

## **Green is the New Black: A Guide to Environmental Marketing**

*By Nancy Felsten, Esq.<sup>1</sup> and Sarah Staveley-O'Carroll<sup>2</sup>*

Everyone is wearing green. With increasing awareness about global issues like climate change and rising energy costs, four in ten Americans say they prefer to purchase “environmentally friendly” products.<sup>3</sup> U.S. spending for “green” products is expected to double in the next year to an estimated \$500 billion dollars.<sup>4</sup> Protecting the environment has become fashionable and marketing efforts in response have not missed a beat. From environment-focused television programming<sup>5</sup> like NBC’s “Green Week” to “carbon neutral” sporting events like the Super Bowl and a NASCAR race to hybrid cars, eco-shaped water bottles, airline flights selling carbon offsets, energy-saving light bulbs and even eco-friendly make-up, everyone is getting into the act; including the Federal Government. In January 2007, President Bush signed Executive Order 13423, requiring federal agencies to procure goods and services that include “biobased, environmentally preferable, energy efficient, water-efficient, and recycled-content products”. Demand is driving new green technology as well. According to one news organization, 328 new “environmentally friendly” products entered the market last year, as compared to only five in 2002,<sup>6</sup> while trademark applications with the word “green” more than doubled between 2006 and 2007.<sup>7</sup>

But what do all these green terms and buzzwords actually mean? What kind of environmental benefits do these products and services actually offer? Can a water bottle properly call itself “eco” anything considering the waste its production, disposal and even recycling generates and the oil and other energy needed to produce it? Although 61% of Americans say they understand environmental product claims, nearly half the population

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<sup>3</sup> “Cone Releases 2008 Green Gap Survey: Americans Misunderstand Environmental Marketing Messages,” available at <http://www.coneinc.com/content1136>.

<sup>4</sup> CBS Evening News, *A Closer Look at “Green” Products*, May 18, 2008, available at <http://www.cbsnews.com/stories/2008/05/18/eveningnews/main4105507.shtml>.

<sup>5</sup> <http://www.sundancechannel.com/thegreen/#/aboutTheGreen:overview>

<sup>6</sup> CBS Evening News, *A Closer Look at “Green” Products*, May 18, 2008, available at <http://www.cbsnews.com/stories/2008/05/18/eveningnews/main4105507.shtml>.

<sup>7</sup> GreenBiz Staff, *Eco Trademarks Made Big Gains in 2007*, GREENBIZ.COM, Apr. 28, 2008, <http://www.greenbiz.com/news/2008/04/28/eco-trademarks-made-big-gains-2007>.

mistakenly believes that a product described as “green” or “environmentally friendly” by definition has a positive impact on the environment, while only 22% understand that these terms more often refer to an allegedly lesser negative environmental impact when compared with earlier versions or a competitors’ product.<sup>8</sup> In response to the marketing glut and the general confusion surrounding these “green” claims, the FTC recently announced its decision to conduct an early review and update of its “Guides for the Use of Environmental Marketing Claims”, commonly known as the “Green Guides.” Last revised in 1998, the current Guides do not address newer terms and policies used in the greener marketing of products and services; terms and services such as carbon offsets, renewable energy credits (“RECs”), and ever greener claims for packaging, textiles and building product. Many in industry as well as the government have expressed the belief that both advertisers and the public need updated, and in some cases more uniform guidance regarding the definitions of green terms (e.g. recyclable, life cycle analysis, sustainable) as well as new and updated examples of proper and improper use of various of these green marketing claims.

Below we provide an overview of (i) the general and specific green claims currently covered under the Green Guides, (ii) current marketplace realities and common use – and misuse – of many green claims, and (iii) a look at how the FTC may address some of these issues in its revisions to the Guides.

## **I. The Current Green Guides**

When the last green wave hit in the late 1980’s and early ’90’s, the FTC responded by issuing its first updated set of Green Guides to assist advertisers in formulating environmental claims the FTC would not consider false or deceptive under Section 5 of the FTC Act.<sup>9</sup> Although they do not have the force of law, the Guides provide a “safe harbor” for marketers who craft claims within their four corners. The Guides begin with an outline of four **[please confirm this is correct??]** overarching General Principles to consider when making environmental claims followed by more tailored guidance covering eight categories of specific claims covering, inter alia, general environmental benefit claims, use of degradable and associated terms, as well as use of compostable, recyclable, recycled content

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<sup>8</sup> “Cone Releases 2008 Green Gap Survey: Americans Misunderstand Environmental Marketing Messages,” <http://www.coneinc.com/content1136>

<sup>9</sup> Guides for the Use of Environmental Marketing Claims, 57 Fed. Reg. 36363 (Aug. 13, 1992).

claims, refillable claims, source reduction claims and ozone safe and ozone friendly claims.<sup>10</sup> As with all product or service claims, the advertiser must be able to substantiate all express and implied claims inherent in use of the “claim.” As always, the guidepost is the net commercial impression of the marketing piece as determined by the reasonable consumer, and substantiation requires “competent and reliable “evidence” the level of which will depend upon the nature and context of the claim.<sup>11</sup>

## **The Guides’ “General Principles”**

### **Principle #1: Qualifications and Disclosures<sup>12</sup>**

This General Principle mirrors that necessary for all advertising; that is the qualifications or disclosures may not negate the main claim and all material qualifications to the main claims must be disclosed in a manner sufficiently clear, prominent and understandable to prevent deception. In determining the sufficiency of disclosures, the FTC will consider factors include clarity of language, relative type size of the main claim and its qualifying disclosure, proximity to the claim being qualified, and an absence of contrary claims that could undercut effectiveness.

The Guides note that marketers should avoid use of overly broad, unqualified environmental benefit claims. For example, a marketer advertises its product as “eco-friendly” but does not explain in what way – does the claim relate to the manufacture, the use of the product, the packaging or to its disposal in some way? Without any qualifying language, a claim may be deceptive if it implies that the product or service does more to limit its environmental impact than the advertiser can properly support.

The National Advertising Division (the “NAD”), the voluntary regulatory arm of the Better Business Bureaus, addressed this specificity issue last May, in a competitive challenge to advertising claiming that the meat used for the advertiser’s dog food came from “family farmers and ranchers committed to *eco-friendly* practices and the humane treatment of farm animals” (emphasis added). Ultimately, the NAD determined that the claim was both sufficiently specific and reasonably supported given evidence of the dog food company and

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<sup>10</sup> *Id.* at Part 260.6, 260.7.

<sup>11</sup> See *Guides for the Use of Environmental Marketing Claims*, 16 C.F.R. Part 260.5 (1998), available at <http://www.ftc.gov/bcp/gnrule/guides980427.htm>.

<sup>12</sup> *Id.*, at 260.6(a).

its suppliers' environmental practices "including energy conservation, recycling of bedding and manure and participation in nonprofit organizations that work to improve and preserve the environment."<sup>13</sup>

**Principle #2: Distinction between Benefits of Product, Package and Service<sup>14</sup>**

Advertisers must present their claims in such a way as to make it clear whether they relate to the product, the packaging, and/or to the company's practices. In 1994, Oak Hill Industries, a company selling plastic tableware, became the subject of an FTC enforcement action for labeling its packages "recyclable" with the depiction of a three-chasing arrow symbol. The label did not specify whether it referred to the packaging or the product, so the FTC assumed it referred to both, neither of which actually came within the Guide's definition of "recyclable".<sup>15</sup>

**Principle #3: Overstatement of Environmental Attribute<sup>16</sup>**

A claim must not overstate an environmental attribute or benefit, either expressly or by implication, particularly if the real benefit is negligible. For example, if a manufacturer increases the recycled content of its packaging from 2% to 3% and advertises the package as "50% more recycled content than before", the claim is true, but it gives the consumer the false impression that the advertiser significantly increased the use of recycled material.<sup>17</sup> In 1994, the FTC brought an enforcement action against Mr. Coffee for a packaging claim that labeled its new filters "chlorine-free" and "good...for the environment" and that the "special manufacturing process whitens without elemental chlorine". The FTC found the claim false and misleading because there was still some chlorine in the process, just a lesser amount.<sup>18</sup>

In 1998, the NAD reviewed a challenge to an ad for nuclear energy, which the ad described as "environmentally clean" and produced "without polluting the environment." The NAD found the claim might suggest to the reasonable consumer that nuclear energy has no negative impact on the environment, which would be overly broad and inaccurate without

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<sup>13</sup> *Id.*, citing *Nestle Purina Pet Care Company, Pet Promise Dog & Cat Food*, NAD Case #4801 (May 16, 2008). [SARAH?]

<sup>14</sup> *Id.*, at 260.6(b)

<sup>15</sup> *The Oak Hill Industries Corp.*, 118 F.T.C. 44 (1994).

<sup>16</sup> 16 C.F.R. Part 260.6(c).

<sup>17</sup> *Id.*

<sup>18</sup> *Mr. Coffee, Inc.*, 117 F.T.C. 156 (1994)

qualifications. It recommended that the advertiser specify that the plants meet EPA standards under the Clean Water Act, rather than claiming they “don’t pollute the air”.<sup>19</sup>

#### **Principle #4: Comparative Claims<sup>20</sup>**

Advertisers must present comparative environmental claims in a way that makes the basis for the comparison clear. For example, if a water bottle ad claims to use “35% less plastic”, it must specify the basis for comparison, *e.g.* 35% less than a previous version of the bottle or than a competitor’s version. The NAD and FTC have not frequently addressed this issue to date.

### **The Specific Claims Covered by the Green Guides**

#### **General Environmental Benefit Claims<sup>21</sup>**

The specific claims section of the Guides lays out a series of environmental terms together with examples of proper and improper use. The “claims” section begins with a recommendation to avoid or qualify general claims like “environmentally friendly”, because such claims convey broad environmental benefits that more often than not cannot be adequately supported.

This section of the Guides also notes that **seals of approval, eco-seals and certifications from third-party organizations** imply that a product is environmentally superior to other products, requiring substantiation. The Guides further explain that any third-party certifying entity must be truly independent from the advertiser and must have “professional expertise in the area that is being certified.”<sup>22</sup> According to the Guides, “[t]hird-party certification does not insulate an advertiser from Commission scrutiny or eliminate an advertiser’s obligation to ensure for itself that the claims communicated by the certification are substantiated.”<sup>23</sup>

The FTC has brought a series of enforcement actions involving general environmental benefit claims such as “safe for the environment,” “environmentally friendly,”<sup>24</sup> “environmentally safe,”<sup>25</sup> “environmentally responsible,”<sup>26</sup> “ecologically safe”<sup>27</sup>

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<sup>19</sup> Comment, “Green Packaging Workshop Comment to FTC,” Project No. P084200 (May 19, 2008), citing *Nuclear Energy Institute, Nuclear Energy*, Case #3508 (Nov. 1, 1998).

<sup>20</sup> See 16 C.F.R. Part 260.6(d).

<sup>21</sup> See 16 C.F.R. Part 260.7(a).

<sup>22</sup> See FTC, “Complying with the Environmental Marketing Guides,” at 6.

<sup>23</sup> *Id.*

<sup>24</sup> *First Brands, Corp.*, 115 F.T.C. 1 (1992); *Archer Daniels Midland Company*, 117 F.T.C. 403 (1994).

and “practically non-toxic.”<sup>28</sup> In each case, the product or packaging at issue had some undisclosed harmful environmental side effect which rendered the main claim misleading.

In one case, the FTC held in 1992 that the advertiser’s labels claiming “no bleach added” in manufacturing coffee filters was substantiated, but the product’s claim to “environmentally friendly product and packaging” was too general and should be modified to provide specifics.<sup>29</sup> By way of contact, in an NAD case involving unbleached coffee filters, NAD found an “environmentally friendly” claim for unbleached coffee filters properly qualified where the claim explained, “no chloride is used to bleach [the filters], [so] no chlorine is dumped into our lakes and streams”.<sup>30</sup>

### ***Degradable, Biodegradable, and Photodegradable Claims***<sup>31</sup>

The Guides explain that the **unqualified** use of each of these claims requires competent and reliable scientific evidence that the *entire* product or package “will completely break down and return to nature, i.e., decompose into elements found in nature within a *reasonably short period of time* after customary disposal” (emphasis added). The FTC defines a “reasonably short period of time” based on where the product is customarily disposed. For example, a biodegradable claim for a shampoo – something that goes down the drain – may be substantiated if it will degrade in a wastewater treatment system. However, if a product is typically disposed of in a landfill – where most waste ends up – it will likely not satisfy the definition of “degradable,” because waste in landfills decomposes very slowly due to a lack of sunlight and oxygen. In response to criticism that this definition, stipulating a “short period of time after customary disposal”, is too vague, the FTC is currently considering revising this section to provide more specificity regarding the time frame for product decomposition.<sup>32</sup>

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<sup>25</sup> *DeMert & Dougherty, Inc.*, 116 F.T.C. 841 (1993); *Texwipe Company*, 116 F.T.C. 1169 (1993); *Chemopharm Laboratory Inc. d/b/a CP Industries*, 118 F.T.C. 1195 (1994); *Creative Aerosol Corp.*, 119 F.T.C. 13 (1995); *Safe Brands Corp., ARCO Chemical Company*, 121 F.T.C. 379 (1996).

<sup>26</sup> *G.C. Thorsen, Inc.*, 116 F.T.C. 1179 (1993).

<sup>27</sup> *Zipatone, Inc.*, 114 F.T.C. 376 (1991).

<sup>28</sup> *Orkin Exterminating Company, Inc.*, 117 F.T.C. 747 (1994).

<sup>29</sup> *Id.*, citing *Rockline, Inc., Natural Brew Coffee Filters*, Case #2918 (Nov. 1, 1991).

<sup>30</sup> Comment, “Green Packaging Workshop Comment to FTC,” Project No.P084200 (May 19, 2008), citing *A.V. Olsson Trading Company, Inc., If You Care Coffee Filters*, Case #2957 (June 1, 1992).

<sup>31</sup> See 16 C.F.R. Part 260.7(b).

<sup>32</sup> Request for Public Comment re: Guides for the Use of Environmental Marketing Claims, 72 Fed. Reg. 227, 66093 (Nov. 27, 2007).

Between 1992 and 1996, the FTC prosecuted eleven cases against companies for making false or deceptive claims regarding degradability – often because the product was disposed of in a landfill, where degradation time extends beyond the requisite “short period of time after customary disposal”.<sup>33</sup> For example, in 1993, the FTC settled charges against Mobil Oil Corp. for claims that its Hefty Trash Bags were “degradable”. Although the bags had been treated with a special chemical allowing degradation upon exposure to sunlight, since the bags were typically disposed of in incineration facilities or landfills, this was irrelevant and the claims were found to be deceptive.<sup>34</sup> Likewise, the NAD reviewed a challenge to a “biodegradable” claim for coffee filters and found that since the filters are customarily used once and then disposed of in landfills which inhibit the degradation process, the claim should be discontinued.<sup>35</sup>



### **Compostable Claims<sup>36</sup>**

A “compostable” claim requires competent and reliable scientific evidence that the product or packaging “will break down or become part of usable compost (e.g., soil-conditioning material, mulch) in a safe and timely manner in an appropriate composting program or facility, or in a home compost pile or device.” The FTC defines “timely manner” as “approximately the same time that it takes organic compounds like leaves” to compost. An unqualified claim compostable is deceptive if: (i) the package cannot be safely composted in a home compost pile, or (ii) the claim misleads consumers about the environmental benefit provided when the product is disposed of in a landfill.

The FTC has brought six actions against companies allegedly making false or deceptive claims that their products or packaging were “compostable.”<sup>37</sup> For example, in

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<sup>33</sup> See *RBR Productions, Inc.*, C-3696 (December 10, 1996); *BPI Environmental, Inc.*, 118 F.T.C. 930 (1994); *North American Plastics Corp.*, 118 F.T.C. 632 (1994); *Keyes Fibre Company*, 118 F.T.C. 150 (1994); *Archer Daniels Midland Company*, 117 F.T.C. 403 (1994); *LePage's, Inc.*, 118 F.T.C. 31 (1994); *AJM Packaging Corp.*, 118 F.T.C. 56 (1994); *Mobil Oil Corp.* 116 F.T.C. 113 (1993); *First Brands, Corp.*, 115 F.T.C. 1 (1992); *American Enviro Products, Inc.*, 115 F.T.C. 399 (1992); *RMED International, Inc.*, 115 F.T.C. 572 (1992).

<sup>34</sup> *Mobil Oil Corp.* 116 F.T.C. 113 (1993).

<sup>35</sup> Comment, “Green Packaging Workshop Comment to FTC,” Project No.P084200 (May 19, 2008), citing *Andex Corp., Gourmay Premium Filters*, Case #2974 (June 1, 1992).

<sup>36</sup> See 16 C.F.R. Part 260.7(c).

1994, the FTC settled charges against Chinet paper plates for making several unsubstantiated and misleading claims, including a claim that its plates were “compostable” in municipal solid waste composting facilities. The FTC considered this misleading, since at the time there were only a few of these facilities available nationwide.<sup>38</sup>

### ***Recyclable Claims***<sup>39</sup>

Recyclability has been one of the most controversial sections of the Guides, with many arguing that the majority of such marketing claims are misleading. Under the Green Guides, a product or its packaging may only be marketed as “recyclable” if it can be “collected, separated or otherwise recovered from the solid waste stream for reuse” through an established recycling program. An unqualified “recyclable” claim is acceptable only if the entire product or package, excluding minor incidental components, is recyclable. Generally, the claim must specify whether it applies to the packaging, the product or both. If a product or package is made of both recyclable and non-recyclable components, the claim should be qualified to reflect that. The claim should also provide a qualification if the availability of recycling programs and collection sites is limited. If a product is not accepted at recycling facilities due to its size or shape it may not be labeled “recyclable.”

Marketers should avoid positioning a chasing arrows symbol (the kind used by the Society of Plastics Industry to specify the type of plastic) in close proximity to the name and logo of a product, because such use may be deemed a recyclability claim.

The FTC has brought eleven actions involving “recyclable” claims, often because even though a product or package could technically be recycled, there were only a few facilities nationwide that could recycle the product or because the term did not specify whether it referred to the package or the product.<sup>40</sup> For example, in 1994 the FTC settled charges against Chinet paper plates for making several unsubstantiated and misleading

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<sup>37</sup> *Keyes Fibre Company*, 118 F.T.C. 150 (1994); *Archer Daniels Midland Company*, 117 F.T.C. 403 (1994); *Mobil Oil Corp.*, 116 F.T.C. 113 (1993); *RMED International, Inc.*, 115 F.T.C. 572 (1992); *American Enviro Products, Inc.*, 115 F.T.C. 399 (1992); *First Brands, Corp.*, 115 F.T.C. 1 (1992).

<sup>38</sup> *Keyes Fibre Company*, 118 F.T.C. 150 (1994).

<sup>39</sup> 16 C.F.R. Part 260.7(d)

<sup>40</sup> *Safe Brands Corp., ARCO Chemical Company*, 121 F.T.C. 379 (1996); *RBR Productions, Inc.*, C-3696 (December 10, 1996); *Creative Aerosol Corp.*, 119 F.T.C. 13 (1995); *White Castle System, Inc.*, 117 F.T.C. 1 (1994); *Mr. Coffee, Inc.*, 117 F.T.C. 156 (1994); *America's Favorite Chicken Company*, 118 F.T.C. 1 (1994); *Oak Hill Industries Corp.*, 118 F.T.C. 44 (1994); *LePage's, Inc.*, 118 F.T.C. 31 (1994); *AJM Packaging Corp.*, 118 F.T.C. 56 (1994); *Keyes Fibre Company*, 118 F.T.C. 150 (1994); *Amoco Foam Products Company*, 118 F.T.C. 194 (1994);



claims, including a claim that its products were “recyclable” even though there were virtually no collection facilities that accepted the paper plates. The NAD has also reviewed several “recyclable” claims, many of which claims were immediately discontinued due to a lack of substantiation.<sup>41</sup>

### ***Recycled Content Claims***<sup>42</sup>

According to the Guides, a “recycled content” claim may only be used to describe materials that have been recovered or diverted from the solid waste stream either during the manufacturing process (pre-consumer) or after consumer use (post-consumer). If the material was diverted during the manufacturing process, the company must be able to substantiate that it would have otherwise entered the solid waste stream. For example, the Guides explain if a manufacturer collects left over scraps of raw material from the original manufacturing process and combines them with virgin raw materials to create the same product, the advertiser cannot claim it contains “recycled content” since the scraps are normally reused within the industry.

As with “recyclable,” unqualified claims of “recycled content” are acceptable only if the entire product or package, “excluding minor, incidental components”, is made of recycled material. For products or packages made in part from recycled material, the claim should be qualified accordingly to stipulate the amount, by weight, of the recycled content. Products that contain used, reconditioned, or remanufactured components must likewise qualify their claims.

The FTC has only brought one action involving a “recycled” content claim. In that instance, a box of coffee filters was labeled with the claim “recycled paper”, without specifying whether it referred to the package, filters or both, and since the coffee filters were not made from recycled paper, the claim was found deceptive.<sup>43</sup>



The NAD has thus far evaluated eight cases involving claims of “recycled” material, with many more on the horizon. In five of the cases, the claims stated the exact percentage

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<sup>41</sup> See

<sup>42</sup> 16 C.F.R. Part 260.7(e).

<sup>43</sup> *Mr. Coffee, Inc.*, 117 F.T.C. 156 (1994).

or a range of the percentage of recycled material in the product or package. According to the NAD, these claims were all properly substantiated.<sup>44</sup> In one case, the labeling claim did not specify recycled content, but the NAD found the claim properly substantiated because the supplier provided data showing that the board stock contained 90% post-consumer waste.<sup>45</sup> In the remaining two cases, the NAD recommended that claims stating “The carton is made from recycled material” should be qualified to specify the percentage of recycled material used.<sup>46</sup>

### Source Reduction Claims<sup>47</sup>

According to the Green Guides, claims that a product or package has a lower weight, volume or toxicity should be qualified to avoid confusion over the amount of the source reduction or the basis of the comparison.

In August 2006, the FTC settled charges against the manufacturers of FuelMAX and SuperMAX products for making false claims of increased gas mileage (by 27%), reduced fuel consumption and reduced emissions.



The FTC alleged that the product’s “magnetic fuel saver” technology did not do any of these things. With the increase in gas prices, fuel-saving claims represent one of the most common recent false advertising claims, according to the FTC.<sup>48</sup>

### Refillable Claims<sup>49</sup>

Under the Guides, in order to claim a container is “refillable,” the Advertiser must have a system in place which provides for “collecting and returning the package for refill or the later refill of the package by consumers with a product subsequently sold in another

<sup>44</sup> Comment, “Green Packaging Workshop Comment to FTC,” Project No.P084200 (May 19, 2008), citing *Confab, Inc., Today’s Choice Paper Towels*, Case #2952 (May 1, 1992), *Fort Howard Corp., Green Forest Paper Towels*, Case #2948 (Apr. 1, 1992), *Statler Industries, Inc., The Tree-Free Co. Bathroom Tissue*, Case #2945 (Apr. 1, 1992), *Colgate-Palmolive Co., Palmolive Dishwashing Liquid*, Case #2912 (Nov. 1, 1991), *Lever Bros. Co., Sunlight Hand Dishwashing Liquid*, Case #2909 (Nov. 1, 1991).

<sup>45</sup> *Id.*, citing *3M, Scotch-Brite No Rust Wool Soap Pads*, Case #2955, (May 1, 1992).

<sup>46</sup> *Id.*, citing *Andex Corp.*, Case #2974 (June 1, 1992), *Mr.Coffee, Inc., Mr. Coffee Filters*, Case #2925 (Dec. 1, 1991).

<sup>47</sup> 16 C.F.R. Part 260.7(f).

<sup>48</sup> *FTC v. Int’l Research & Dev. Corp.* (2006) [FTC File No. 042-3138, Case No.: 04C 6901].

<sup>49</sup> 16 C.F.R. Part 260.7(g).

package.”<sup>50</sup> The package must not leave it up to the consumer to find new ways to refill it – i.e., “a gallon spring water jug should not be labeled ‘refillable’ just because consumers could refill the jug of water.”<sup>51</sup> Although the Green Guides do not define the term “reusable,” the FTC has indicated that “as long as [the] product can be used again in some way,” it is unlikely to be deceptive.<sup>52</sup> The Green Guides suggest that if a package is labeled “refillable x times”, then the manufacturer must have the capability to refill returned containers and show that the container will withstand being refilled at least x times.<sup>53</sup>

Although the FTC and NAD have not considered any actions regarding “refillable” claims, the FTC has provided the following examples: (i) a detergent bottle may be labeled ‘refillable’ if the manufacturer sells a concentrated refill for the detergent bottle, and (ii) baby wipes sold in foil wrap may be labeled a “refill” if the manufacturer also sells wipes in a container where the refill can be placed.<sup>54</sup>

### ***Ozone Safe and Ozone Friendly Claims***<sup>55</sup>

According to the Guides, a claim that a product or its package is “ozone safe” or “ozone friendly” is deceptive if it contributes to the depletion of the stratospheric (upper atmosphere) ozone layer or to the formation of ground-level ozone. For example, if a hair gel contained volatile organic compounds (VOCs), which create smog, an “ozone friendly” label would be deceptive. Even if a product claims to be “CFC-Free”, it must not contain any ozone-depleting substances, including VOCs and HCFCs.

The FTC has brought three enforcement actions for “ozone safe” or “ozone friendly” claims against ads for aerosol hair spray and cleaning products, which either contained Trichloroethane or HCFC, both of which are ozone-depleting chemicals.<sup>56</sup> The NAD found that an advertising claim describing spray paint as “no chlorofluorocarbons” was substantiated where the advertiser stated that its propellants are “hydrocarbons,” which are not ozone-depleting chemicals.<sup>57</sup>

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<sup>50</sup> See FTC, “Complying with the Environmental Marketing Guides,” at 14.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> 16 C.F.R. Part 260.7(h).

<sup>56</sup> See *Jerome Russell Cosmetics, USA, Inc.*, 114 F.T.C. 514 (1991); *Tech Spray, Inc.*, 115 F.T.C. 433 (1992); *PerfectData Corp.*, 116 F.T.C. 769 (1993)

<sup>57</sup> Comment, “Green Packaging Workshop Comment to FTC,” Project No. P084200 (May 19, 2008), citing *The Sherwin-Williams Co., Krylon Rust Tough Spray Paint*, Case #2970 (June 1, 1992).

## II. The Post Guides Greening of America

A whole new “green” vocabulary has emerged in the marketplace since the Green Guides were last updated in 1998. To help it review and analyze this modern reality in anticipation of its revisions to the Guides, the FTC held a series of workshops in the past year focusing on few of the most prevalent and pressing environmental claims practices and procedures under the general headings of carbon offsets and credits, green packaging claims and green textile and building claims. **[Sarah – is this an accurate titling more or less of the workshops?]** In point III. below, we summarize some of the information learned and public comments submitted in support of these workshops as well as a sense of where the FTC may be heading.

The need for updated guides has become increasingly clear to many given the proliferation of environmental claims lacking in universally understood definitions, which have created concern among regulators and consumer advocacy groups as well as among many companies looking for consistency and guidance. These groups have also become more sensitive to problems inherent in “greenwashing,” a term popularized by the consumer advocacy group TerraChoice in a seminal article on the subject entitled the “Six Sins of Greenwashing.” **[Sarah – you will have to move the picture of the article. I couldn’t do that; also, is this actually the title?]** Greenwashing is essentially the use of incomplete claims that tell only part of the environmental story or green advertising claims which are otherwise overbroad or insufficiently supported. According to a survey reported by TerraChoice in the article, of 1,018 consumer products/packaging TerraChoice identified making green claims, “all but one made claims that are demonstrably false or that risk misleading intended audiences.”<sup>58</sup> Based on these results, TerraChoice identified its six common “sins of greenwashing” outlined below.<sup>59</sup> Although these “sins” are in many cases not covered under the FTC Guides, they often flag substantiation issues that are covered. Whether denominated as sin avoidance or merely as “best practices” which all agree are crafting carefully tailored claims geared to their available substantiation, most agree that avoiding greenwashing will help advertisers build credibility with increasingly distrustful and

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<sup>58</sup> *The “Six Sins of Greenwashing”*: A Study of Environmental Claims in North American Consumer Markets (2007) at <http://www.terrachoice.com/Home/Six%20Sins%20of%20Greenwashing>.

<sup>59</sup> *Id.*: the following “sins” are taken directly from <http://www.terrachoice.com/Home/Six%20Sins%20of%20Greenwashing>.

savvy consumers. Further, the concepts behind the “six sins” most certainly provide for marketer and consumer alike a useful guide to the analysis and expression of environmental marketing claim.

- **The Sin of the Hidden Trade-Off** (“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?” “Does the alleged benefit itself create negative consequences?”)

Although hidden trade-offs are not directly covered under the Green Guides, this issue does arise in the context of general environmental benefit claims that are unqualified and unsubstantiated. For example, in an NAD case last year, Panasonic print and television ads claimed its plasma televisions were “environmentally friendly” because unlike LCD televisions they contained neither lead nor mercury. NAD recommended that the company discontinue the use of that comparative claim given that plasma TV’s consume significant amounts of power, more so than comparably sized LCD televisions.<sup>60</sup> In another case in 1997, the NAD considered claims that a recreational vehicle refrigerator was “CFC-free” and “environmentally friendly.” However, the refrigerator company had merely substituted CFCs in its product for HCFCs (hydro chlorofluorocarbons instead of chlorofluorocarbons), so the NAD recommended the company disclose this trade-off.<sup>61</sup>

- **The Sin of No Proof** (“e.g. Personal care products that claim not to have been tested on animals, but offer no evidence or certification”). **Sarah – where are these examples coming from – the article, or from you? I am trying to understand the quotation marks.]**

Many FTC and NAD cases deal with the issue of substantiation, which the “sin of no proof” addresses. In a recent case, a motorcycle company advertised its motorcycle as “the world’s first production zero-emission battery powered plug-in electric motorcycle”. The NAD noted in its decision that the rise of the “green” movement had “resulted in an influx of

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<sup>60</sup> Comment, “Green Packaging Workshop Comment to FTC,” Project No.P084200 (May 19, 2008), citing *Panasonic Corporation of North America, Large-screen plasma display panel televisions*, Case #4697 (07/16/07).

<sup>61</sup> *Id.*, citing *Norcold, Inc., Norcold Refrigerators*, case #3416 (Apr. 1, 1994).

new products and product innovations”, but in this case, the evidence did not support the company’s claims, so the NAD recommended it discontinue them.<sup>62</sup>

- **The Sin of Vagueness** (“If the marketing claim doesn’t explain itself (‘here’s what we mean by ‘eco’ ...’), the claim is vague and meaningless. Similarly, watch for other popular vague green terms: ‘non-toxic’, ‘all-natural’, ‘environmentally-friendly’, and ‘earth-friendly.’”)

Many FTC and NAD actions already deal with the issue of vagueness, often as it relates to general benefit claims lacking in qualifications and substantiation. In May 2008, the NAD reviewed a laundry detergent company’s claim that its product was “more sensible for the environment”. The NAD recommended that the advertiser discontinue the claim because it could not support the proposition that its product was any better than competing brands for the environment.<sup>63</sup> In another case in 1993, the NAD heard claims relating to Sekisui’s Supreme Brand and Cohere Sealing Tape, which advertised itself as “environmentally friendly, clean, clear and non-toxic”.<sup>64</sup> Sekisui did not present any data to support these claims and informed NAD that it would discontinue the advertising in question.

- **The Sin of Irrelevance** (“e.g. CFC-free oven cleaners, CFC free shaving gels, CFC-free window cleaners, CFC-disinfectants. Could all of the other products in this category make the same claim?”)

The NAD and FTC have not directly dealt with this issue, but the NAD has long held that a claim must have consumer relevance. In *Tyson Foods, Inc.*, for example, NAD required the Advertisers to modify its claim that its chickens parts has “no hormones or

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<sup>62</sup> Comment, “Green Packaging Workshop Comment to FTC,” Project No.P084200 (May 19, 2008), citing *Brammo Sports Eertia-brand motorcycle*, Case #4828 (4/16/2008).

<sup>63</sup> Comment, “Green Packaging Workshop Comment to FTC,” Project No.P084200 (May 19, 2008), citing *Church & Dwight Co., Inc., Arm & Hammer Essentials Liquid Laundry Detergent*, Case #4805 (05/16/08).

<sup>64</sup> Comment, “Green Packaging Workshop Comment to FTC,” Project No.P084200 (May 19, 2008), citing *Sekisui TA Industries, Inc., Supreme Brand and Cohere Brand Sealing Tapes*, Case #3057 (10/1/93).

steroids added,” since all chicken producers were prohibited by law from adding hormones or steroids.<sup>65</sup>

- **The Sin of Fibbing** (“e.g. Shampoos that claims to be “certified organic”, but for which our research could find no such certification.”)

While dealing with certification issues only in passing – although the revised Green Guides may well address this topic in greater depth – the NAD and FTC have addressed the “fibbing” issue in claims that overstate environmental benefits. For example, the NAD determined that a packaging claim stating that using coffee filters “will have a positive effect on our environment” was overly broad and ignored the reality that the “manufacture and use of the product must, by necessity, have some adverse environmental consequences including depletion of natural resources, energy consumption, and addition to solid waste”. The NAD held that the claims should either be discontinued or modified.<sup>66</sup>

- **The Sin of the Lesser of Two Evils** (e.g. Organic tobacco. “Green” insecticides and herbicides”)

This concept arose in the Panasonic case mentioned above, based on comparative advertising claiming that Panasonic plasma televisions were lead and mercury free on the basis of which the advertising suggested they were “environmentally friendly”. The NAD recommended that the company discontinue the use of that claim because although they don’t contain mercury or lead, plasma TV’s use far more energy than do LCD televisions.<sup>67</sup>

In addition to the generalized greenwashing practices highlighted above, below we identify some additional areas and claims which help highlight some of the current confusion faced by marketers and consumers alike.

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<sup>65</sup> *Tyson Foods, Inc.*, NAD Case # 3808 (8/7/07).

<sup>66</sup> *Id.*, at *A.V. Olsson Trading Co., Inc., If You Care Coffee Filters*, Case #2957 (June 1, 1992).

<sup>67</sup> *Id.*, at *Panasonic Corporation of North America, Large-screen plasma display panel televisions*, Case #4697 (07/16/07).

- **Carbon Offset Claims and Practices**

With “carbon offsets”, the consumer or marketer pays an organization to reduce its “carbon footprint.” This allows carbon creators to offset the amount of carbon their actions spew into the atmosphere, for example counterbalancing a flight or hotel stay with some other activity that reduces carbon in the atmosphere – such as planting trees. Although the carbon offset market exceeded an estimated \$10 million dollars last year and continues to expand, it has been plagued with credibility problems given the lack of a standardized method for determining how to calculate offsets. This is in part because the calculation involves considerable guesswork – e.g. about the energy cost of planting the tree, the future growth of the tree, how much carbon actually needs to be displaced for a given activity. In the end, the carbon offset is an “abstract and often unprovable promise to reduce emissions.”<sup>68</sup> The FTC has made this category of claims a priority and dedicated its first workshop to discussing the topic, as further discussed below.

- **“Eco Friendly” For All Manner of Products**

In April of 2008, for example, Dr. Bronners, a line of beauty products known for its organic ingredients and long used by environmentally-conscious outdoorsmen, filed suit in California Superior Court against 13 personal-care brands, it calls “organic cheaters”, including Avalon, Jason, Kiss My Face and Estee Lauder. Dr. Bronners alleged that the companies’ claims of “all natural”, “organic” and “eco friendly” were “deceptive and false advertising” because the products contain petro-chemicals. The defendants called for a clearer legal definition of what constitutes “eco friendly.”<sup>69</sup>

- **Hybrids**

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<sup>68</sup> Jesse Ellison, *Save The Planet, Lose The Guilt*, NEWSWEEK, Jun. 28, 2008, also at <http://www.newsweek.com/id/143701/output/print>.

<sup>69</sup> *Id.*; *All One God Faith, Inc., D/B/A/ Dr. Bronner’s Magic v. The Hain Celestial Group, Inc.* Case No. CGC-08-474701 (filed Apr. 28, 2008); see also [http://www.drbronner.com/usda\\_organic\\_body\\_care.html](http://www.drbronner.com/usda_organic_body_care.html).



As gas prices continue to climb, the market for hybrid cars has exploded. But what does the term “hybrid” actually mean? Generally, consumers buy them because they expect the car to get better gas mileage. Yet according to one recent survey, half of all hybrid vehicles currently on the market are no more fuel-efficient than their non-hybrid counterparts.<sup>70</sup> According to *Newsweek*, these “hollow hybrids” “have neither the hybrid technology – a battery that boosts the combustion engine – nor the efficiency to warrant the designation.”<sup>71</sup>

**[Sarah – in addition to moving this picture, please make sure your footnotes still work. They may now have some “ids” before the main source for example because of some moving around.]**

It is in light of this rapidly evolving marketplace, that the FTC is considering it updates and revisions to the Guides.



### III. Possible Updates to the Green Guides

As a response to the market proliferation of environmental claims, the FTC signaled its intention last November to begin review of the current Green Guides a year earlier than scheduled. The FTC called for comments regarding general issues any updated Guides should address as well as specific terms that should be covered and how they might be substantiated.<sup>72</sup> To further help it review and analyze the modern green reality, the FTC has hosted a series of workshops or “public meetings” beginning in January 2008, to provide a forum for members of industry, consumer groups and environmental advocates to examine developments in (i) carbon offsets and renewable energy certificates (RECs)<sup>73</sup> claims, (ii) green packaging claims, and (ii) green building and textile claims, as well as consumer perception of such claims.

<sup>70</sup> See Jesse Ellison, *Save The Planet, Lose The Guilt*, NEWSWEEK, Jun. 28, 2008, also at <http://www.newsweek.com/id/143701/output/print> (citing a study by the Union of Concerned Scientists).

<sup>71</sup> *Id.*

<sup>72</sup> Request for Public Comment re: Guides for the Use of Environmental Marketing Claims, 72 Fed. Reg. 227, 66093 (Nov. 27, 2007).

<sup>73</sup> See FTC, “Reporter Resources: The FTC’s Green Guides” at <http://www.ftc.gov/opa/reporter/greengds.shtm> (“RECs are created when renewable power generators sell their electricity as conventional electricity, and then sell the environmental attributes of their power separately through a certificate.”).

We identify below some of the issues the FTC is wrestling with as it considers whether and to what extent it will revise the Green Guides, including information gleaned from the workshops and the public comments submitted. FTC Commissioner Rosch has explained that the Commission received more than 150 comments from interested parties expressing a consensus that the Guides are important to both consumers and industry.<sup>74</sup> While many welcome the FTC's efforts in this area, several comments warn the FTC against making "major changes" to the Guides that would include "strict requirements" as to what environmental claims can be made and how they can be substantiated, cautioning that this approach could have a chilling effect on advertisers and dissuade them from making environmental claims, which would deprive consumers of valuable information.<sup>75</sup>

### **The First Workshop: Carbon and Renewable Energy Claims**

The first Green Guides workshop brought together experts from environmental groups, industry, government and academia to address the "technical and marketing issues" posed by carbon offsets and RECs and the meaning of increasingly common, related terms, like "carbon neutral" and "carbon footprint".<sup>76</sup> In its press release announcing the workshop, the FTC defined "carbon offsets" as "projects designed to reduce greenhouse gas emissions in one place in order to counterbalance or 'offset' emissions that occur elsewhere."<sup>77</sup> Two fundamental principles explain the success of these offsets: (i) greenhouse gases circulate evenly around the earth, so carbon offset vendors can maximize their emission reductions by finding the biggest bang for their buck, i.e., the cheapest carbon reduction projects around the world, and (ii) by putting a price on emissions, companies are more likely to realize the cost of emissions and are more likely to try to reduce them.<sup>78</sup> A range of carbon offset projects have emerged over the last few years, including landfill methane collection, tree planting,

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<sup>74</sup> J. Thomas Rosch, Commissioner, FTC, Keynote Address at the American Conference Institute's Regulatory Summit for Advertisers and Marketers: Responsible Green Marketing (June 18, 2008).

<sup>75</sup> See Adonis E. Hoffman, Jeffrey Perlman, Daniel Jaffe, & Ronald R. Urbach, Am. Ass'n of Adver. Agencies, Am. Adver. Fed'n & the Ass'n of Nat'l Advertisers, "Comments Submitted for the FTC Green Guides Regulatory Review," 16 CFR Part 260, Project No. P954501 at 7.

<sup>76</sup> Deborah Platt Majoras, Chairman, FTC, Opening Remarks at the FTC's Carbon Offset Workshop (Jan. 8, 2008) at 4.

<sup>77</sup> Press release, "FTC Reviews Environmental Marketing Guides, Announces Public Meetings: First Workshop is January 8, 2008 on Carbon Offsets and Renewable Energy Certificates" (Nov. 27, 2007), available at <http://www.ftc.gov/opa/2007/11/enviro.shtm>.

<sup>78</sup> Katherine Hamilton, Carbon Project Manager, Ecosystem Marketplace, "Panel on Current Practices for Carbon Offsets and RECs at the FTC's Carbon Offset Workshop" (Jan. 8, 2008), available at [http://htc-01.media.globix.net/COMP008760MOD1/ftc\\_web/FTCindex.html#Jan8\\_08](http://htc-01.media.globix.net/COMP008760MOD1/ftc_web/FTCindex.html#Jan8_08).

and the destruction of industrial gas. In her opening remarks, Chairman Deborah Platt Majoras signaled that carbon offsets may be treated as claims for a reduction of greenhouse gas emissions, because they “purportedly represent measurable reductions in greenhouse emissions.”<sup>79</sup> Carbon offsets will have to show the “additionality” of the emissions reduction by measuring the difference in emissions between a “no-project” scenario or “business-as-usual” baseline and a scenario that takes into account the carbon offset project.<sup>80</sup>

In addition, the workshop focused on Renewable Energy Credits, also known as Green tags, Renewable Energy Certificates or Tradable Renewable Certificates (TRCs), which are tradable commodities that represent proof that one megawatt-hour (MWh) of electricity was generated from a renewable energy source.<sup>81</sup> They originated in the mid-1990’s, when California first began developing a renewable portfolio standard – a policy mandating that utility companies use a certain percentage of renewable energy.<sup>82</sup> Essentially, they are created “when renewable power generators sell their electricity as conventional electricity, and then sell the environmental attributes of their power separately through a certificate.”<sup>83</sup> This solves the problem of intermittency. Since wind and solar energy do not operate all the time, depending on how windy or sunny it is, a consumer can compensate for this by purchasing the exact number of RECs needed to offset her given energy use. RECs allow consumers to purchase conventional electricity from their utility, and then separately purchase RECs online to subsidize renewable energy elsewhere, a concern particularly relevant to those consumers who want to support renewable energy but do not have the option.<sup>84</sup> Although REC sellers often claim the same environmental benefits as carbon offsets, they generally do not provide the same “additionality” of an offset project.

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<sup>79</sup> Deborah Platt Majoras, Chairman, FTC, Opening Remarks.... (Jan. 8, 2008) at 3-4.

<sup>80</sup> Aimee Barnes and Laura H. Kosloff, “Comment of EcoSecurities Re: Carbon Offset Workshop,” Project No.P074207 (Jan. 25, 2008).

<sup>81</sup> [http://en.wikipedia.org/wiki/Green\\_tags](http://en.wikipedia.org/wiki/Green_tags)

<sup>82</sup> Lori Bird, Senior Energy Analyst, National Renewable Energy Laboratory, “Panel on Current Practices for Carbon Offsets and RECs at the FTC’s Carbon Offset Workshop” (Jan. 8, 2008).

<sup>83</sup> Press release, “FTC Reviews Environmental Marketing Guides, Announces Public Meetings...” (Nov. 27, 2007), available at <http://www.ftc.gov/opa/2007/11/enviro.shtm>.

<sup>84</sup> Lori Bird, Senior Energy Analyst, National Renewable Energy Laboratory, “Panel on Current Practices for Carbon Offsets and RECs at the FTC’s Carbon Offset Workshop” (Jan. 8, 2008), available at [http://htc-01.media.globix.net/COMP008760MOD1/ftc\\_web/FTCindex.html#Jan8\\_08](http://htc-01.media.globix.net/COMP008760MOD1/ftc_web/FTCindex.html#Jan8_08).

Accordingly, the environmental benefits are less clear because there is no evidence that the pollution from a non-renewable energy source has been displaced.<sup>85</sup>

There are two types of REC markets: (i) the rapidly growing compliance markets, which now exist in 25 states (and Washington, D.C.) and mandate that a certain portion of a utility's portfolio consists of renewable energy (i.e. in California, utilities must increase their renewable portfolio by 1% each year until reaching 20% by 2010<sup>86</sup>), and (ii) voluntary markets. Approximately 25% of U.S. utilities offer a "Green Power" program, particularly in the northeast, which offers either RECs or actual electricity bundled with the REC.<sup>87</sup> All told, the RECs market is growing at a rate of about 50% annually.<sup>88</sup>

### **Substantiation Problems**

At the workshop, Chairman Majoras addressed the difficulty in defining and substantiating carbon offset and REC claims. She noted that they have a "heightened potential for deception" because (i) they are intangible goods, so it is harder for consumers to verify that they have received the product they paid for, (ii) many carbon offset projects and RECs occur in places remote from consumers (i.e. planting trees in another country or subsidizing wind-powered energy across the U.S.), and (iii) it is difficult to confirm that the project actually reduced the amount of atmospheric carbon claimed and that this reduction would not have occurred in the absence of the purchase.<sup>89</sup> The FTC has indicated that it plans to deal with substantiation issues in the carbon market in the same way it has dealt with other environmental claims. Carbon offset and REC marketers must be able to substantiate all express and implied claims with competent and reliable evidence, so that if a marketer claims the carbon offset project will reduce carbon by a certain amount, it must be able to support those figures.<sup>90</sup> This begs the question of how this can be accomplished. Further, these claims may be difficult to crystallize, particularly given the lack of uniform definitions and standards in the carbon market.

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<sup>85</sup> Aimee Barnes and Laura H. Kosloff, EcoSecurities, "Comment Re: Carbon Offset Workshop," Project No.P074207 (Jan. 25, 2008).

<sup>86</sup> <http://www.cpuc.ca.gov/PUC/energy/electric/renewableenergy/index.htm>.

<sup>87</sup> Lori Bird, Senior Energy Analyst, National Renewable Energy Laboratory, "Panel on Current Practices for Carbon Offsets and RECs at the FTC's Carbon Offset Workshop" (Jan. 8, 2008).

<sup>88</sup> *Id.*

<sup>89</sup> Deborah Platt Majoras, Chairman, FTC, Opening Remarks at the FTC's Carbon Offset Workshop (Jan. 8, 2008) at 3-4.

<sup>90</sup> *Id.* at 5.

## Consumer Concerns

Foremost on the FTC's agenda for revising the Guides is to understand consumer perception of environmental claims, so that it may shape the Guides to better reflect those perceptions. Katherine Hamilton, the Carbon Project Manager at Ecosystem Marketplace, a leading source of information on emerging environmental markets, reported on a poll of carbon credit suppliers to highlight specific consumer confusion and concern in this arena:<sup>91</sup>

**1. Are carbon offsets or RECs *additional*?** The poll revealed suppliers' belief that their customers were concerned with the "additionality" of the carbon credit, that is evidence that the project would not have happened without the carbon market.

**2. Are they certified?** Given recent "exposes" of the carbon market in the mainstream media, suppliers reported that customers want certified "credit," assurance that they are paying for legitimate carbon offset projects.

**3. Are credits being double counted?** Suppliers also reported their clients' concerns that purchased credits were being double-counted or resold to another consumer, which relates back to the question of "additionality."

**4. Are the projects actually producing those credits?** Consumers have expressed concern whether the carbon offset projects were actually reducing the anticipated amount of carbon emissions.

**5. Are there hidden trade-offs?** Some consumers worry that the carbon offset projects may have unanticipated negative consequences on the environment.

These are precisely the type of questions the FTC's Hampton Newsome, of the FTC's Division of Enforcement, indicated that the FTC is looking to answer in order to help formulate any Guide revision:<sup>92</sup> Toward that end, Mr. Newsome posited the following:

**1. How to calculate a consumer's greenhouse gas emissions from everyday activities.**

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<sup>91</sup> Katherine Hamilton, Carbon Project Manager, Ecosystem Marketplace, "Panel on Current Practices for Carbon Offsets and RECs at the FTC's Carbon Offset Workshop" (Jan. 8, 2008), available at [http://htc-01.media.globix.net/COMP008760MOD1/ftc\\_web/FTCindex.html#Jan8\\_08](http://htc-01.media.globix.net/COMP008760MOD1/ftc_web/FTCindex.html#Jan8_08).

<sup>92</sup> Hampton Newsome, Division of Enforcement, FTC, Moderator of the "Technical Substantiation Issues" Panel at the FTC's Carbon Offset Workshop (Jan. 8, 2006).

There is currently no standard method for calculating what has been called a “carbon footprint”, which leaves room for ambiguity in the meaning of environmental claims and benefits.

## **2. How to calculate emission reductions from one’s offset activities.**

Derik Broekhoff, director of the Greenhouse Gas Protocol Team at the World Resources Institute, emphasized that when calculating the overall emissions reduction associated with a project, one must account for *all* emissions associated with the product, including its production. For example, if use of biomass fuel produces zero carbon emissions, but the production of that fuel *did* produce emissions, this must be factored into the final emissions or offset calculation. Further, the environmental benefits of REC purchases may vary dramatically depending on the geographic location of the renewable energy source, because different regions of the United States use varying sources of energy; to displace a coal plant in Washington, for example, would reduce significantly more greenhouse gases than displacing a cleaner source of energy in Vermont.<sup>93</sup>

## **3. How to track carbon offsets and RECs.**

Carbon offsets and RECs often involve multiple transactions and a variety of different entities, so inadequate tracking may cause sellers to inadvertently sell the same offsets twice.<sup>94</sup> Some experts have indicated that the FTC should require that carbon projects monitor the emissions reductions from a calculated “baseline”.

## **4. How to verify that the emissions reductions are not being double counted.**

Jim Sullivan from the EPA noted that since there is no national registry tracking emissions reductions or offset projects, a marketer might want to “make sure that there’s some sort of serialization of the ton”, to avoid double counting.<sup>95</sup>

## **5. How to verify that the carbon reduction was *additional* and would not have happened anyway.**

One carbon offset vendor noted that “since RECs have no requirements for additionality (and since additionality can require significant expenditures of time and

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<sup>93</sup> Aimee Barnes and Laura H. Kosloff, “Comment of EcoSecurities Re: Carbon Offset Workshop,” Project No.P074207 (Jan. 25, 2008).

<sup>94</sup> Deborah Platt Majoras, Chairman, FTC, Opening Remarks at the FTC’s Carbon Offset Workshop (Jan. 8, 2008) at 5-6.

<sup>95</sup> Jim Sullivan, Director, EPA’s Climate Leaders Program, Panelist on the “Technical Substantiation Issues” session of the FTC’s Carbon Offset Workshop (Jan. 8, 2006).

money), RECs can generally be sold more cheaply than carbon offsets. Subsequently, price-conscious consumers who are unaware of this key difference may erroneously gravitate toward RECs to offset their emissions.”<sup>96</sup> Experts have urged the FTC to require vendors to substantiate that carbon offsets projects or the use of renewable energy would not have happened in the absence of the consumer’s purchase of these goods, because otherwise the environmental benefit claim may be misleading.

### **The Submitted Comments**

Carbon offset and REC vendors, environmental groups, industry leaders and private citizens submitted their concerns and recommendations to the FTC on how carbon offsets and RECs should be treated in the revised Green Guides.<sup>97</sup> GE AES Greenhouse Gas Services, a leading vendor in the carbon offsets market, welcomed FTC involvement in this area by expressing a common concern about credibility: “Customer confidence is critical to the successful growth of this market, whether those customers are ordinary consumers or more sophisticated business buyers. Emerging markets are relatively ‘fragile’ and confidence often builds slowly.”<sup>98</sup> The comments addressed a number of critical concerns the FTC will be considering as it finalizes its work: **[SARAH – is all of this below from the submitted comments?]**

#### **Should the new Green Guides define “carbon offsets” and “RECs” or mandate requirements regarding “additionality” or “double-counting”?**

Many players in the carbon market have indicated that without some uniform standard for carbon offset and REC calculations, there will continue to be ambiguity in the market and in consumer interpretation of claims.<sup>99</sup> A Wal-Mart representative described the current lack of universal definitions and terms of offsets and RECs: “[t]here are currently four proposed U.S. regional greenhouse gas cap-and-trade programs, approximately thirty mandatory U.S. State renewable portfolio standards, and voluntary REC and carbon offset

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<sup>96</sup> Aimee Barnes and Laura H. Kosloff, “Comment of EcoSecurities Re: Carbon Offset Workshop,” Project No.P074207 (Jan. 25, 2008).

<sup>97</sup> All public comments with respect to the FTC’s treatment of carbon offsets and RECs in the revised Green Guides are available at <http://www.ftc.gov/os/comments/carbonworkshop/index.shtm>.

<sup>98</sup> Karl R. Rabago, “Comment of GE AES Greenhouse Gas Services Re: Carbon Offset Workshop,” Project No.P074207 (Jan. 25, 2008).

<sup>99</sup> Derik Broekhoff, Director of the Greenhouse Gas Protocol Team, World Resources Institute, Panelist on the “Technical Substantiation Issues” session of the FTC’s Carbon Offset Workshop (Jan. 8, 2006).

markets, all with varying, and sometimes conflicting, requirements. As a result, standards for what constitutes an offset or an REC are not necessarily consistent from one provider to another.”<sup>100</sup> Despite this ambiguity in the market, Wal-Mart urged the FTC to “resist the temptation to define what constitutes an eligible offset or REC”, explaining:

Rather than attempting to define offsets or RECs, the Commission should rely on the “reasonable basis doctrine.” The fact that standards may differ from one seller to another simply reflects the fact that there is no consensus about what does, or should, constitute a carbon offset. Different authoritative and expert institutions have adopted different, but reasonable approaches. Although the Commission should insist that all carbon offset claims are supported by a reasonable basis, FTC precedent provides no reason to choose one reasonable approach over another.<sup>101</sup>

Wal-Mart recommended that given the lack of a widespread consensus on what constitutes a carbon offset or REC, and the fact that there may be multiple ways to establish a reasonable basis for such claims, the FTC should treat these claims like other environmental claims – by evaluating the reasonable consumer’s likely interpretation of it and the substantiation available to support it.

However, some of the players involved in the carbon market have expressed wariness of this flexible approach. At least one carbon offset vendor requested a universal standard for its competitors in the REC market, urging the FTC to require REC providers “to calculate the exact quantity of GHG emissions displaced by 1MWh of renewable energy,” because otherwise, “sellers can apply an average grid factor that may not accurately reflect the actual emissions reduced,” given the varying “energy mixes” across different regions of the United States.<sup>102</sup> Sharp Solar, a business unit of Sharp Corporation and a leading producer of solar photovoltaic equipment, urged that any REC sale should “include a specific listing of the environmental attributes (including carbon) that may or may not be associated” with the purchase.<sup>103</sup>

Another carbon offset vendor complained that the current lack of commonly understood definitions gives REC vendors the opportunity to mislead consumers by

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<sup>100</sup> Angela S. Beehler, Senior Director of Energy, Wal-Mart Stores, Comment on the Guides of the Use of Environmental Marketing Claims, Carbon Offsets & Renewable Energy Certificates Workshop (Jan. 25, 2008).

<sup>101</sup> *Id.*

<sup>102</sup> Aimee Barnes and Laura H. Kosloff, EcoSecurities, Comment Re: Carbon Offset Workshop, Project No.P074207 (Jan. 25, 2008).

<sup>103</sup> Christopher O’Brien, VP for Strategy & Government Relations, Sharp Electronics Corp. Solar Energy Solutions Group, Public Comment re: FTC’s Carbon Offset Workshop, Project No. P074207 (Jan. 25, 2008).



“implying that RECs represent a quantifiable reduction in emissions, and therefore that consumers can effectively neutralize emissions through their purchase and retirement.”<sup>104</sup>

These claims often lead consumers to believe that their purchase of RECs is an integral factor in the use of renewable energy. In reality, several factors, like government subsidies or the low cost of production, provide the critical incentive, so a renewable energy purchase would occur regardless.<sup>105</sup> In fact, most of the REC market is comprised of wind energy, which is eligible for Production Tax Credits and Investment Tax Credits and is therefore less likely to be “additional”, whereas renewable technologies like solar photovoltaic, which is more likely to benefit from REC funding, only comprise 1% of the energy sold as RECs.<sup>106</sup> Carbon offset vendors argue that because overwhelmingly “non-additional” projects make up the REC market, they should not be equated with carbon offsets.<sup>107</sup>

### **Third Party and Internal Certification Programs**

Many participants at the workshop called for guidance on carbon certification programs, which they felt could be a boon for both industry and consumers, because it would give credibility to the carbon market, increase sales, improve corporate image, and reduce the risks associated with the carbon markets.<sup>108</sup> However, several major trade associations urged the FTC not to impose predetermined substantiation techniques or require certain third party certifications because they felt this (i) assumed incorrectly that only one method of substantiation exists and (ii) would have a chilling effect on advertisers by increasing the costs of environmental claims and (iii) would ultimately harm consumers who may be left uninformed without these claims.<sup>109</sup>

Third party certification programs also raise an important substantiation issue for advertisers. If an advertiser claims to be carbon neutral and verifies this with a third party certification, is it then responsible to the FTC for substantiating that third party’s approval? The current Green Guides stipulate that the marketer is not insulated from substantiation

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<sup>104</sup> Aimee Barnes and Laura H. Kosloff, “Comment of EcoSecurities Re: Carbon Offset Workshop,” Project No.P074207 (Jan. 25, 2008).

<sup>105</sup> *Id.* at 7.

<sup>106</sup> *Id.* at 8.

<sup>107</sup> *Id.* at 8.

<sup>108</sup> See “Roundtable Discussion on Consumer Protection Challenges and Need for FTC Guidance,” Session 5 of the FTC’s Carbon Offset Workshop (Jan. 8, 2006); Mario Teisl, Professor, University of Maine, Panelist, “Certification Programs and Self-Regulatory Efforts,” Session 4, FTC’s Carbon Offset Workshop (Jan. 8 2006).

<sup>109</sup> Am. Ass’n of Advert. Agencies, Am. Advert. Fed’n, and the Ass’n of Nat’l Advertisers, Comments, FTC Green Guides Regulatory Review, Project No. P954501 at 8.

requirements or an enforcement action simply because of a third party certification. Still, the Grocery Manufacturers Association along with several other trade associations argue that advertisers “are not equipped to evaluate the scientific details of carbon offsets or RECs” and that valid third-party certifications should therefore satisfy any substantiation requirements for the FTC.<sup>110</sup> 3M, however, disagreed and urged the FTC to hold any company making a claim related to carbon offsets responsible for verifying such a claim and clearly identifying for the public the source and methodology used to calculate those offsets; “[i]t is the company’s responsibility to ensure that carbon offsets being advertised are real (e.g. no double counting) and to adequately investigate and substantiate the carbon offset methods being employed by any third party with which it contracts”.<sup>111</sup>

Several certification and accounting organizations, like Green-e<sup>112</sup> and EcoPower<sup>113</sup> have emerged to fill the increasing demand for certification in the REC market. Green-e, for example, claims to “track” RECs and certify that they are not double-counted, that they represent approved renewable energy sources from approved facilities, and that if “mixed” with non-renewables, they still maintain a specified minimum portion of renewable energy.<sup>114</sup> Green-e also claims to certify that RECs are “additional” – meaning that they do not come from compliance markets where utilities are required to use a certain proportion of renewable energy anyway – but the authenticity of this claim has been attacked by carbon offset vendors. However, given the lack of a commonly held definition for “additionality”, it is difficult to assess the accuracy of such attacks.<sup>115</sup>

In the carbon offset market, the “Voluntary Carbon Standard” emerged on the scene in March 2006 through the collaborative efforts of The Climate



Group, the International Emissions Trading Association and the World Economic Forum. The VCS-approved offsets are based on the ISO standard and must be “real (have happened), additional (beyond business-as-usual activities), measurable, permanent (not temporarily

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<sup>110</sup> Grocery Mfrs. Ass’n, *supra* note 81, at 7.

<sup>111</sup> 3M, Comment, Green Guides Regulatory Review, Project No. P954501, at 2 (Feb. 11, 2008).

<sup>112</sup> <http://www.green-e.org/>

<sup>113</sup> <http://www.ert.net/ecopower/>

<sup>114</sup> Green-e, National Standard for Renewable Electricity Products, available at [www.green-e.org/docs/energy/Appendix%20D\\_Green-e%20Energy%20National%20Standard.pdf](http://www.green-e.org/docs/energy/Appendix%20D_Green-e%20Energy%20National%20Standard.pdf).

<sup>115</sup> Aimee Barnes and Laura H. Kosloff, “Comment of EcoSecurities Re: Carbon Offset Workshop,” Project No.P074207 at 9-10 (Jan. 25, 2008).

displace emissions), [and] independently verified and unique (not used more than once to offset emissions).”<sup>116</sup> The objectives of the VCS program are to (i) “standardize and provide transparency and credibility to the voluntary offset market”, (ii) “enhance business, consumer and government confidence in voluntary offsets”, (iii) “create a trusted and tradable voluntary offset credit, the Voluntary Carbon Unit (VCU)”, (iv) “stimulate additional investments in emissions reductions and low carbon solutions”, (v) “experiment and stimulate innovation in emission reduction technologies and offer lessons that can [] build into future regulation”, and (vi) “provide a clear chain of ownership over voluntary offsets that prevents them from being used twice. This is achieved through multiple VCS registries and a central project database that is open to the public.”

The VCS model aligns with EPA guidance on the issue. In its six year-old Climate Leaders Program, which develops comprehensive climate strategies with a group of companies representing 10% of U.S. GDP and emissions, the EPA evaluates performance in the marketplace against a performance standard that considers four key criteria for offsets: that they are “real, additional, permanent, and verifiable.”<sup>117</sup> The EPA requires proof that *actual* reductions have occurred, that are *additional* to the “business as usual” approach, that can be backed by guarantees if there are concerns of backsliding, and that are *verifiable*, meaning that the benefits of the project can be measured and monitored.<sup>118</sup>

Some experts think the VCS could be a model for the level of substantiation the FTC will require in carbon offset claims. That said, the FTC has indicated that it will remain consistent with previous guidance on environmental claims and is not looking to develop environmental performance standards, as it does not have the requisite authority or technical expertise. Regardless, the substantiation burden will presumably depend on the exact context of the claim. It follows that if an ad implies that a service will offset *all* emissions *permanently* from a given activity, the FTC will require the advertiser to substantiate that the activity’s carbon emissions have been calculated and will be offset in a real, verifiable and measurable way.

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<sup>116</sup> <http://www.v-c-s.org/about.html>

<sup>117</sup> Jim Sullivan, Director, EPA’s Climate Leaders Program, Panelist on the “Technical Substantiation Issues” session of the FTC’s Carbon Offset Workshop (Jan. 8, 2006).

<sup>118</sup> *Id.*

Carbon offset vendors are also providing consumers with their own “certification” or “accounting” of carbon offsets. TerraPass, for example, one of the country’s largest carbon offset retailers, publishes an audit of every project which lists the number of tons of carbon that have been offset.<sup>119</sup> TerraPass says that it ensures that the offsets it sells to consumers are additional “by running each and every project through internal due diligence, followed by third-party validation and verification against broadly accepted third-party standards.”<sup>120</sup> Another carbon vendor urged the FTC to “encourage participants in the offset markets to self-regulate against the requirements judged appropriate to market needs and international best practices, and to take full account of any guidelines forthcoming from the Commission.”<sup>121</sup>

State regulatory agencies are also filling the certification void by approving public utilities’ carbon offset programs. The California Public Utilities Commission (CPUC), for example, approved the Pacific Gas & Electric Company’s (PG&E) ClimateSmart program, which launched in June 2008 to allow PG&E customers to “remove or avoid” the CO<sub>2</sub> associated with their energy use during a given period.<sup>122</sup> Each carbon offset project is approved by the California Climate Action Registry (CCAR), which was established by California law to provide a voluntary registry for GHG emissions, and by the CPUC.<sup>123</sup> All offsets are registered with CCAR and given serial numbers so they can be tracked and then retired.<sup>124</sup>

### ***Carbon Neutral & Carbon Footprint Claims***

A relatively new term, “carbon neutral” was named the 2006 “word of the year” by the New Oxford American Dictionary, defined as “a balance between the amount of carbon released from making a product and the amount sequestered or offset in the activity.”<sup>125</sup> Chairman Deborah Platt Majoras addressed the rise in the use of this term and noted that in

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<sup>119</sup> Adam Stern, Senior Advisor, TerraPass, Panelist at the “Roundtable Discussion on Consumer Protection Challenges and Need for FTC Guidance,” Session 5 of the FTC’s Carbon Offset Workshop (Jan. 8, 2006).

<sup>120</sup> TerraPass, Public Comment re: Carbon Offset Workshop, Project No.P074207 (Jan. 25, 2008).

<sup>121</sup> Karl R. Rabago, GE AES Greenhouse Gas Services, Public Comment re: Carbon Offset Workshop, Project No.P074207 (Jan. 25, 2008).

<sup>122</sup> Pacific Gas & Electric Company, Comment re: the FTC’s Carbon Offset Workshop, Project No. P074207.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *The New Oxford American Dictionary* (2nd ed.) (carbon neutral was its 2006 word of the year)

2007, American viewers watched a “carbon neutral” Super Bowl, Academy Awards telecast and NASCAR race.<sup>126</sup>

It follows that the FTC will likely address substantiation issues on this front. In its comments, the Grocery Manufacturers Association (GMA) noted the lack of industry-wide regulation or even agreement on definitions and the potential danger and chilling effect this void may have, because

Continental: Fly the Carbon Neutral Skies



advertisers do not know what types of claims they can and cannot make.<sup>127</sup> GMA noted that it is unclear how consumers interpret the term “carbon neutral” and suggested that the FTC might consider treating such a claim as it does with general environmental benefit claims – it must be properly qualified. GMA urged the FTC to consider including the following example as a properly qualified and substantiated claim:

Example: A product is advertised as *Carbon Neutral Packaging* and qualified with the statement: *No net carbon emissions generated in the packaging of this product.* The qualified claim would not be deceptive because it discloses the fact that the carbon neutrality claim is limited to the advertiser’s activities in packaging the product and it is properly substantiated by the company, as systems are in place internally to measure, validate and offset all carbon emissions in the packaging of the product.<sup>128</sup>

A “carbon footprint” has been defined as the impact a person, product or service has on the environment as measured by the amount of carbon dioxide or greenhouse gases emitted into the atmosphere over the course of a person’s activities or the life cycle of a product – which includes its manufacture, use, and disposal or reuse.<sup>129</sup> Thus, in an effort to become *carbon neutral* consumers are increasingly calculating their personal *carbon footprints* and the *carbon footprints* of their products and then purchasing *carbon offsets* to counter-balance or displace this pollution. As discussed above, calculating one’s carbon footprint involves a measure of guess-work given the lack of precision involved in estimating a person’s carbon emissions in daily activities. Several major trade associations urged the

<sup>126</sup> Deborah Platt Majoras, Chairman, FTC, Opening Remarks.... (Jan. 8, 2008) at 4.

<sup>127</sup> Grocery Mfrs. Ass’n, Am. Bakers Ass’n, Food Mktg. Inst., Int’l Bottled Water Ass’n, Int’l Dairy Foods Ass’n, and Soap and Detergent Ass’n, Comments on Guides for the Use of Environmental Marketing Claims, Project No. 954501 (Feb. 11, 2008).

<sup>128</sup> *Id.*

<sup>129</sup> [www.carbonfootprint.com](http://www.carbonfootprint.com).

Commission to provide guidance on “carbon footprint” labels for individual products because they carry significant uncertainty given the lack of an agreed upon method for their calculation. These groups suggested requirements that the claims be “accurate, based on sound science, and properly qualified to communicate boundaries (*e.g.*, whether the carbon footprint calculation accounted for carbon emissions from the production of raw materials and extended all the way to the product’s use and disposal)”.<sup>130</sup>

## **The Second Workshop: Green Packaging Claims**

According to the EPA, packaging constitutes 1/3 of all municipal solid waste (MSW) in the United States.<sup>131</sup> Public concern has inspired major companies like Wal-Mart to respond with ambitious goals. In the next three years, Wal-Mart aims to reduce its solid waste by 25% and to improve all private brand packaging by: (i) eliminating all unnecessary materials, (ii) reducing the packaging to the “right size” to optimize material strength, (iii) reusing materials where appropriate, (iv) using materials made of “renewable” and “biodegradable” resources as determined by ASTM<sup>132</sup> standards, and (v) using materials made of post-consumer and post-industrial recycled content that can also be recycled after use.<sup>133</sup> Manufacturers world-wide have taken note and begun adjusting packaging accordingly, prompting a flurry of new green packaging claims.

In its second public workshop on revising the Green Guides, the FTC brought panelists together from industry, the non profit sector and academia to focus on packaging claims and address changes in consumer perception of terms currently covered under the Guides as well as new claims like “sustainable”, “renewable”, and “bio-based”, life cycle or “cradle to cradle” claims, and third party certifications and seals.<sup>134</sup> Some groups, like 3M and the American Forest and Paper Association, argue that the FTC packaging guidelines

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<sup>130</sup> Grocery Mfrs. Ass’n, *supra* note 81, at 7.

<sup>131</sup> Sara Hartwell, Environmental Protection Agency, Panelist, “Parceling Out the Green Guides – Do They Need Rewrapping?”, Session 2 of the FTC’s Green Packaging Claims Workshop (Apr. 30, 2008).

<sup>132</sup> <http://www.astm.org/Standards/D6866.htm>.

<sup>133</sup> Amy Zettlemoyer-Lazar, Wal-Mart Stores, Panelist, “Opening the Package – Overview of Trends in Packaging Claims”, Session 1 of the FTC’s Green Packaging Claims Workshop (Apr. 30, 2008).

<sup>134</sup> 16 C.F.R. Part 260, Guides for the Use of Environmental Marketing Claims; The Green Guides and Packaging; Public Workshop (Apr. 30, 2008).

should be aligned with ISO standards to promote uniformity in the market.<sup>135</sup> 3M encouraged the FTC to expand its consumer education website and identify companies making “vague and non-specific” environmental claims, in an effort to level the playing field for those adhering to the Guides.<sup>136</sup> Such an approach would represent a substantial change from the current Guides, which allows for more flexibility in the substantiation process.

### ***Biodegradable, Degradable, and Photodegradable Claims***

Currently, the FTC requires that an unqualified degradability claim must be substantiated by competent and reliable scientific evidence that the entire product or package will break down and return to nature *within a reasonably short period of time after customary disposal*.<sup>137</sup> The FTC has indicated it will shore up consumer confusion by specifying what constitutes “a reasonably short period of time”. Since most solid waste is disposed of in landfills, which actually thwart biodegradation given the lack of sunlight and oxygen, the FTC is now considering whether these claims should be qualified to give consumers this information.<sup>138</sup>

### ***Recyclable Claims***

FTC Commissioner Rosch signaled that the Guides’ treatment of “recyclable” claims will continue to require qualification if recycling facilities are not widely available – “[a]s newer products develop that have the capability to be recycled, producers must keep in mind the fact that facilities may not yet be widely available for the recycling of such products.”<sup>139</sup> Some vendors, like the Personal Care Association, challenge this approach, noting that it adds an extra hurdle for manufacturers considering making their products recyclable.

## **New Terms**

### ***Renewable Claims***

The FTC has expressed an interest in addressing newer terms like “renewable”, a claim which has saturated the advertising world. According to one dictionary, a “renewable”

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<sup>135</sup> 3M, Comment, Green Guides Regulatory Review, Project No. P954501, at 1-2 (Feb. 11, 2008); Cathy Foley, VP of Paper Group, Am. Forest & Paper Ass’n, Comment, Green Packaging Workshop, Project No. P084200 (May 19, 2008).

<sup>136</sup> 3M, Comment, Green Guides Regulatory Review, Project No. P954501, at 1-2 (Feb. 11, 2008).

<sup>137</sup> 16 C.F.R. § 260.7(b)(2008).

<sup>138</sup> J. Thomas Rosch, Commissioner, FTC, Keynote Address at the American Conference Institute’s Regulatory Summit for Advertisers and Marketers: Responsible Green Marketing at 10-11 (June 18, 2008).

<sup>139</sup> *Id* at 11.

product is made from “a commodity or resource, such as solar energy or firewood, that is inexhaustible or replaceable by new growth.”<sup>140</sup> Several companies urged the FTC to provide clear guidance in this area, with particular consideration given to the total environmental impact of using such sources. Proctor & Gamble suggested the following considerations, which emphasize the “hidden trade-offs” of using a renewable source:

- (i) whether the rate of replenishment of the renewable material or energy source matches its rate of consumption,
- (ii) whether sourcing of the renewable material or energy results in the destruction of critical ecosystems, loss of habitat for endangered species, reductions in biodiversity or other negative impacts on sustainability
- (iii) whether sourcing of the renewable materials or energy results in less consumption of non-renewable resources than the nonrenewable material or energy being replaced,
- (iv) whether the use of the renewable material or energy source significantly increases the product’s environmental footprint in other relevant indicators, like water, waste or energy.<sup>141</sup>

The Soap and Detergent Association (“SDA”) suggested that the FTC consider such factors as “reduced energy requirements, reduced greenhouse gas emissions, etc.”<sup>142</sup> Similar to P&G’s approach, the SDA also recommended that the FTC assess “renewable” claims by looking at the entire lifecycle of the sources and whether the use of such sources led to any adverse environmental or health impacts, like the “depletion of resources at a rate exceeding their replenishment, loss of biodiversity, or overall increases in environmental burdens such as energy or water consumption.”<sup>143</sup> This concern pushes FTC towards addressing the “hidden trade-offs” of a product or package and the “life cycle analysis” of a product.

### ***Sustainable Claims***

The Grocery Manufacturers’ Association recently cited the following definition of sustainability: “meeting the needs of the present without compromising the ability of future

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<sup>140</sup> *The American Heritage® Dictionary of the English Language*, Fourth Edition copyright ©2000 by Houghton Mifflin Company.

<sup>141</sup> Jack McAneny, The Proctor & Gamble Co. - Global Sustainability, Comment, Green Guides Regulatory Review, Project No. P954501 (Feb. 1, 2008).

<sup>142</sup> Michelle Radecki, General Counsel & Sec’y, The Soap and Detergent Ass’n, Comment, Green Packaging Workshop, Project No. P084200 at 2 (May 19, 2008).

<sup>143</sup> *Id.*



generations to meet their own needs.”<sup>144</sup> The GMA and SDA urged the FTC to treat “sustainability” claims the same as other general environmental benefit claims and provide examples of “what qualifiers are necessary and what constitutes a reasonable basis for substantiating [such] claims.”<sup>145</sup> Similarly, the American Forest & Paper Association (AF&PA) urged the FTC to adopt only a broad definition of the term and describe the “necessary components of substantiation” while not specifying the method of substantiation so as to allow advertisers to develop “focused definitions that meet the needs of that sector”.<sup>146</sup> This would encourage marketers to be clear about the definition and provide substantiation that meets its specific use of the term.

### ***Bio-Based Claims***

A bio-based product is “composed in whole or in significant part of biological products or renewable domestic agricultural materials (including plant, animal, and marine materials) or forestry materials.”<sup>147</sup> The AF&PA urged the FTC to take a similar course with bio-based claims – to provide a broad definition and then allow marketers to specify the meaning in a given circumstance and require substantiation tailored to this narrower meaning.<sup>148</sup>

### **Life Cycle Claims**

Increasingly, marketers are assessing a product’s environmental impact from a holistic perspective, through what has been called a life cycle analysis (“LCA”) that accounts for a product’s environmental benefits or harms over its full, commercial cycle – either “cradle-to-grave” if it is thrown away or “cradle-to-cradle”, if the product is reused. This analysis considers the ecological impact of each phase of a product’s life cycle from how the feedstock is produced to how the product is manufactured, where and how it is distributed, how it is used and where and how it is disposed of or reclaimed. It allows companies and consumers to compare the full environmental impact of products. According to FTC Commissioner J. Thomas Rosch, this issue raises one of the most interesting challenges for

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<sup>144</sup> Grocery Mfrs. Ass’n, *supra* note 81, at 8 (citing United Nations, *Report of the World Commission on Environment and Development* (also known as the Brundtland report) (Dec. 11, 1987)).

<sup>145</sup> *Id.*; Michelle Radecki, *supra* note 150, at 1-2.

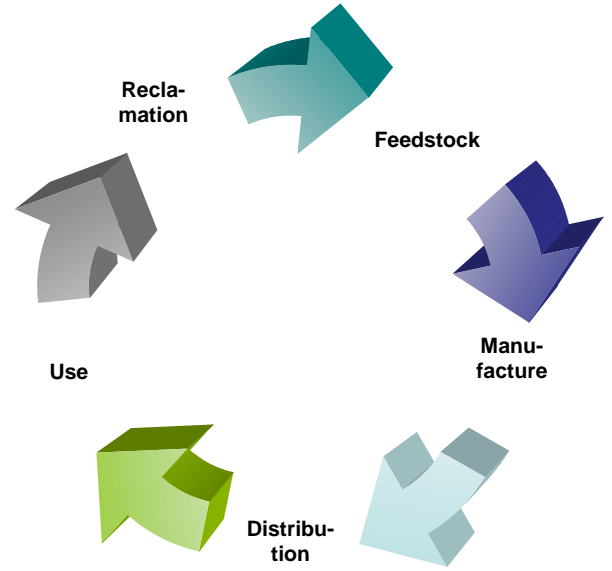
<sup>146</sup> Cathy Foley, *supra*, Am. Forest & Paper Ass’n, Comment at 1-2.

<sup>147</sup> Office of the Federal Environmental Executive, Green Purchasing.

<sup>148</sup> Cathy Foley, *supra*, Am. Forest & Paper Ass’n, Comment at 1-2.

environmental marketing and represents the direction in which green marketing is moving. The Green Guides may provide guidance on the use of single attribute claims that advertise one environmental benefit without disclosing other, detrimental consequences.

The Guides currently include a footnote indicating that claims based on “lifecycle theory” have not been addressed because the Commission “lacks sufficient information on which to base guidance on such claim s.”<sup>149</sup> Some companies, like P&G, have urged the FTC to recognize internationally accepted standards for LCA, like ISO 14040, which will help insure consistency.<sup>150</sup> Several trade associations agree and encourage the FTC to include in the revised Guides a discussion that addresses the increased use of claims based on LCAs, the variety of organizations that have adopted such standards, and the companies that are adopting their own criteria.<sup>151</sup>



Although marketers like the SDA, encourage the FTC to evaluate environmental claims through LCAs, they warned against requiring marketers to provide such LCAs given its high costs. The Green Guides may address LCA claims by acknowledging that LCAs can accurately and reliably be described with appropriate context, transparency and boundaries to the measurement.

### Environmental Seals and Third-Party Certifications

Currently, the Guides hold that environmental seals-of-approval, eco-seals and certifications from third-party organizations should be accompanied by information that explains the basis for the award. The certifying



<sup>149</sup> Guides for the Use of Environmental Marketing Claims, *supra* note 8, at fn 2.

<sup>150</sup> Jack McAneny, P&G, *supra* note 149, at 2.

<sup>151</sup> Grocery Mfrs. Ass’n, *supra* note 81, at 9.

party must be “truly independent” and have “professional expertise in the area that is being certified.”<sup>152</sup> The FTC still analyzes third-party certification claims and notes that they do not “insulate an advertiser from Commission scrutiny or eliminate an advertiser’s obligation to ensure for itself that the claims communicated by the certification are substantiated.”<sup>153</sup>

Several comments urged the FTC to expand on its discussion of this area, since only one example in the Guides currently addresses the issue.<sup>154</sup> P&G recommended the FTC subject such “[s]eals and eco-labels that communicate a general ‘environmentally friendly’ message” to the same scrutiny as other environmental claims.<sup>155</sup> The SDA also noted the problem of eco-seals that “communicate a general claim of ‘environmental preferability’” without providing the basis for such a claim and insisted that such eco-seals and logos should “provide specificity with regard to the attributes that cause them to endorse the products”. The SDA suggested that the manufacturer list its website or a toll-free telephone number where the consumer can obtain this information.<sup>156</sup>

### **Internet and Text Message Disclosures**

Panelists also discussed the difficulty of providing sufficient disclosures and qualifications on a product’s label or package. Snehal Desai from NatureWorks LLC suggested that the revised Guides allow advertisers to provide additional information on the company’s website or through a text message. As companies try to reduce the amount of packaging used and qualify their environmental claims appropriately, this approach might provide a solution.<sup>157</sup>

### **The Third Workshop: Green Building and Textile Claims**

The FTC’s third and final workshop focused on green building and textile claims. Panelists discussed consumer perception of these claims, substantiation issues, third party certifications or seals for these products, and the need for new or updated guidance in this area.

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<sup>152</sup> See FTC, *supra* note 22, at 6.

<sup>153</sup> *Id.*

<sup>154</sup> Guides for the Use of Environmental Marketing Claims, *supra* note 8, at Part 260.7(a) example 5.

<sup>155</sup> Jack McAneny, P&G, *supra* note 149, at 2.

<sup>156</sup> Michelle Radecki, *supra* note 150, at 3.

<sup>157</sup> Snehal Desai, NatureWorks LLC, “Wrapping It Up: Roundtable on Consumer Protection Challenges and the Need for FTC Guidance,” FTC Green Packaging Claims Workshop (Apr. 30, 2008), available at [http://htc-01.media.globix.net/COMP008760MOD1/ftc\\_web/FTCindex.html#July15\\_08](http://htc-01.media.globix.net/COMP008760MOD1/ftc_web/FTCindex.html#July15_08).

## Green Textile Claims

Panelists and public comments focused much of their concern with green textile claims on organic cotton, a hot, new market that has seen global retail sales increase by over 80% in 2006 and 2007.<sup>158</sup> The FTC noted that some retailers have been using “organic cotton” as a basis for “environmentally friendly” claims due to the fact that its production uses considerably less insecticides. The FTC also signaled that the new Guides will address such vague textile claims as “eco-fabric” and “natural” claims, which are frequently used to describe products derived from plants like bamboo, which only takes four years to harvest (as opposed to most trees, which take 25 years) and requires no pesticides or fertilizer.<sup>159</sup>

Panelists also discussed whether consumers thought “sustainable” and “renewable” claims relate to the material used, the production process or both. Bamboo, for example, may provide environmental benefits as a raw source, but its harvesting and processing requires substantial chemical treatment, that may contribute to pollution, for example to soften it prior to weaving.<sup>160</sup>

**[I am not sure I am getting this next point]** The Textile Act and the rules associated with it, which the FTC also administers, govern clothing labels and requires the use of generic fiber names recognized by the Act or by the International Organization for Standardization (IOS). For example, one of the FTC's recognized generic names for regenerated cellulose from bamboo is called rayon.<sup>161</sup>

As of July 2008, the U.S.D.A.'s National Organic Program (NOP) extended its regulation of the word “organic” in agricultural products, to include textiles, although it only covers production standards of the raw fibers, not the “off-farm treatment” of such fibers.<sup>162</sup> Still the NOP notes:

Although the NOP has no specific fiber or textile processing and manufacturing standards, it may be possible for fibers grown and certified to

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<sup>158</sup> LaRhea Pepper, Executive Director, Organic Exchange, Comment to the FTC re: Green Building & Textiles Workshop, Project No. P084203 at 2 (Aug. 14, 2008).

<sup>159</sup> Donald S. Clark, Sec’y, FTC, Announcement, Guides for the Use of Environmental Marketing Claims; Green Building and Textiles; Public Workshop at 9.

<sup>160</sup> *Id.* at 9.

<sup>161</sup> Janice Frankle, FTC enforcement attorney, panelist, “Weaving Green Textile Claims,” Green Textiles & Bldg Workshop (July 15 2008).

<sup>162</sup> *Id.*; U.S.D.A. Nat’l Organic Program, *Labeling of Textiles Under Nat’l Organic Program Regulations* (July 2008), available at:

<http://72.14.205.104/search?q=cache:cTXNU8VWzbUJ:www.ams.usda.gov/AMSV1.0/getfile%3FdDocName%3DSTELPRDC5070818+national+organic+program+regulates+organic+fibers&hl=en&ct=clnk&cd=1&gl=us&client=firefox-a>

NOP crop/livestock standards to be processed and manufactured into textile and other products which meet NOP standards.<sup>163</sup>

The NOP regulations strengthen this cryptic statement by noting that only those “textile products certified to the NOP production AND processing standards are eligible to be labeled ‘100 percent organic’ and ‘organic’”; thus, “[a]ll operations producing, handling, processing and manufacturing the final product must be certified.”<sup>164</sup> A claim of “organic” must meet the same standards but only requires a minimum of 95% organic fiber content.

The NOP regulations note that its labeling requirements are merely additional to those required by the FTC. Both the Organic Exchange, a non-profit dedicated to “catalyz[ing] market forces to expand the global organic cotton fiber supply”, and the Organic Trade Association (OTA) urged the FTC to provide guidance that recognizes the NOP standards.<sup>165</sup> The OTA urged the FTC to focus on the “distinction between *process* standards, which describe the methods by which the product is produced, and *product* standards, which refer to specific qualities of the product” (emphasis added), and which the NOP does not address.<sup>166</sup> OTA noted that under the NOP, an “organic” label refers to “the methods by which the raw fiber was produced, including methods required to protect soil and water resources,” but “does not make specific claim about environmental impact or other qualities of the product.” Similarly, the OE noted that consideration should be given to “independent standards that support environmental stewardship for product processing”.<sup>167</sup>

Both OTA and the OE believe third party certification under a credible organic standard should constitute sufficient substantiation under the Green Guides, although they also recommend more guidance on the use of third party certifications in general. The OTA recommended using third parties certified by the Global Organic Textile Standard and accredited under ISO 65 standards as an example of a “credible private, voluntary standard for organic textile processing”.<sup>168</sup> The GOTS provides “detailed criteria and standards for

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<sup>163</sup> U.S.D.A. Nat’l Organic Program, *supra* note 165.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*; Organic Trade Ass’n, Comment to FTC re: Green Building & Textiles Workshop, Project #P084203, at 1 (Jun. 10, 2008).

<sup>166</sup> Organic Trade Ass’n, *supra* note 165 at 1.

<sup>167</sup> LaRhea Pepper, *supra* note 164.

<sup>168</sup> Organic Trade Ass’n, *supra* note 168 at 4.

certification of textile products that can be labeled ‘organic’ or ‘made with organic fiber’”.<sup>169</sup> However, according to Oeko-Tex, a textile certification body, that provides a certification system for textiles at all stage of production, the GOTS “leaves many opportunities for mistakes and fraud” given that the compositions of textile chemicals, like dyes, are rarely disclosed and “can only be verified by rigorous analytical confirmation.”<sup>170</sup> As discussed earlier, under the current Green Guides, such a third party certification would not insulate the manufacturer from liability.

### **“Natural” or “Green” Textile Claims**

Many public comments and panelists noted that terms like “natural” and “green” lack a clear meaning and should be discussed in the revised Guides. One panelist at the workshop, Dr. Patricia O’Leary, a senior director at the trade association Cotton Incorporated, told attendees that cotton is “natural,” “renewable, and “green”.<sup>171</sup> One audience member challenged her “green” message given the “higher wash temperature and longer drying times” for cotton as opposed to synthetic clothes. Dr. O’Leary responded by suggesting that from a life cycle perspective, cotton would still be “greener” than a synthetic material, but underscored a common theme: “we need to have these claims addressed in the Green Guides.”<sup>172</sup>

OTA suggested that although the meaning of “natural” is ambiguous, “it may be appropriate to distinguish fiber content that is derived from petrochemicals, and is therefore synthetic, from fiber that is derived from an agricultural source.”<sup>173</sup>

### **Green Building Products and Buildings**

According to the FTC, despite the sluggish housing market, the demand for green homes and products is growing dramatically, with approximately 40% of homeowners choosing green products when remodeling their homes.<sup>174</sup> The market has responded by offering “green” paint, carpeting, wallpaper, flooring, cabinetry, lighting, windows,

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<sup>169</sup> *Id.* at 4.

<sup>170</sup> Dr. Manfred Wentz, Head, Oeko-Tex Certification Body (USA), Comment to FTC re: Green Building & Textiles Workshop at 4 (Aug. 14, 2008).

<sup>171</sup> Dr. Patricia O’Leary, Cotton Inc., Panelist, “Weaving Green Textile Claims,” FTC Green Bldg & Textiles Workshop at 9 (July 15, 2008), available at [http://htc-01.media.globix.net/COMP008760MOD1/ftc\\_web/FTCindex.html#July15\\_08](http://htc-01.media.globix.net/COMP008760MOD1/ftc_web/FTCindex.html#July15_08).

<sup>172</sup> Dr. Patricia O’Leary, *supra* note 175 at 21.

<sup>173</sup> Organic Trade Ass’n, *supra* note 168 at 2.

<sup>174</sup> Donald S. Clark, *supra* note 166 at 10.

insulation, appliances, and heating and cooling systems, with corresponding claims that these products are “sustainable,” “renewable,” “green,” and “environmentally friendly.” As a result of the confusion surrounding these terms, many marketers are turning to third-party certification programs, like the U.S. Green Building Council’s Leadership in Energy and Environmental Design program (“LEED”), the National Association of Homebuilders’ Green Building Standard, Green Globes’ Green Building Initiative or even the federal government’s Energy Star program, which certifies homes based on energy use. The FTC devoted the second half of its final workshop to the discussion of these issues and looked at how consumers perceive such claims and whether or not they are sufficiently specific and substantiated.

According to U.S. Green Building Council, a non-profit composed of leaders in the business industry who are working to promote greener buildings, consumer perception of “green” housing products has grown with the demand for such products; an estimated 31% of homeowners indicate that they are “moderately knowledgeable about green homebuilding,” while “45% reported that they are very or extremely knowledgeable about the subject.”<sup>175</sup> Still, the “savviest of consumers” may not understand some of the technical aspects of such claims, says the USGBC. The group urges the FTC to respond to this confusion by providing examples of misleading marketing claims as well as information about “appropriate (and inappropriate) means of substantiating and qualifying green building claims.”<sup>176</sup> This sentiment was echoed at the workshop, in which panelists called on the FTC to educate the marketplace on these issues and provide a baseline for substantiation requirements.

Panelists also discussed the frequent use of general environmental benefit claims in this area, noting that given the complexity of a building and its systems, and the variety of factors one might need to consider in substantiating environmental benefits (i.e. its “sustainable” design features, its life cycle analysis, durability, maintenance, indoor air quality, and energy efficiency), the use of a broad claim like “green” becomes even more problematic than usual.<sup>177</sup> The American Chemistry Council urged the FTC to treat such

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<sup>175</sup> Michelle Moore, Senior VP of Policy & Public Affairs, USGBC, Comment re: Green Bldg & Textiles Workshop, Project No. P084203 at 2.

<sup>176</sup> *Id.* at 2-3.

<sup>177</sup> FTC Green Bldg & Textiles Workshop, Session 5: Punch List for Green Buildings – Roundtable on Consumer Protection Challenges & the Need for FTC Guidance, available at [http://htc-01.media.globix.net/COMP008760MOD1/ftc\\_web/FTCindex.html#July15\\_08](http://htc-01.media.globix.net/COMP008760MOD1/ftc_web/FTCindex.html#July15_08)

claims as it would any other general claim under Section 260.6 of the Guides – “general ‘green building’ claims need to be clear whether they refer to one or more components or the entire building” – but also called for “specific examples and applications”.<sup>178</sup>

Many advertisers feel that third-party certification programs offer an opportunity to provide consumers with a standard they can trust while promoting the central purpose of the *Guides*. USGBC, which offers its own third-party certification through the LEED program, recommended that the FTC strengthen such programs by incorporating guidance pertaining to: “1) the promotion of free access to the substantive information about rating systems and certification processes; 2) the disclosure of participants and processes involved in the development of rating systems and certification processes; and 3) the proper use of logos, brands, seals, and other representations demonstrating compliance with rating systems and certification processes.”<sup>179</sup> The underlying principle is to promote transparency in the rating process

The revised Guides may also address Life Cycle Analysis claims in this area. The USGBC recommends that the FTC either 1) encourage “all marketers that use LCA to derive input data from a common source” like the National Renewable Energy Laboratory’s Life Cycle Inventory Database Project and set forth basic parameters that should define such an LCA or 2) “adopt the concept of an Environmental Product Declaration (EPD)” which is used increasingly in Europe and are based on LCAs but provide a “standard vehicle” for reporting a product’s environmental impact, so that consumers can compare like products.<sup>180</sup> In either case, according to the USGBC, the FTC should “ensure that marketers disclose the parameters they have used in the life cycle assessment of their products to avoid consumer confusion and deception.”<sup>181</sup>

## Conclusion

Despite the wave of new green claims and the opportunity for the Green Guides to expand considerably, the FTC has emphasized that the Guides will be just that, guidance, and will not likely contain reference to specific scientific standards or otherwise provide

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<sup>178</sup> Michael P. Walls, Managing Dir., Regulatory & Technical Affairs, Am. Chemistry Council, Comment re: Green Bldg & Textiles Wkshop, Project No. P084203 (Aug. 15, 2008).

<sup>179</sup> Michelle Moore, *supra* note 182 at 4.

<sup>180</sup> *Id.* at 11.

<sup>181</sup> *Id.* at 11.



definitive substantiation requirements. Instead, the FTC will seek to update its definitions and examples, adding new ones as appropriate to reflect the evolving green landscape. However expanded the Guides may ultimately look, in evaluating advertising claims the FTC will continue to focus, as Commissioner Rosch noted, “on the net impression taken away by the consumer about the claims made”.