. If enacted, the bill would require manufacturers and wholesalers to publish on the Internet detailed lists of the ingredients of all household products, including soap, toys, and wall paneling. The bill would not regulate the use of any chemicals *per se*, but seeks instead to educate consumers and let them decide whether to buy the product. The bill is pending before the State Assembly and will require the further approval of the Governor.

INTERNATIONAL ACTIONS TO REGULATE GREEN MARKETING

The European Union has also recognized a need for greater transparency and integrity in the use of environmental marketing claims, but has taken a somewhat different (and likely less litigious) approach than is likely to evolve in the U.S. The EU has established a voluntary labeling scheme designed to assist consumers in more easily identifying those products that reliably deliver on their environmental claims. The Eco-Label, a green and blue flower, is awarded to “goods and services which are genuinely a better choice for the environment,” based on criteria established by the EU.¹⁹

In addition to the EU’s voluntary labeling program, the Scandinavian countries of Norway, Sweden, Finland, and Denmark adopted a mandatory set of guidelines that somewhat resemble the FTC’s Eco-Advertising Guidelines. The joint guidelines for ethical and environmental marketing claims, first adopted in 1994 and recently revised in 2005, require that environmental claims must be clear and indicate whether they apply to the product or the packaging. In addition, claims must be verifiable and the company must have scientific documentation that substantiates the statements. Importantly, going beyond where the FTC had gone until its recent initiative, in the Nordic countries claims must also be accurate and balanced and may not exaggerate a product’s positive impact on the environment. In September 2007, the Norwegian government used the joint guidelines as the basis for prohibiting car manufacturers from claiming that cars are “green,” “clean,” or “environmentally friendly.”²⁰ The Norwegian government’s position is that “[i]f someone says their car is more ‘green’ or ‘environmentally friendly’ than others then they would have to be able to document it in every aspect from production, to emissions, to energy use, to recycling.”²¹

In the UK, Trading Standards Officers are empowered under the Trade Descriptions Act to address claims that are demonstrably false or are found to be misleading, and the Office of Fair Trading can address misleading claims under the Control of Misleading Advertisement Regu-

19. See http://ec.europa.eu/environment/ecolabel/index_en.htm.

20. See Alister Doyle, “Norway Says Cars Neither Green Nor Clean,” Reuters (Sept. 6, 2007), available at <http://www.reuters.com/article/email/idUSL0671323420070906>.

21. *Id.*

lations.²² Similar to the National Advertising Division of the Better Business Bureau in the United States,²³ the UK's Advertising Standards Authority (ASA) is an independent body that the advertising industry can use to assess and resolve disputes related to allegedly deceptive advertising.²⁴ In 2007, the number of complaints filed with ASA relating to ads making green claims was four times higher than greenwashing complaints in 2006.²⁵ According to ASA's 2007 annual report, "consumers were most confused about ads for carbon emission claims and green tariffs as well as green terms like sustainable and food miles."²⁶ The annual report further noted that "[c]onsumers said they typically did not read the fine print or explanatory text in ads."²⁷ Indeed, in the past year alone, the ASA has ruled against companies such as Shell and Lexus over green claims in their advertising.²⁸

In addition, the International Organization for Standardization's ISO 14000 series of environmental management standards apply general guidelines for evaluating a company's environmental practices, including any claims made about the environmental attributes of a product. The ISO 14000 standards do not specify levels of environmental performance, but rather give generic requirements for an environmental management system. ISO 14020, in particular, attempts to harmonize worldwide environmental labeling efforts by establishing international voluntary labeling guidelines. That is, ISO 14020 establishes principles for environmental labeling and directs companies both to produce accurate labels on the basis of scientific results and to make the meaning of claims made on the label, as well as the research supporting the claims, available to the public. Substantively, ISO 14020 sets forth several principles, the most important of which are that a claim must be accurate, verifiable, relevant, nondeceptive, nontrivial, clear, lack exaggeration, and be based on a sound scientific research methodology.

Additionally, ISO 14020 encourages the use of what is called "life-cycle analysis" during the formulation of an environmental label. That is, a product should only be labeled as "environmentally friendly" pursuant to ISO 14020 if all of its wastes and by-products have been accounted for. Enforcement of ISO 14020 labeling standards occurs through certification under ISO 14021, but the credibility of such a claim rests entirely on the company's reputation. External verification also occurs through ISO 14024, but the company is essentially allowed to select its own criteria

22. See also UK's "Green Claims Code" (revised June 2000), <http://www.defra.gov.uk/ENVIRONMENT/consumerprod/pdf/genericguide.pdf>.

23. See <http://www.nadreview.org/>.

24. See <http://www.asa.org.uk/asa>.

25. <http://greenbiz.com/news/2008/05/02/uk-greenwash-complaints-quadrupled-2007>.

26. *Id.*

27. *Id.*

28. http://www.asa.org.uk/asa/adjudications/Public/TF_ADJ_43476.htm; http://www.asa.org.uk/asa/adjudications/Public/TF_ADJ_42574.htm.

when determining whether its products warrant an environmental marketing claim. Thus, the ISO 14000 rules provide a potentially reliable, but not necessarily fully objective, system for verification of a company's claims.

NON-GOVERNMENTAL ORGANIZATION "CERTIFICATION" PROGRAMS

In response to concerns about the legitimacy and legality of "green" marketing claims, independent organizations have stepped in to help consumers make educated choices. The Center for Resource Solutions, a non-profit organization based in San Francisco, has launched a program called Green-E (www.green-e.org), a voluntary certification program that sets consumer-protection and environmental-integrity standards for carbon offsets and RECs sold in the voluntary market. The Voluntary Carbon Standard (VCS) (www.v-c-s.org) also lends credibility to carbon offsets by establishing transparent and standardized certification criteria. Under the VCS, emission reductions from submitted projects are independently verified and approved as Voluntary Carbon Units (VCUs). VCUs are then registered in a VCS-approved registry and may be transacted. The VCS also provides accreditation under the ISO 14000 standards. The purpose of the Green-E and VCS programs is to verify that consumers are getting what they pay for when purchasing certified offsets and RECs. According to Eric Carlson, Executive Director of Carbonfund.org, "certification is really the hallmark of quality in the REC and offset industries. It answers the fundamental question, is this real and who says so?"

The Green-E and VCS programs also build on the success of certification programs devised by independent organizations that stepped in to help companies address the original Eco-Advertising Guidelines. One example, Green Seal (www.greenseal.org) evaluates products by gathering test data and evaluating processes at manufacturing facilities and recommends products it finds to be environmentally beneficial, thereby providing substantiation (if not appropriate qualification) for a "green" claim. Scientific Certification Systems (www.scscertified.com), on the other hand, uses its Environmental Claims Certification Program to certify particular environmental attributes, such as the content of recycled material or biodegradability associated with a product, again helping to facilitate a claim's compliance with the original Eco-Advertising Guidelines. (More controversially perhaps, for those wishing to make bolder claims, it also certifies claims that a certain product is environmentally preferable to a competitor's product.)

In the building and construction field, the U.S. Green Building Council established the Leadership in Energy and Environmental Design (LEED) Green Building Rating System, a certification program which provides independent, third-party verification that a building project satisfies benchmarks for the design, construction, and operation of "green buildings." The LEED program has set up rating systems for a wide variety of building projects, including homes, retail and commercial space,

schools, and neighborhood development, and has special criteria for both new construction and existing buildings. Performance is measured in five key areas: sustainable site development, water savings, energy efficiency, materials selection, and indoor environmental quality. Certified projects may display the LEED logo to signify compliance with the rating system's criteria. By creating and implementing uniform performance criteria, the LEED rating system seeks to encourage and accelerate global adoption of more environmentally sustainable building and development practices. Not only has the LEED system gained widespread acceptance, but many municipalities nationwide are mandating compliance with LEED criteria for certain types of building projects.

CONCLUSION

In sum, the law regarding environmental marketing claims and greenwashing practices is rapidly evolving and demands attention. Companies that wish to make such claims should, at a minimum, make every attempt to comply with the FTC's current Eco-Advertising Guidelines. That includes avoiding general, unqualified claims like "environmentally friendly" or "ecologically sound," ensuring that claims are accurate and specific to the particular environmental attributes they are referencing, and ensuring that any environmentally-related claims being made are substantiated by scientific evidence that the company already possesses. Complying with a voluntary "green" labeling program administered by an independent third party organization may provide an additional safeguard, especially in the very new carbon offset and REC markets.