GREEN MARKETING: 
AVOIDING UNWANTED ATTENTION FROM REGULATORS AND LAWYERS

by

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According to a recent Gallup poll, more than 8 out of 10 Americans believe that a company’s environmental record is an important factor in deciding whether to buy its products.\(^1\) Environmental marketing claims are hot, and they continue to attract consumer attention. There are steps marketers can take to ensure their claims are not attracting the wrong kind of attention—from regulators and competitors.

A lot of environmental claims suffer from murky definitions and standards, and there is concern that companies are “greenwashing.”\(^2\) Consumers, regulators, and competitors are catching on. Marketers interested in making claims about the environmental benefits of their product should therefore ensure that they are communicating their product and company attributes truthfully.

**Increasing Popularity of Green Claims.** Calls to “save the planet” are no longer limited to advertisers of hemp oils and compost bins. Major corporations in every industry have taken up the cause, including:

- Chevron’s “Human Energy” marketing campaign\(^3\) and British Petroleum, rebranded as BP, running a “Beyond Petroleum” campaign.\(^4\)

- Volkswagen, advertising its Carbon Neutral Project, a partnership with Carbonfund.org, that informs VW owners of their vehicle’s carbon impact and provides new VW purchasers with one year of carbon offsets.\(^5\)

- Clorox, developing the “Green Works” line of “natural cleaners,” which are biodegradable, free of petrochemicals, made from renewable resources, and not tested on animals. The products are marked with the logo of the United States Environmental Protection Agency’s “Design for the Environment” program, and carry the endorsement of the Sierra Club.

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\(^4\)[http://www.bp.com/sectiongenericarticle.do?categoryId=9010219&contentId=7019491](http://www.bp.com/sectiongenericarticle.do?categoryId=9010219&contentId=7019491).


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The past two Super Bowls, going “carbon neutral” through the planting of trees and the purchase of alternative energy and carbon offsets.  

The 2007 Academy Awards, partnering with the Natural Resources Defense Council to “green” the Oscars through purchase of renewable energy credits and use of organic foods, recycled paper products, and hybrid vehicles.

Confusing Terms. But what do all of these new environmental claims really mean? Consider the example of the opening of a new dry cleaner that claims to be “environmentally friendly.” They clean clothes “without harsh chemicals” so that they “protect the environment.” The average consumer has only a poor understanding of the technology behind these claims, and is unable to evaluate their accuracy.

The conscientious consumer might wonder whether the cleaning methods that the new store uses are actually better for the environment than traditional methods. What if the cleaning is sent out, requiring fuel use? What if the gentler cleaning solution requires more processing and uses more energy? What if the new cleaning solution is better for humans but can harm plants and animals, or vice versa? Can any dry cleaning really claim to be environmentally friendly when it is presented to the consumer on metal hangers and draped in plastic?

Similar concerns arise wherever green claims are made. A recent study from the environmental marketing company TerraChoice identified “The Six Sins of Greenwashing” as:

- The Sin of the Hidden Trade-Off (“Okay, this product comes from a sustainably harvested forest, but what are the impacts of its milling and transportation? Is the manufacturer also trying to reduce those impacts?”);
- The Sin of No Proof (e.g., “products… that claim not to have been tested on animals, but offer no evidence or certification of this claim”);
- The Sin of Vagueness (terms like “all-natural,” and “environmentally friendly”);
- The Sin of Irrelevance (claims such as a “water-efficient lightbulb,” where the claimed attribute is not normally an area of concern);
- The Sin of Fibbing (completely unsubstantiated claims); and
- The Sin of Lesser of Two Evils (“organic” cigarettes or “green” insecticides).

Greenwashing not only leads to increasingly skeptical consumers. It can also result in a lawsuit.

Legal and Regulatory Climate. U.S. regulators have recently sent signals that they are paying increased attention to environmental marketing claims. The FTC is in the process of updating its “Guides for the Use of Environmental Marketing Claims.” These “Green Guides” contain the FTC’s position on what constitutes unfair or deceptive advertising in environmental marketing.  

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916 CFR § 260; available at http://www.ftc.gov/bcp/grnrule/guides980427.htm. Many states have their own versions of the Green Guides that may be stricter than the federal version. California’s “Environmental Representations Law,” for example, adds “environmental choice,” “ecologically friendly,” “earth friendly,” “environmentally friendly,” “ecologically sound,” “environmentally sound,” “environmentally safe,” “ecologically safe,” “environmentally lite,” and “green product,” or any other like term to those defined by the FTC. CAL. BUS. AND PROF. CODE §§ 17580 and 17580.5.
The Green Guides define common terms such as “biodegradable,” “recyclable,” and “ozone friendly.”10 They offer general environmental marketing principles, such as suggesting that qualifications and disclosures be clear and prominent and cautioning that environmental attributes should not be overstated.11 Because the Guides were last revised in 1998, they do not address many newer environmental claims. The FTC, is currently holding a series of workshops to generate suggestions for improving the Guides. January’s workshop focused on carbon offsets and renewable-energy claims. An April workshop focused on packaging, including recycling, composting, and reducing or substituting materials. It seems likely that FTC will define newer terms like “zero impact” or “sustainable,” “bio-based,” “cradle-to-cradle,” and “carbon neutral.” Both consumer groups and the business community have voiced agreement that FTC should expand the definitions in the Green Guides and provide safe harbors for marketers using these newer terms.12

Regulatory action is not the environmental marketer’s only concern. Consumers and consumer watchdogs continue to scrutinize claims, generating legal challenges and bad press. The National Advertising Division of the Council of Better Business Bureaus (or “NAD”), which arbitrates competitor advertising disputes, did not hear any environmental marketing cases between 2000 and 2006.13 They have decided at least six since then, including a number of cases in which the advertiser of a “green” product misrepresented the harm of the traditional product. NAD has recognized:

...a growing consumer interest in and demand for a variety of environmentally friendly (“green”) products, from cleaning products to clothing. Advertisers of these products often highlight the health and environmental risks associated with ‘traditional’ products which contain any number of chemicals. While advertisers are free to illustrate the benefits of their products, it is important that the advertised benefits be substantiated and that any potential risks associated with the use of a competing product ... are not overstated.14

International advertising authorities are similarly occupied with “greenwashing” matters. Norwegian and Belgian regulators have banned advertisements claiming that any cars are “green,” “clean,” and “environmentally friendly.” According to one official, “Cars cannot do anything good for the environment except less damage than others.”15 In January, the United Kingdom’s Advertising Standards Authority found advertising by the Malaysian Palm Oil Council, touting the industry’s environmental benefit, to be deceptive.16 The advertisements claimed that Malaysia palm oil’s “trees give life and help our planet breathe.” In reality, the advertising authority found, oil palm plantations do not provide an environmental benefit over native rain forest, which is often cleared to plant the palms.

Make Green Claims That Matter. Like all advertising claims, environmental claims must be truthful and adequately substantiated. Marketers have a large (and growing) number of substantiation tools for environmental claims. These tools can not only add credibility in the eyes of the consuming public, but help protect the marketer from claims of deceptive advertising. The key to a successful advertising claim is substantiation. You must be able to substantiate any claim, or reasonable interpretation of a claim, at the time it is made. Some substantiation carries more weight than others. Established industry standards, nonbiased third-party certification, and independent testing are all great potential sources of substantiation.

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1016 C.F.R. § 260.7.
1116 C.F.R. § 260.6.
14Columbia Forest Products, Inc., NAD Case #4529 (July 2006).
16Id.
Is there a recognized industry standard that you meet and can cite in connection with your claim? Industry-wide, voluntary consensus organizations are a primary source of such standards. The American Society for Testing and Materials (“ASTM”), for example, publishes ASTM D6400 (Standard Specification for Compostable Plastics) and ASTM D6868 (Standard Specification for Biodegradable Plastics Used as Coatings on Paper and Other Compostable Substrates). The International Organization for Standardization (“ISO”) has established the ISO 14000 series, addressing a range of environmental management issues. The ISO 14020 series provides guidelines for environmental labeling.

Not all standards come from standard-setting organizations. How does your packaging score on the Walmart Sustainable Packaging Initiative scorecard? The scorecard measures manufacturer performance on the “7 R’s of Packaging: Remove, Reduce, Reuse, Recycle, Renew, Revenue, and Read” through weighted metrics such as a carbon dioxide creation, recycled content, and ration of product mass to packaging. Such measurement, if conducted by third parties, may serve as the basis for a claim and may possibly be used to compare your packaging to a competitor’s.

Can you add a certification seal to your packaging? Does your packaging qualify for a program established by an organization like the Recycled Paperboard Alliance (100% recycled paperboard), the Chlorine Free Products Association (totally chlorine-free or processed chlorine-free paper), the Sustainable Forestry Initiative, Forest Stewardship Council, or Program for the Endorsement of Forest Certification (materials sourced from land meeting certain forest practices)? Do you print with soy inks that could be certified by the American Soybean Association? Do you use renewable energy that could be certified by Green-e? Or do you purchase carbon offsets verified by the Chicago Climate Exchange? Note that a manufacturer must typically receive a license from the certifying organization to use their trademark.

Marketers may also consider partnering with environmental organizations to market a product. As noted above, Clorox has launched a “Green Works” line of natural cleaners which carries an endorsement from the Sierra Club. Volkswagen has partnered with Carbonfund.org to create its Carbon Neutral Project to create awareness of the carbon impact of driving and provide carbon offsets.

These third-party standards, certifications, and partnerships are certainly not the only means of making a valid and defensible “green” claim. Such opportunities should be considered, however, as a way to enhance consumer perception of any environmental claims, ease fears of “greenwashing,” and help insulate the advertising from potential challenges.

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19 See http://www.carbonfund.org/vw.