Regulations, Watchdogs, Eco-labels, oh my! : The Highly Fragmented and Uncoordinated State of Anti-Greenwashing Efforts

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Regulations, Watchdogs, Eco-labels, oh my! : The Highly Fragmented and Uncoordinated State of Anti-Greenwashing Efforts
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I. Introduction

In the 1980s, public awareness of climate change and pressing environmental issues reached new heights, leading consumers to be more conscious of the environmental impacts of the products they were purchasing. This purchasing phenomenon is known as “green consumerism.” Capitalizing on this trend and tapping into a new market, companies developed marketing strategies advertising products’ environmental attributes. However, many companies were more concerned with profits than they were with accurate claims and inundated the market with vague, baseless, and unverifiable environmental claims. The term “greenwashing” emerged in response, which describes the act of misleading consumers about firm environmental performance or the environmental benefits of a product. Although green advertising has a number of benefits, greenwashing causes consumers to become skeptical of environmentally friendly products. This paper will show that government regulation of environmental claims is largely fragmented and piece-meal, and has been weak at best -- primarily existing in the form of non-binding guidance on environmental claims from the FTC called the Green Guides. As a result, considerably effective market-based tools, such as environmental watchdogs and certifications from independent voluntary consensus organizations (“eco-labels”) have emerged to fill the void.

Successful anti-greenwashing campaigns and blogs by environmental watchdogs have powerful and long-lasting effects on a company’s reputation. And, done well, eco-labels provide a baseline within industry sectors by encouraging best practices and setting guidelines that companies must meet in order to meet a

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2 Id.
3 As used in this paper, “company” refers to all of the businesses involved in the distribution of consumer products, including manufacturers, wholesalers, distributors, retailers, and advertising agencies.
4 Supra note 1.
5 Id.
certified criteria. Below, the paper will demonstrate that eco-labels have several demonstrated economic benefits – they allow consumers to make more informed green purchases, they encourage manufacturers to make “greener” products, and as a result, the environment benefits. They are also an effective tool for manufacturers seeking to avoid greenwashing litigation.

However, the paper argues that the efforts of environmental watchdogs are not harmonized and often suffer from a lack of coordination. Additionally, while eco-label schemes will likely continue to be essential in validating green claims, they are not without problems. The eco-label landscape is currently highly fragmented and often confusing to consumers. Consumer confusion continues to grow due to competing claims on what makes a product “green,” especially when there are two or more competing schemes for the same sector or product. Not all eco-labels are created equally, and can ironically, perpetuate more greenwashing. Eco-label organizations and the manufacturers that rely on them are not protected from liability simply because the eco-label is a third party; not only can the eco-label organizations themselves face deceptive advertising litigation over their standards and certifications, but other bodies of law such as antitrust, international trade, and tort law may be implicated. And, although there are efforts to oversee and harmonize eco-labels, those efforts also suffer from a lack of harmonization.

This paper has two primary goals. First, it organizes and examines all of the current anti-greenwashing efforts. The focus will be on the three principle existing methods of combatting greenwashing: (1) government solutions (regulations and regulatory guidance), (2) social solutions (grassroot campaigns and blogs), and (3) market-based solutions (independently certified eco-labels.) Given that the regulatory and social solutions are reactive solutions, independently certified eco-labels appear to be the most effective way for companies to proactively avoid greenwashing litigation. Second, this paper organizes and examines the diverse web of laws that can become implicated once an independently certified eco-label is used. What becomes clear is that (1) both the efforts to combat greenwashing and the efforts to harmonize eco-label standard setting are highly fragmented, uncoordinated, and often overlapping, and (2) a company’s use of an independently-issued eco-label may not be the end of the road, as the use of the eco-label itself may lead to additional types of liability.

II. Greenwashing Basics

The 1980s saw a steep rise in U.S. consumer interest in environmentally-friendly products, in large part attributable to events such as the Exxon Valdez oil spill and an increased awareness of the threats of global warming and ozone depletion. Surveys conducted in the early 1990s revealed that a majority of Americans worried about the environment and were willing to alter their purchasing behavior to favor...
environmental quality. This heightened public concern for the environment created a new kind of consumer who demanded environmentally responsible products, which in turn led manufacturers who saw a chance to capitalize on a potentially huge market to make claims of eco-friendly products. Environmental marketing grew tremendously in the 1990s, both in corporate product development and advertising campaigns. The demand and market for green products, services, and firm practices has only continued to grow exponentially in the last twenty years.

Unfortunately, throughout this growth, many corporations advertised environmental benefits that were false, misleading, or unsubstantiated, likely preying upon the average consumer, who lacks the resources to verify marketers’ environmental claims. This rise in unfounded claims, such as “recyclable,” and “biodegradable” and “green,” increased consumers’ confusion. In response, lawmakers and environmental groups began to focus on how to address the greenwashing problem.

There are two types of greenwashing: firm level greenwashing, in which companies make misleading statements regarding the environmental practices of the company or product-level greenwashing, referring to the environmental benefits of one of its products or services. Product-level greenwashing is done through labeling and advertising, whereas firm-level greenwashing is done through advertising and public relations. Examples of firm-level greenwashing is General Electric’s “Ecomagination” campaign, in which GE touted its work in the environmental arena while it simultaneously lobbied against new EPA clean air requirements, or the massive environmental sustainability promises that Walmart makes, that somehow never come to fruition. Illustrative examples of product-level greenwashing are LG Electronics and its incorrectly-certified Energy Star refrigerators; “Audubon International”, a certifier of golf courses with questionable standards that uses the well-known name and bird logo despite no affiliation with the Audubon

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9 Lane supra note 7, at 2-7
10 Id.
11 See Terrachoice Grp. Inc., The Sins Of Greenwashing: Home And Family Edition 6,11 (2010), available at http://singsofgreenwashing.org/findings/greenwashing-report-2010 [hereinafter Terrachoice 2010] (finding that the consumer market for green products and services was estimated at $230 billion in 2009 and predicted to grow to $845 billion by 2015 and that since 2009, the number of “green” products has gone up by 73%).
14 See generally Stacy Mitchell, Walmart’s Greenwash, Institute for Local Self-Reliance (ILSR), (2012), available at http://www.ilsr.org/wp-content/uploads/2012/03/walmart-greenwash-report.pdf; Drew Hudson, Report Don’t be Fooled 2014, The Green Life Online, available at http://50.87.144.187/grnlife/wp-content/uploads/2014/04/report-2.pdf. According to these reports, since Walmart launched its sustainability campaign in 2005, it has yet to come close to any of the “goals” it set for itself, which includes being supplied 100% by alternative energy sources. In fact, although it releases annual sustainability reports where they talk up test cases and reaffirm its promises, its own reporting says that its greenhouse gas footprint has increased by 13.8% since 2005, less than 4% of its electricity comes from solar and wind sources as of March 2012, and ILSR calculates that it would take approximately 300 years for Walmart to achieve its alternative energy goal at the current pace it is going.
15 Eric L. Lane, Consumer Protection in the Eco-mark Era: A Preliminary Survey and Assessment of Anti-Greenwashing Activity and Eco-mark Enforcement, 9 J. MARSHALL REV. INTELL. PROP. L. 751-752 (2010). Energy Star, a government-backed third party eco-label indicating that a product meets a set of energy efficiency guidelines, certified many of LG Electronics’ refrigerator models. It was discovered, however, that ten of the certified LG refrigerator models had listed erroneous energy usage measurements on their labels and did not actually meet the efficiency standards required to earn the certification. Id.
Society\(^1\)\(^6\) and Kashi’s use of “all Natural” on its cereal boxes, despite its use of genetically-modified ingredients.\(^1\)\(^7\)

Product-level greenwashing has been researched and documented more extensively than firm-level
greenwashing.\(^1\)\(^8\) For example, Gillespie identifies ten signs of greenwashing, ranging from “fluffy language,”
words or terms with no clear meaning such as “eco-friendly,” to “outright lying,” totally fabricated claims or
data.\(^1\)\(^9\) TerraChoice Environmental Marketing Inc. (“TerraChoice”), a marketing agency, published a report
which was based upon an analysis of thousands of products in the U.S. and Canada, initially called the “Six
Sins of Greenwashing” and later revised to include a seventh sin.\(^1\)\(^0\) Their initial report found that, of over
1,000 self-declared “green” products reviewed, all but one engaged in some form of greenwash by
committing at least one of the sins.\(^1\)\(^1\) TerraChoice’s 2010 report found that over 95% of “green” products
commit one or more of the seven sins.\(^1\)\(^2\) Per the TerraChoice report, committing a sin consists of making an
environmental claim that is either “demonstrably false” or misleading.\(^1\)\(^3\) For example, the “sin of the hidden
trade-off” consists of promoting one particular green attribute of a product while ignoring other aspects of
the product or its life cycle that either fail to benefit or actually harm the environment.\(^1\)\(^4\) Paper, for instance,
is not necessarily environmentally preferable just because it comes from a sustainably harvested forest.\(^1\)\(^5\)
Other important environmental issues in the papermaking process, including energy, GHG emission, and
water pollution are just as significant, if not more.\(^1\)\(^6\) The “sin of no proof” occurs when a claim
of environmental benefit cannot be substantiated by the consumer through easily accessible information or by a
reliable third-party certification. An example is a tissue product that claims various percentages of post-
consumer recycled content without providing any evidence.\(^1\)\(^7\)

Greenwashing tends to result in several consequences. First and foremost, greenwashing is
misleading. Greenwashing deceives consumers by presenting firms as environmentally conscious when in
fact they have a questionable environmental track record, or by presenting products as having certain

\(^1\) Id. at 6
\(^2\) Id. at 3
\(^3\) Id. at 3
\(^4\) Id. at 3
\(^5\) Id.
\(^6\) Jeffgang, Greenwash Alert: Why is Audubon Endorsing Gold Courses?, THE GREEN LIFE BLOG (Nov. 15, 2012),
http://thegreenlifecine.org/greenwash-alert-audubon-society-golf-courses/ (citing several articles on instances of confusion between the two.)
\(^7\) Katherine Bindley, Kashi GMO Use Creates Controversy, Backlash On Facebook And Twitter, HUFFINGTON POST (Apr. 27, 2012, 3:09 PM),
\(^1\) Id. (citing Ed Gillespie, Stemming the Tide of Greenwash, 18 CONSUMER POLICY REV. 79-83 (2008),
\(^2\) See Terrachoice 2009, supra note 12
\(^3\) Id. at 3
\(^4\) Id. at 3
\(^5\) Id.
\(^6\) Id.
\(^7\) Id. There are other “sins.” The “sin of vagueness” is where a claim is either incorrectly defined or overly broad such that consumers cannot
understand what it means, e.g., “all natural” or “chemical free” products. The “sin of irrelevance” is where a claim may be true but is unimportant or
unhelpful, such as the claim that a product does not contain chlorofluorocarbons (“CFCs”), which were banned almost 30 years ago. The “sin of the
lesser of two evils” arises when a green claim may be true, but is made about a category of product that has an adverse environmental impact.
Examples are organic cigarettes or “green” herbicides. The “sin of fibbing” simply means that the claim is false and cannot be confirmed. The most
common example is products falsely claiming to be Energy Star certified. The “sin of worshipping a false label “is committed by a product that,
through either words or images, gives the impression of third-party endorsement where no such endorsement actually exists; fake labels, in other
words. Id.
characteristics when in fact they only have some or none of those attributes. By misdirecting consumer and investor dollars, greenwashing in turn creates marketplace inefficiency.

Greenwashing can also result in consumer and regulator complacency. “If one corporation in a particular company gets away with greenwashing, other corporations will follow suit, thereby creating an industry-wide illusion of environmental sustainability, rather than sustainability itself. This creation of the illusion of environmental sustainability could have dire social consequences as consumers will continue to use products and support companies that further environmental degradation and reduce the quality of living conditions for future generations.”

Greenwashing may also promote consumer cynicism. “If consumers start to expect self-promoting ads from even the most environmentally backwards corporations, or are bombarded by endless amounts of green claims without any seeming credibility, this could make consumers skeptical the sincere portrayals of legitimate corporate environmental achievements.” Similarly, greenwashing can “negatively affect investor confidence in environmentally friendly firms, eroding the socially responsible investing capital market.”

III. Combatting Greenwashing

Three broad categories of anti-greenwashing efforts currently exist; (1) regulatory solutions (regulations and regulatory guidance), (2) social solutions (grassroot campaigns and blogs), and (3) market-based solutions (independently certified eco-labels.) Each suffer from their own unique problems, but all are weakened in some way by a lack of coordination and redundancy.

A. Regulation

Although a false advertising claim under the FTC’s consumer protection laws remains the primary remedy against greenwashing, there are several other agencies and legal frameworks that are or can be directly or indirectly used to combat the issue. An assortment of legal remedies is not, in it of itself a problem -- in fact, it provides more avenues for consumers and government agencies to curb bad behavior. On the other hand, given the often redundant differing standards and definitions among federal regulations and as between federal and state regulations, greenwashing regulation also suffers from “too may hands in the cookie pot,” making the task of crafting legitimate green claims highly confusing for companies.

1. The Federal Trade Commission

Section 5 and the Green Guides

See Terrachoices supra note 11, at 228
See generally Delmas, supra note 13.
Melissa Whellams and Chris MacDonald, What is Greenwashing, and Why is it a Problem?, BusinessEthics.ca, http://www.businessethics.ca/greenwashing/ (citing Joel J. Davis, Ethics and Environmental Marketing, 11 J. Or BUS. ETHICS 81-87 (1992)).
Id.
Id. See also Terrachoice 2010 supra note 11, at 2
Delmas, supra note 13, at 3.
The FTC Act is the main source of protection for consumers against false advertising. Although Section 5 of the Act gives the Federal Trade Commission (FTC) the power to prevent “unfair or deceptive acts or practices in or affecting commerce,” the FTC did not consider environmental marketing advertising until the early late 1980s and early 1990’s when issues surrounding unclear environmental claims first gained national attention. In response to the flurry of greenwashing, in July 1991, during the time that federal legislation that would establish a national regulatory scheme for environmental marketing claims was being proposed, and after being lobbied by the National Association of Attorneys General and industry leaders, the Federal Trade Commission (FTC) hosted its first meetings to discuss environmental marketing. Ultimately, no federal legislative action was taken, but a year later, the FTC released its first Green Guides. The Green Guides suggest a series of general principles that apply to all environmental marketing, and guidelines regarding specific terms, such as “biodegradable” or “recyclable,” with illustrative examples throughout. However, the Green Guides themselves are not agency rules or regulations, but are instead intended to set forth the FTC’s current view of the types of environmental claims the agency may find deceptive under Section 5 of the Federal Trade Commission Act. The language the FTC uses emphasizes that these guides provide advice, not strictly enforced regulations.

The Guides have been subject to a range of criticisms: unclear definitions, over generalized principles, too few examples, and failing to set enforceable regulations. They were lightly revised in 1996

\[\text{References}\]

\[\text{Footnotes}\]

\[\text{Citations}\]
and 1998, but the criticisms were more directly addressed in the most recent 2012 revisions. Released on October 1, 2012, the revised Green Guides include both updates to existing guidance and newly added sections.

Notable Cases

In recent years, the FTC has increased its enforcement activities regarding the advertising of green products. This increased activity -- FTC complaints and warning letters -- is based on existing laws and rules such as the FTC Act, the Green Guides, the Textile Fiber Products Identification Act, 15 U.S.C. § 70, (Textile Act), and the Textile Rules, 16 C.F.R. pt. 303.

For example, in late 2009, the FTC charged K-Mart, Tender Corp., and Dyna-E International with making false and unsubstantiated statements by labeling and marketing paper products as “biodegradable.” The FTC alleged that the companies’ products were generally disposed of in landfills, incinerators and recycling facilities that made the paper products impossible to biodegrade in a reasonable time. Clothing and textile companies were also charged with deceptive labeling and advertising. The FTC alleged that these companies made false and unsubstantiated “green” claims by claiming that their textile products were manufactured using an environmentally friendly process, that the products retained the natural antimicrobial properties of the bamboo plant, and that the products were biodegradable. The FTC claimed that several claims related to rayon clothing were being labeled as “100% bamboo fiber” and being marketed under names such as “ecoKashmere,” “Pure Bamboo,” “Bamboo Comfort,” and “BambooBaby.” All companies charged by the FTC entered into settlement agreements, barring them from making any of the claims they had been, and from generally making any claims that were untrue. Then, in early 2010, pursuant to the Textile Act and Rules, section 5 of the FTC Act, and the Green Guides, the FTC sent letters to seventy-eight

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48 Id.
50 Id.
52 Id.
55 Id.
well-known companies with warnings that their respective advertisements could subject them to a public enforcement action. The FTC warning letters arose over the companies’ alleged marketing practices of labeling and advertising their rayon textile products as “bamboo.”

Criticisms

While the creation and revisions of the Green Guides are admirable, common criticisms include: (1) the guidelines are voluntary and thus do not have the force of law; (2) because the guidelines are voluntary, they do not preempt state regulations which prevents a uniform standard; (3) the guidelines provide extremely vague definitions and lack the specificity needed for scientific terminology; (4) the terminology is limited and outdated, failing to reflect current environmental marketing trends; and (5) the guidelines have failed to provide effective monitoring and enforcement.

First, expanded Green Guides will continue to be non-binding guidance. Without binding guidance, all environmental claims are still reviewed on a case-by-case basis using the section 5 “deceptive” standard, as a result, the FTC’s limited resources are put towards prosecuting only the most egregious and visible violators and judges and jurors must make subjective determinations based on common sense or consumer surveys. Additionally, non-binding guidelines do not preempt states’ individual regulations, resulting in a lack of national uniformity in environmental regulations. Though several states have used the Guides as a model when enacting regulation, other states have created their own stricter and more precise standards to combat the perceived leniency of the Green Guides. State standards and definitions, however, vary greatly among the states.

Manufacturers incur greater costs from this patchwork of standards, which can prevent advertiser compliance.

Another limitation of this regime is that the guidelines are subjective. The standards and terminology defined in the Green Guides are vague mainly because they are not based on scientific technology, but rather...
on how the FTC believes the advertisement will affect a consumer’s decision making. As a result, manufacturers have often complained that they fail to provide “clear rules on what they may or may not claim about their products. Instead, manufacturers are left to interpret the definitions and examples in assessing whether their claims are valid.”

Although case-by-case prosecution gives some guidance to future green marketers as to what the FTC considers deceptive, it does not establish discernable marketing standards upon which green marketers can dependably rely when marketing their own environmentally friendly products. Green-marketing claims are unique in that each claim is made about a specific product with distinctive properties, and each claim is judged by the effect it would have on a “reasonable consumer.”

Risk-adverse manufacturers may find the unclear definitions confusing and decide not to make environmental claims in order to avoid false or misleading advertising. Second, the subjectivity provides loopholes for manufacturers with average practices and products to apply eco-labels, which may prevent manufacturers with environmentally superior practices from successfully differentiating their products.

The range of currently existing environmental terms is enormous, and the Green Guides only define a select few, even after the 2012 additions. The Guides remain over-generalized – while the updated Guides provide clear definitions of what it means for claims to be “deceptive” or “substantiated,” it is difficult for manufacturers to predict how the FTC will interpret things, because so few cases have been prosecuted under either version of the Guides. Finally, the Guides have been criticized for being “simply out of touch with current environmental marketing realities” given its failure to adequately respond to the emergence of new technology and terminology. Although the 2012 revisions attempted to close the gap, another decade of no revisions would mean the problem would persist.

The FTC’s case-by-case enforcement approach is also time consuming. Considering each case individually makes it impossible to regulate all of the manufacturers making environmental claims about hundreds of types of products. Perhaps not surprisingly, as of January 2010, the FTC had only prosecuted thirty-seven green marketing claims. This relevant handful of cases is not nearly enough to cover all of the

65 Fliegelman, supra note 6, at 1038-1039.
66 Id.
68 Fliegelman, supra note 6, at 1038-1039; see also Avallone, supra note 36, at 686.
69 Fliegelman, supra note 6, at 1038-1039; see also Sebastian Koos, Varieties of environmental labelling, market structures, and sustainable consumption across Europe: A comparative analysis of organizational and market supply determinants of environmental-labelled goods, 34 J. OF CONSUMER POLICY 127-151 (2011); Grodsky, supra note 37, at 155-156 (“An unintended consequence of the FTC’s application of the reasonable consumer standard is that it has essentially granted immunity in the gray area cases.”); see, e.g., Hill v. Roll Int’l Corp., 128 Cal. Rptr. 3d 109 (Ct. App. 2011).
70 Fliegelman, supra note 6, at 1043-44; see generally 16 C.F.R §§ 260.5-17.
71 Fliegelman, supra note 6, at 1043-44; see generally 16 C.F.R § 260.2 (advising that “relevant and reliable scientific evidence” should be used to substantiate environmental claims); see also White, supra note 67, at 336 (“The FTC would need to prosecute a significant number of various deceptive green-marketing claims to give the Green Guides sufficient context and provide marketers with well defined, predictable standards of what it considers ‘deceptive.’”).
72 Fliegelman, supra note 6, at 1042-43; see also Avallone, supra note 36, at 691.
73 Id.
environmental claims a product could make, never mind all of the possible types of products. Another problem with its incremental approach is that the FTC waits until after the false claims have been made before taking action, rather than preventing false claims from being made in the first place and staying ahead of the rapidly changing landscape of environmental marketing. Waiting until after environmental claims have already misled many consumers is problematic: it creates consumer cynicism, takes market share away from eco-labels making legitimate claims, and prevents the potential environmental benefits of purchasing eco-labeled products. Moreover, because the FTC is limited to this case-by-case method due to legislation restricting its ability to make rules addressing specific issues related to deceptive advertising, an ad-hoc and discretionary enforcement pattern is left, with little precedential value. Further contributing to the FTC’s lack of enforcement is the FTC’s unwillingness to pursue any action that might be seen as creating environmental policy. Finally, the fact that injured consumers lack standing is also troublesome – without standing to sue, consumers must wait for the FTC to act or for a competing business to bring claims under the Lanham Act.

The Green Guides are clearly a step in the right direction. It’s also clear that the FTC will continue to use the FTC Act and the Green Guides, independently and in combination with other federal laws and rules, to bring public enforcement claims against companies making greenwashed claims about their products or the environmental attributes of their products. It is possible that because of the clearer, bolder guidelines in the 2012 Green Guide revisions, the FTC will increase its enforcement efforts and gain traction, especially since the Guide is based on a consumer-based survey of consumer beliefs about the meaning of typical green claims. The revisions may also make businesses equip themselves with their own data on consumer understandings of green claims. Additionally, companies may benefit by policing competitors using deceptive advertising; companies will likely rely on the guidelines to bolster their position in Lanham Act claims or in proceedings before the National Advertising Division. However, the need for clarity and consistency, precisely what spurred the FTC to publish the Green Guides in the first place, has prompted

74 Id.; see also Tom Redick, Regulatory Update – FTC Seeks Input on Green Marketing Guides, 26 AGRICULTURAL L. UPDATE 1,4 (2009)
75 Tawnya Wojciechowski, Comment, Letting Consumers Stand on Their Own: An Argument for Congressional Action Regarding Consumer Standing for False Advertising Under Lanham Act Section 43(a), 24 SW. U. L. REV. 231 (1994) (using environmental marketing as an example of the FTC’s ineffectiveness)
77 See Grodsky, supra note 37, at 155 (calling case by case enforcement “selective, incremental, and highly contextual.”)
78 Fliegelman, supra note 6, at 1043 (citing to News Release, Fed. Trade Comm’n, FTC Announces Actions Against Kmart, Ten- der and Dyna-E Alleging Deceptive ‘Biodegradable’ Claims (June 9, 2009), available at www.ftc.gov/opa/2009/06/kmart.shtm.) Fliegelman also notes that at the FTC’s January 2008 workshop, FTC Chairman Majoras stated that despite the Commission’s intent to explore these scientific issues, she “want[ed] to make clear that [the FTC] [does not] . . . have the authority or the technical expertise to ad- dress issues of environmental or energy regulation,” (citing to Deborah Majoras, Chairwoman, Fed. Trade Comm’n. Opening Remarks at the Fed. Trade Comm’n’s Workshop on Carbon Offsets and Renewable Energy Certificates 16 (Jan. 8. 2008), available at http://www.ftc.gov/bcp/workshops/carbonoffsets/transcript/opening_dpmajoras.pdf) and that during July 2009 congressional hearings, James Kohm, the Associate Director of the Enforcement Division in the FTC’s Bureau of Consumer Protection at the time, reiterated that any marketing modifications must avoid “set[ting] environmental standards or policy,” because the Commission’s only purpose is to “protect[] consumers from unfair or deceptive practices.” Id; see also Valerie Davis, FTC on Greenwashing: Is That All There Is?, ENVIRONMENTAL LEADER (June 20 2009), http://www.environmentalleader.com/2009/06/20/ftc-on-greenwashing-is-that-all-there-is/
79 This will be discussed further in section 3.
80 Diffenderfer, supra note 35.
many scholars to suggest that a new regulatory framework that creates uniform national standards is what’s needed.82

2. EPA

Both the House83 and the Senate84 proposed legislation that would have given the EPA differing degrees of authority to regulate environmental marketing terminology; however, these legislative efforts did not succeed, preventing the EPA from having either exclusive or joint authority to address green marketing.85 The first FTC Green Guides were created in conjunction with the EPA in 1998,86 however, since then the EPA has been significantly less involved in addressing greenwashing. Currently, the EPA is the chief enforcement agency for five main areas that involve greenwashing,87 and in each of these areas, the Agency has promulgated labeling regulations.88 The most notable is its creation of the most prominent government-backed environmental labeling program in the United States, the ENERGY STAR Program, which lends a stamp of approval to electronic products that achieve certain levels of energy efficiency.89 Not to be confused with the FTC/DOE Energy Guide label,90 the blue-and-white Energy Star label is a voluntary program available to a much broader range of products than just appliances, including buildings, identifying the product carrying it as more efficient than most of its peers.91 Energy Star labels have been criticized for remaining on products that no longer qualify for updated standards.92

The EPA also sets mandatory vehicle emissions and fuel economy standards. The Energy Policy and Conservation Act established corporate average fuel economy (“CAFE”) standards, which require that all new light-duty vehicles sold in the U.S. must bear a label indicating the estimated miles-per-gallon rate (fuel economy) for city and highway use.93 NHTSA, an agency within the U.S. Department of Transportation (DOT), administered the original CAFE program while the EPA was responsible for establishing the testing

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83 Environmental Marketing Claims Section of the National Waste Reduction, Recycling, and Management Act (the Swift Act), H.R. 3865, 102d Cong., 2nd Sess. (1992); See Israel, supra note 1, at 323-326; see generally Downs, supra note 82.
84 Environmental Marketing Claims Act of 1991 (the Lautenberg Act), S. 615 102d Cong., 1st Sess. (1991); See Israel, supra note 1, at 323-326; see generally Downs, supra note 82.
86 In order to address the issue of federal uniformity, the staff from the EPA, White House Office of Consumer Affairs, and the FTC met as part of the Interagency Task Force on Environmental Marketing Claims to develop these guidelines. See U.S. Environmental Protection Agency, Status Report on the Use of Environmental Labels Worldwide, EPA 742-R-9-93-001 (1993); See also U.S. Environmental Protection Agency, Guidance for the Use of the Terms “Recycled” and “Recyclable” and the Recycling Emblem in Environmental Marketing Claims, 56 Fed. Reg. 49,992 (Oct. 2, 1991).
87 The five main areas are: (1) compliance with vehicle emissions standards; (2) placement of warning labels on ozone-detrimental products; (3) participation in the national recycling and emissions reduction program; (4) elimination of nonessential products containing chlorofluorocarbons; and (5) greenhouse gas emissions. See Cavanagh, supra note 37, at 164-165.
88 Id.; See also, United States Environmental Protection Agency, Environmental Standards and Guidelines, http://yosemite1.epa.gov/oppt/opptstandards2.nsf/Pages/Standards.html?Open (listing the various relevant U.S. programs run by the E.P.A.).
90 16 C.F.R. §305 (1987)
91 See supra note 89
and evaluation protocol for assessing compliance and calculating the fuel economy for each manufacturer. However, after the landmark Supreme Court decision in Massachusetts v. EPA,94 which gave the EPA a mandate to regulate greenhouse gas emissions, and the National Fuel Efficiency Policy announced by President Obama on May 19, 2009,95 the EPA created greenhouse gas emissions standards under the Clean Air Act. Because authority to set CAFE standards rests with the NHSTA, in an effort to avoid creating two sets of standards, NHTSA and EPA worked together to ensure that greenhouse gas regulations on vehicles coordinated with CAFE standards, creating a new, harmonized National Program under which automobile manufacturers will be able satisfy all requirements under both programs.96 Failure of a manufacturer to meet the average standards would ultimately result in the potential for monetary penalties under both EPCA and the CAA.

The EPA has also taken a few indirect approaches to curb greenwashing. Pursuant to Executive Order (EO) 13101, entitled "Greening the Government through Waste Prevention, Recycling and Federal Acquisition," under which the EPA is required to develop guidance to "address environmentally preferable purchasing," the EPA issued its Final Guidance on Environmentally Preferable Purchasing to help executive agencies meet their 13101 obligations to identify and purchase environmentally preferable products and services.97 It also developed its Green Purchasing Guides98 and the Database of Environmental Information for Products and Services99 to further assist in the green government procurement effort. The EPA recognizes organizations, programs, and individuals that “significantly advance green power development" in its annual Green Power Leadership Awards, jointly sponsored by the U.S. Department of Energy (DOE) and Center for Resource Solutions (CRS). While intended to be an incentive to companies to make legitimate claims, the program has been criticized for promoting “something-is-better-than-nothing sustainability.”100 In addition, the EPA has participated in the International Standards Organization’s (ISO) efforts to standardize eco-label criteria on a global scale.101

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94 U.S. 497 (2007)
96 Id.; See also National Highway and Safety Administration, Fuel Economy and Environmental Label, http://www.nhtsa.gov/Laws+%Regulations/CAFE+%Fuel+Efficiency+F+economy+and+environment+label
97 available at http://www.epa.gov/epp/pubs/guidance/finalguidance.htm#executiveagencyimplementation
99 United States Environmental Protection Agency, Database of Environmental Information for Products and Services, http://yosemite1.epa.gov/oppt/eppstand2.nsf/Pages/Search.html?Open, Also called the Environmentally Preferable Purchasing (EPP) Database, it includes standards and guidelines for environmentally preferable products and services, written by national government agencies and independent third-party organizations from around the world. There are currently more than 500 standards in the EPP Database, covering more than 600 product and service categories.
Because of its environmental expertise, many scholars have advocated for increased EPA involvement, suggesting that the EPA is the more preferable agency over the FTC altogether,102 or that a collaborative effort between the FTC and the EPA would be most effective regulatory scheme.103

3. National Advertising Division

Another false advertising remedy is a proceeding before the National Advertising Division (NAD), the advertising industry’s self-regulating body.104 NAD cases can be initiated through staff monitoring of advertising claims105 or through “challenges” to advertising claims filed by competitors106, consumers, or public interest groups.107 Compliance with NAD decisions is voluntary, but advertisers that either refuse to participate in the self-regulatory process or do not implement the NAD recommendations are referred to the government.108 The NAD uses the Green Guides to evaluate disputes between competitors about the legality of environmental marketing claims.109

4. Private Actions Under Federal Law

In addition to FTC enforcement actions and EPA regulations, companies can also face civil litigation from private parties such as consumers and competitors under federal law.110 For example, in Paduano v. American Honda Motor Company,111 a consumer brought a claim for alleged violations of the Song-Beverly Consumer Warranty Act112 and the Magnuson-Moss Warranty Act.113 These actions can be brought in state or federal court.114

Businesses may bring suit under the Lanham Act.115 Section 43(a) of the Lanham Act imposes civil liability against “[a]ny person who . . . uses in commerce any word, term, name, symbol, or device . . . which

102 See Downs, supra note 82, at 155, 172–80 (proposing a new program of green claims regulation under the jurisdiction of the EPA due to its expertise in environmental issues); Avallone, supra note 40, at 699-700 (suggesting a role for individual states, the EPA, and the FDA)
103 See Barnett, supra note 76, at 508-09 (proposing a joint effort in which the “EPA would set standards and define terms based on current scientific evidence and FTC would incorporate these measures into interpretive rules”); Grodsky, supra note 37, at 172 (environmental advertising regulations require an “intricate weaving of environmental policy and consumer protection principles.”)
107 ASRC, supra note 105 (providing a sample list of recent greenwashing cases brought before the NAD and noting that between 1988 and 2014, NAD issued more than 40 decisions involving a range of greenwashing claims).
108 Id. See also Letter from C. Lee Peeler, President & CEO, National Advertising Council, to the Honorable Donald S. Clark, Federal Trade Commission, (May 21 2008), available at http://www.ftc.gov/sites/default/files/documents/public_comments/2008/04/534743-00053.pdf (summarizing NAD decisions that had examined advertising involving “green marketing” or environmental claims.)
108 Diffenderfer, supra note 35.
Similar to section 43(a)’s general prohibition of false and misleading advertising, section 2(a) of the Lanham Act bars the registration of deceptive trademarks with the U.S. Patent and Trademark Office (USPTO). The USPTO has generally treated environmental terms such as “organic,” “sustainable,” and “natural” as potentially deceptive when attributed to products that do not fit the bill. However, unlike 43(a), which provides damages and injunctive relief, companies barred under 2(a) are only denied the benefits of trademark registration – their marketing strategies are not otherwise scrutinized.

5. State Law

At the state level, there are private consumer actions under state law or federal law, as well as individual and coordinated state agency and state attorney general enforcement actions. In private court actions, the plaintiff can be an individual, but are more often consumer class actions, and typically

116 Lanham Act § 43(a), 15 U.S.C. § 1125(a) (2006). A successful claim generally proves five elements: 1) [T]he defendant has made false or misleading statements of fact concerning his own product or another’s; 2) the statement . . . will likely influence the deceived consumer’s purchasing decisions; 4) the advertisements were introduced into interstate commerce; and 5) there is some causal link between the challenged statements and harm to the plaintiff. [cite]


118 Id. at 330

119 15 U.S.C. § 1125(a)(1)(B); Id.


121 See Lanham Act § 2(a), 15 U.S.C. § 1052(a); See generally, In re Budge Mfg. Co., 857 F.2d 773, 775 (Fed. Cir. 1988) (Before refusing registration of a mark under section 2(a), the USPTO or Trademark Trial and Appeal Board (TTAB) must make three inquiries: (1) Is the term misdescriptive of the character, quality, function, composition or use of the goods? (2) If so, are prospective purchasers likely to believe that the misdescription actually describes the goods? (3) If so, is the misdescription likely to affect the decision to purchase?)


123 15 U.S.C. § 1052(a)

124 See, e.g., Hill v. Roll, supra note 69 (challenging Fiji green water drop shown on the Fiji bottled water label); Koh v. S.C. Johnson & Son, Inc., No. C-09-09027 RMW, 2010 WL 94265, at *1 (N.D. Cal. Jan. 6, 2010) (challenging the environmental safety of the cleaning product Windex in a class action lawsuit under various California state law claims relating to unfair competition, false advertising, unlawful business practices, and consumer protection violations).

125 White, supra note 67, at 331; Israeli, supra note 1, at 312; see e.g. PEOPLE OF THE STATE OF CALIFORNIA ex rel. Kamala D. Harris, Attorney General, Plaintiff, v. ENSO PLASTICS, LLC; Aquamanta, Inc.; Balance Water Company LLC; Does 1 through 9, Inclusive, Defendants., 2011 WL 5103052 (Cal.Superior) (California AG filed a greenwashing suit in against two bottled water companies and their plastic resin supplier, allegong that they made misleading claims by marketing plastic water bottles as 100% biodegradable and recyclable); See also Stephen Gardner, How Green Were My Values: Regulation of Environmental Advertising Claims, 23 U. TOL. L. REV. 31 (1991) (describing the multistate, cooperative investigations of Mobil Oil Co.’s claim that their Hefty trash bags were degradable and Gamble Company’s claim that their disposable diapers were compostable.).

126 See, e.g., Paduano v. American Honda Motor Co. Inc., 169 Cal. App. 4th 233 (1996); True v. Am. Honda Motor Co., 520 F Supp. 2d 1175, 1183 (C.D. Cal. 2007) (two lawsuits, an individual action in state court and a federal class action, bringing stating that the plaintiff relied on the defendant’s advertisements about the vehicles fuel economy when purchasing the Honda Civic hybrid)
allege either that the advertised environmental benefits of the product itself are false or misleading\textsuperscript{129}, or that the brand owner misrepresented its own green certification program as that of an independent, objective third party.\textsuperscript{130}

Every state has its own general consumer protection laws that are similar to section 5 of the FTC Act, hence called “little FTC Acts.”\textsuperscript{131} Each state uses state common law or FTC regulations and FTC cases to define “unfair” and “deceptive” rather than defining the terms in the acts themselves, and therefore are susceptible to the same advantages and disadvantages as the FTC Act.\textsuperscript{132} However, there is one notable exception -- while only the FTC can bring claims under the federal statutes, many of these corresponding state laws provide consumer standing.\textsuperscript{133} Additionally, several states have enacted laws specifically aimed at misleading environmental marketing,\textsuperscript{134} which usually fall under one of three main categories:\textsuperscript{135} (1) comprehensive definitional statutes,\textsuperscript{136} (2) market-oriented regulations,\textsuperscript{137} or (3) adoption of the FTC’s Green Guides.\textsuperscript{138} Further, it is likely that plaintiffs could bring claims under unfair business practices and unfair competition laws,\textsuperscript{139} as well as common-law claims, including, but not limited to, fraudulent misrepresentation,\textsuperscript{140} breach of warranty,\textsuperscript{141} and unjust enrichment claims.\textsuperscript{142}

6. Other Enforcement Options on the Horizon

This section describes several other legal frameworks that, though untested, may be effective tools to challenge greenwashing.

Federal Securities Fraud: 10b-5

One possible avenue is a 10b-5 claim by investor alleging, for example, that a corporation intentionally made a material misstatement or actionable omission about its environmental behavior, which the investor relied on in choosing to invest in the company, and as a result of the fraudulent statement, the corporation suffered a PR nightmare of the sort Chevron did, or got slapped with a costly FTC enforcement

\textsuperscript{129} See Koh, supra note 125; True, supra note 127
\textsuperscript{128} See Paduano, supra note 127. True supra note 127(alleging false claims about fuel economy, fuel savings, and altering federally mandated disclaimer language regarding fuel efficiency estimates).
\textsuperscript{129} See Hill supra note 69 (holding that the logo, (drop of water) was not deceptive as suggesting endorsement by 3\textsuperscript{rd} party or environmental superiority because since company website was on label, no reasonable consumer would be deceived); Koh, supra note 125 (holding that Logo (leaves & stem) could be deceptive as suggesting endorsement by 3d party or environmental superiority, despite company website on label).
\textsuperscript{131} White, supra note 67, at 331
\textsuperscript{132} Id.
\textsuperscript{133} Id. at 332
\textsuperscript{134} Id.

\textsuperscript{135} See e.g., Indiana’s Environmental Marketing Claims Act, IND. CODE ANN. §§ 24-5-17-1 to -14.
\textsuperscript{136} See e.g., NY’s official recycling emblem, N.Y. Comp. Codes R. & Regs. tit. 6, § 368.1-7. Under this voluntary eco-labeling program, manufacturers must apply the New York State Department of Environmental Conservation to gain permission to use to logo. Id.
\textsuperscript{137} California and Minnesota, for example, are two states which have done so. Goodwin Proctor, Client Alert: FTC Enforcement Initiatives Spotlight Risks In Making Green Marketing Claims, (Nov. 12 2013), \url{http://www.goodwinprocter.com/Publications/Newsletters/Client-Alert/2013/1112_FTC-Enforcement-Initiatives-Spotlight-Flaws-in-Green-Marketing-Claims.aspx?articles=1}.
\textsuperscript{138} See Barnett, supra note 76, at 504-506 (explaining state involvement in the regulation of greenwashing).
\textsuperscript{139} Diffenderfer, supra note 35.
\textsuperscript{140} Id.
\textsuperscript{141} See Barnett, supra note 76, at 504-506.
action, causing damages to the investor in the form of lower returns.\textsuperscript{143} The primary challenge to success with this approach is proving materiality.\textsuperscript{144} Even if the investor could successfully point to the false statement, the statement might be deemed “immaterial as a matter of law on the ground that it is meaningless hyperbolic puffery.”\textsuperscript{145} Another, smaller difficulty is demonstrating causation.\textsuperscript{146} As applied to a BP or Chevron, the investor would have to prove not only that it was motivated to buy or sell their stock on the basis of the companies environmental claim, but also that the stock subsequently fell because it did not live up to its environmental claim.\textsuperscript{147} It is also possible that U.S. securities laws, as part of their requirement to disclose ‘material’ information on publicly traded corporations, could eventually require the inclusion of a corporation’s status as being third party certified with respect to the claims and labels placed on their products.\textsuperscript{148}

**U.S. Dodd-Frank Act**

The newly enacted Dodd-Frank Act\textsuperscript{149} may provide a basis for policing greenwashing. Section 1011 of the Act enables the creation of a Bureau of Consumer Financial protection to “regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws.”\textsuperscript{150} As Cherry & Sneirson explain:

> The statutory language concerning consumer education, appropriate disclosure, and tracking of consumer complaints could overlap with…greenwashing, as these are consumer-information issues and accurate disclosure could certainly influence consumers’ informed investment decisions. Further, educating consumers about their rights should include helping consumers understand whether their purchases will advance the causes they believe in. That can only be done through accurate disclosure. As the legislation and the Bureau are still so new, it is difficult to know how the various provisions will be enforced and what litigation they will generate.\textsuperscript{151}

**Civil RICO Suits**


\textsuperscript{144} Cherry & Sneirson, supra note 143, at 146-147.

\textsuperscript{145} Id. at 147 (citing *In re Ford Motor Co.*, 381 F.3d 563, 57071 (6th Cir. 2004)), (denying plaintiff’s 10b-5 claim that Ford’s statement called itself a “socially responsible company” while simultaneous marketing products that were dangerous and holding that the statement was mere “corporate puffery” and acted only as “loosely optimistic statements that are so vague that…no reasonable investor could find them important to the total mix of information available” and that “all companies praise their products and their objectives”).

\textsuperscript{146} Id. at 147.

\textsuperscript{147} Id.


\textsuperscript{150} Dodd-Frank, supra note 149, § 1011.

\textsuperscript{151} Cherry & Sneirson, supra note 143, at 148
Civil RICO suits are another, albeit rarely used, avenue.\textsuperscript{152} The Rackateer Influenced and Corrupt Organizations Act (RICO) makes it illegal for any person to conduct an enterprise that affects interstate commerce through a pattern of racketeering activity,\textsuperscript{153} or to invest racketeering income in a business that affects interstate commerce.\textsuperscript{154} The statute has a list of crimes that constitute racketeering activities\textsuperscript{155}, the ones relevant to deceptive green marketing being mail fraud and wire fraud.\textsuperscript{156} The plaintiff would claim that the advertiser committed mail or wire fraud by deceptively advertising a product.\textsuperscript{157} At least as of the mid-1990’s, citizen attempts to prosecute false advertising and deceptive green claims under RICO had not been successful, as “lower courts [were] reluctant to allow civil RICO actions to proliferate in these non-traditional areas.”\textsuperscript{158} Even so, the possibility that a plaintiff could prevail in a civil RICO claim concerning a particularly outrageous case of false advertising is something for manufacturers to be mindful of, as RICO liability results in expensive consequences.\textsuperscript{159}

\section*{B. Environmental Watchdogs and Grassroots Campaigns}

In addition to regulatory schemes, private organizations and environmental activists act as greenwashing “watchdogs,” policing corporate greenwashers on the internet, social media, and mainstream media. Since the rise of greenwashing, organizations like TerraChoice,\textsuperscript{160} Greenpeace,\textsuperscript{161} and the Center for Environmental Health\textsuperscript{162} have monitored the problem and brought it to the public’s attention. A successful example of watchdog policing of firm-level greenwashing is the spoofing of Chevron’s “we agree” campaign, launched just few months after the BP oil spill in the Gulf of Mexico, in the wake of public backlash at BP and oil companies in general, and four months before Chevron was hit with a $9.5-billion judgment in a long-running lawsuit alleging that the company was responsible for poisoning the Ecuadorian rainforest.\textsuperscript{163} The campaign involved a series of advertisements agreeing with the public sentiment, affirming its commitment to renewable energy by “agreeing” that it needed to develop affordable, viable alternatives to

\begin{footnotesize}
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\item\textsuperscript{152} Israel, supra note 1, at 314-317

\item\textsuperscript{153} 18 U.S.C § 1962(c) (1988).

\item\textsuperscript{154} Id at § 1962(a)


\item\textsuperscript{156} See 18 U.S.C. § 1341, 1343 (1988); Israel, supra note 1, at 315


\item\textsuperscript{158} Id.

\item\textsuperscript{159} Israel, supra note 1, at 330 (noting the ability for plaintiffs to be awarded attorney’s fees and treble damages in a class action suit).

\item\textsuperscript{160} Greenpeace, Greenwash Criteria, \url{http://www.stopgreenwash.org} (last accessed 11/23/13); Don’t Be Fooled by Shell’s Arctic Ads, Greenpeace (Nov. 15, 2010), http://members.greenpeace.org/blog/greenwashing/ 2010/11/15/don-t-be-fooled-by-shell-s-arctic-ads (accusing Shell of seeking to open risky oil drilling locations while running an aggressive advertising campaign asserting their aim to be environmentally responsible and fuel-efficient).


\item\textsuperscript{163} Cherry & Snerson, supra note 143, at 134-140; see also David Lazarus, Behind Chevron’s feel-good, misleading ad campaign, LA TIMES (May 12, 2011), \url{http://articles.latimes.com/2011/may/12/business/la-fi-lazarus-20110513}.
\end{itemize}
\end{footnotesize}
fossil fuels, and inviting critics to learn the company’s position on environmental issues.\textsuperscript{164} But the campaign did not sit well with many people.\textsuperscript{165} So much so that three organizations\textsuperscript{166} embarked on a parody series of “we agree” ads and press releases that went viral,\textsuperscript{167} spoofing the campaign so well that many news outlets thought they were authentic.\textsuperscript{168} And the negative press did not stop there; The True Cost of Chevron Network, a coalition of about 40 environmental watchdogs, authored an annual report called the “Alternative Annual Report”, an “alternative” to Chevron’s annual report, which brings together stories from communities across the world that are all directly affected by and in struggle against Chevron’s operations and details the “true costs” paid for Chevron’s profits.\textsuperscript{169} It also released its own series of advertisements in response to Chevron’s campaign that aims to depict the reality for the communities and environments impacted by Chevron.\textsuperscript{170}

Another notable firm-level watchdog success is www.greenwashingindex.com,\textsuperscript{171} which enables individuals to post and rate the extent to which environmental ads are greenwashing attempts. Successful examples of policing of product-level greenwashing are indexing websites such as ecolabelindex.com,\textsuperscript{172} greenerchoices.org,\textsuperscript{173} ConsumerReport’s eco-label database,\textsuperscript{174} and NRDC’s Label Lookup,\textsuperscript{175} which aggregate and provide independent verification and analysis of environmental logos and labels that purport to communicate that products have met environmental standards. A great example of social media’s impact on greenwashing is around Kashi’s “all natural” greenwash. A few months after farm policy watch-dog organization the Cornucopia Institute released a report called "Cereal Crimes," alleging that the "all-natural" cereal brand Kashi uses genetically modified organisms (GMOs) in some of its products, a small health foods grocery store in Rhode Island discovered the news and pulled the cereal off its shelves.\textsuperscript{176} It then posted a picture of Kashi’s “all natural” shelf sign on its Facebook page, creating a viral backlash against Kashi across the web and prompting the need for Kashi to do serious damage control.\textsuperscript{177} This eventually forced Kashi to

\begin{thebibliography}{177}
\bibitem{164} Id. See also, Advertising: The Power of Human Energy, CHEVRON CORP., http://www.chevron.com/about/advertising (last accessed 11/24/13); Ben Casselman, Chevron Ad Campaign Answers Critics Head-On, WALL. ST. J., (OCT. 18, 2010) http://online.wsj.com/article/SB1000142405270230235045755558369302469440.html
\bibitem{165} Id. See also, Adam Werbach, The Failure of Chevron's New "We Agree" Campaign, THE ATLANTIC (Oct. 21, 2010 4:50 PM), http://www.theatlantic.com/business/archive/2010/10/the-failure-of-chevrons-new-we-agree-ad-campaign/64951/ (last accessed 11/24/2103) (stating that many of Chevron’s “good works... were required by law”).
\bibitem{166} Id. See also, Steven Mufson, Critics spoof new Chevron ads promoting responsibility, THE WASHINGTON POST (Oct. 20, 2010 12:11 AM) http://www.washingtonpost.com/wp-dyn/content/article/2010/10/19/AR2010101904622.html (noting that the fake ads were the handiwork of notorious pranksters The Yes Men (known for mocking major corporations), Amazon Watch, and the Rainforest Action Network.)
\bibitem{167} Id. See also, Kirsten Korosec, Chevron Punk'd! How the Big Oil Company Lost Control of Its Message, CBS NEWS, MONEYWATCH, (Oct. 19, 2010 5:35 PM) http://www.cbsnews.com/news/chevron-punkd-how-the-big-oil-company-lost-control-of-its-message/ (last accessed 11/24/13)
\bibitem{168} Id. See also, Stuart Elliott, Pranksters Lampoon Chevron Ad Campaign, N.Y. TIMES MEDIA DECODER BLOG (Oct. 18, 2010), http://mediadecoder.blogs.nytimes.com/2010/10/18/pranksters-lampoon-chevron-ad-campaign/
\bibitem{170} http://truecostofchevron.com/2010-true-cost-of-chevron-ads.pdf
\bibitem{171} GREENWASHING INDEX, http://www.greenwashingindex.com (last accessed 11/23/13)
\bibitem{172} ECOLABEL INDEX, http://www.ecolabelindex.com (last accessed 11/23/13)
\bibitem{173} GREENER CHOICES ECO-LABELS CENTER, http://www.greenerchoices.org/eco-labels/
\bibitem{174} Id.
\bibitem{175} NRDC LABEL LOOKUP, http://www.nrdc.org/living/labels/ (last accessed 11/23/13)
\bibitem{176} Huffington Post, supra note 17.
\bibitem{177} Id. In response, Kashi released a YouTube video featuring “a Kashi team member and a nutritionist” and attempting to explain and dispel the “inaccurate information” about its products, prompting the Cornucopia Institute to post a rebuttal video. Id.
\end{thebibliography}
carry 7 cereals with the Non-GMO Project Verified seal.\textsuperscript{178}

Due to these types of successful watchdog efforts, “notable transgressions and false claims instantly reach millions of concerned consumers through the green blogosphere”,\textsuperscript{179} an “unorganized but interconnected network”\textsuperscript{180} of providers of green products and services, government agencies, non-governmental organizations, certifying organizations, green news organizations, green search engines, social networks, “trendspotter” web sites such as TreeHugger, advocacy groups, bloggers and green lifestyle movements.\textsuperscript{181} Green marketing expert Richard Seireeni has coined this phenomenon “The Gort Cloud.”\textsuperscript{182} Messages can spread through the network and create a PR nightmare for a company that engages in greenwashing and attach long-lasting stigma.\textsuperscript{183} A quote from a strategic communications professional in Advertising Age explains why this is not like what a pesky fly is to a horse: “It’s like a thumb trap, the more the company tries to defend itself, the more it becomes part of the story and that makes it more interesting. The company being attacked can’t effectively fight back itself and that’s why these tactics are so effective.”\textsuperscript{184} These watchdog efforts, while not enough to put an end to false environmental claims (largely due to their unorganized nature),\textsuperscript{185} are a powerful policing tool – a 2013 survey by Cone Communications revealed that 78% of consumers would actively boycott any company that was found to be intentionally making misleading claims about their environmental stewardship.\textsuperscript{186}

C. Eco-Labels

The modern day concept of labeling consumer products has been in existence for some time. In the late 1890s, the Underwriters Laboratory Seal, which rates the safety of electrical equipment, became the first official U.S. product label.\textsuperscript{187} Today, product labeling comes in various forms, such as the Good Housekeeping Seal, Consumer Reports, automobile mileage statements, and pesticide warning labels. While these labels govern different types of claims and different kinds of products, they all have the effect of providing the customer with readily available information on particular characteristics of a product. Likewise, an environmental label identifies a product that meets a wide range of environmental performance criteria or standards. According to the EPA, “environmental labeling is defined as making relevant environmental information available to the appropriate consumers.”\textsuperscript{188} The “environmental information” is

\begin{flushleft}
\textsuperscript{178} Id.
\textsuperscript{179} Lane, supra note 15, at 748
\textsuperscript{180} Id. (citing Richard Seireeni, \textit{The Gort Cloud: The Invisible Force Powering Today’s Most Visible Green Brands} 1 (Chelsea Green Publ’g 2008) )
\textsuperscript{181} Id. (citing Richard Seireeni, supra note 180, at 20-31)
\textsuperscript{182} Id.
\textsuperscript{183} Id.
\textsuperscript{185} See generally, Seireeni, supra note 181.
\textsuperscript{186} See generally, Seireeni, supra note 180.
\textsuperscript{187} See also Fliegerman, supra note 6, at 235 (noting that environmental watchdogs are helpful in reducing consumer confusion and holding greenwashers responsible for their claims.)
\end{flushleft}
Environmental labels can be divided between first-party efforts, claims (“green” and “biodegradable”) and labels (self-developed standards and seal of approval) made by the manufacturer itself, and third-party labels, which are developed, certified, and licensed by an independent entity, such as a government agency or private organization.

As discussed earlier, environmental marketing claims, and therefore greenwashing conduct, typically take one of two forms. Companies either portray themselves as responsible stewards of the environment by touting their sustainable business practices or moralities (firm-level greenwashing), or the environmental advertising is associated with particular goods (product level greenwashing), such as energy efficient appliances or biodegradable diapers. Firm level greenwashing often comes in the form of touting of Environmental Management Systems (EMS), which certifies that a system is in place in the organization to keep track of the environmental performance, or social labeling (e.g., “we are committed to using renewable energy sources”). On the other hand, product-level greenwashing usually takes the form of first party “environmental labeling.”

The 1980s was plagued by a widespread product-level greenwashing—with surveys indicating widespread consumer confusion and skepticism over the alleged claims. As these claims soared, so did the demand for better evidence of claims, and – consequently – the demand for third party endorsement. Privately-developed, voluntary environmental product standards and certifications, otherwise known as “eco-labels,” emerged to fill the void created by the lack of government regulations and national standards, acting as a market-based tool for combatting greenwashing as far back as the 1980s, with Germany’s Blue Angel Program recognized as the first eco-label program. Private certifying organizations typically license their environmental label mark or logo to those who meet their developed standards, permitting the

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189 Forest Stewardship Counsel, *FSC Certification*, [https://ic.fsc.org/certification.4.htm](https://ic.fsc.org/certification.4.htm), [hereinafter called FSC]; See generally *Lane*, supra note 15.
190 See generally, Elliot B. Staffin, *Trade Barrier or Trade Boon: A Critical Evaluation of Environmental Labeling and Its Role in Greening of World Trade*, 21 COLUMBIA J. OF ENVTL. L. 205-296 (1996);
191 Delmas, supra note 13, at 6
192 Id.
193 Id.
194 Id.
195 See generally, Staffin, supra note 190; see also U.S. Environmental Protection Agency, *Determinants of Effectiveness for Environmental Certification and Labeling Programs* 21 (1994) [hereinafter EPA, Determinants of Effectiveness]. (The survey, conducted by Environmental Research Associates, also showed that only 8% of consumers polled felt that “government” was the best source of unbiased information about the environment). See also U.S. Environmental Protection Agency, *Status Report on the Use of Environmental Labels Worldwide* 6-7 (1993) [hereinafter EPA, Status Report].
196 See *Terrachoice* 2010, supra note 11, at 19; *Terrachoice*, supra note 12, at 5
197 See *Downs*, supra note 82, at 5
198 Id. at 172.
199 See *Downs*, supra note 82, at 172-173
manufacturer to display the mark on products and in advertisements, usually in exchange for a licensing fee.²⁰⁰

1. Classification of Environmental Labels

In everyday language, “eco-labels” is often used to refer to all product labels that make a “green” claim, however, eco-label is a subsidiary of a large and composite family that should be referred to as “environmental labels.” Eco-labels are just a type of environmental label, with a certain level of comprehensiveness, independence and reliability. There are four general points of differentiation: (1) whether the scheme is mandatory or voluntary; (2) whether the label is first party, made by the manufacturer/retailer itself, or third party, whereby the label’s standards are set, certified, and licensed to companies by an independent entity; (3) whether that independent entity is a government agency or a private organization; and (4) whether the label is “single attribute” or “multi-criteria.”²⁰¹ To the extent that this paper mentions “eco-labels,” it is in reference to voluntary, third party labeling programs, licensed by either the government or a private entity. However, a discussion of the various types of environmental labels remains helpful in understanding the anti-greenwashing landscape.

Mandatory environmental labeling refer to labels required by law; these appear to be more common for specific, single-attribute performance issues such as water or energy consuming devices.²⁰² These standards are usually developed by the government.²⁰³ Mandatory labels include danger symbols, conformity with standards, declaration of contents, national rating schemes, and research & testing institutions.²⁰⁴ The goal of either type of mandatory labeling scheme is to provide to the consumer reliable product information which might not otherwise be disclosed, and to encourage manufacturers to improve product design so as to achieve more than the minimum required efficiency.²⁰⁵

Mandatory “Negative Content” labels are all government labels requiring the labeling of any good that contains an environmentally harmful substance, or was produced utilizing an environmentally harmful substance or method.²⁰⁶ For example, in the U.S., section 611 of the federal Clean Air Act requires the labeling of any product that contains or was manufactured with certain chemical substances known to deplete the stratospheric ozone layer, such as “CFCs.”²⁰⁷

Mandatory “Content Neutral” labeling schemes refer to instances in which certain products must be labeled in order to disclose information to the consumer that the government has determined to be of importance.²⁰⁸ This information may or may not reveal negative facts about the product.²⁰⁹ Notable examples

²⁰⁰ See Downs, supra note 82, at 173
²⁰¹ See generally Staffin, supra note 190.
²⁰² Id. at 3-6
²⁰³ Id.
²⁰⁴ Id.
²⁰⁵ Id.
²⁰⁶ Id.
²⁰⁸ Id.
²⁰⁹ Id.
are the FTC/DOE’s Energy Guide label, and the EPA/DOT fuel economy and emissions standards discussed earlier. Under the FTC’s “Energy Guide” system, regulated jointly by the FTC and the Department of Energy (DOE), certain home appliances must bear a label indicating their respective energy efficiency ratings. It is a yellow-and-black sticker or hang tag that tells consumers the estimated annual energy use and operating costs of new household appliances, and is legally required to be on refrigerators, freezers, dishwashers, washing machines, room air conditioners, water heaters and other products. Among other things, it also includes a comparison scale that consumers can use to judge a product against similar models. The label is often criticized for conveying outdated information that makes products appear misleadingly efficient relative to others. Although the FTC recently updated the assumed utility rates and the comparison scales to address this, the issues will plague the Energy Guide as long as the agency waits five years between each update. It has also been criticized for being easily confused with, and redundant to, EPA’s Energy Star standards (discussed earlier), which is a voluntary label. The U.S. Department of Agriculture’s (USDA) “organic” certification standards is yet another example. The USDA strictly regulates the use of the word “organic.” The Organic Foods Production Act (OFPA) specifically prohibits the marketing of domestic agricultural products as organically produced, except in conformity with the USDA’s national standards. The law also limits the use of the USDA seal to products that meet the organic certification requirements. OFPA’s accompanying National Organic Program (NOP) lays out the USDA’s particular standards for organic certification.

Voluntary labels, on the other hand, vary significantly. First party labels are claims made by the manufacturer or retailer of the product itself – most U.S. regulations have focused on curbing these types of labels because they often constitute greenwashing. Third party labels are those that either certify that first party claims by manufacturers are valid, or develop the label’s standards themselves and license the ability to use the label on their products upon certification of compliance with the standards. These third parties can mean that the scheme is government-sponsored or is operated solely by a private, third party certification organization. “Single issue” labels are those that focus on a single sector (e.g. the forestry industry, the}

210 Id.
211 Id; see also U.S. FTC, Saving Energy at Home, FTC CONSUMER INFORMATION, http://www.consumer.ftc.gov/articles/0072-shopping-home-appliances-use-energyguide-label
212 Id.
213 Id.
214 Supra note 92
216 Id.
218 7 U.S.C. § 6505; See generally Hetu & Anessa, supra note 122, at 46, 47.
219 7 U.S.C. § 6505(a)
220 Id. § 6505(a) (2)
222 Staffin, supra note 190, at 6-9
223 Id.
224 Id.
chemical industry), and/or address only one environmental issue (e.g. air quality, energy conservation), and/or consider only a single life cycle phase in their applications (e.g. product use, product disposal/recycling).225 “Multi-criteria” labeling schemes, on the other hand, exist in two formats: the “seal of approval” scheme, and the content neutral, “report card” scheme.226 Seal of approval programs seek to award the use of a logo to a manufacturer based on the independent judgment of the comparable environmental impacts of products.227 A report card, on the other hand, differs in that it does not generally judge which criteria are most important in assessing the environmental impact of a product – it’s akin to the nutritional label found on many packaged foods.228 While a “seal of approval” will only be given to a product that “passes the test,” report cards can be given to a product regardless of its environmental impact.229 The report card also gives a greater amount of information and therefore promotes consumer autonomy.230

Combinations of all four attributes exist among the labeling schemes.

The International Organization for Standardization (ISO) has identified three broad types of voluntary labels,231 Type I, Type II,232 and Type III,233 plus a fourth informal type, Type I-like. Although differing in strength and effectiveness, the different label types have been identified by the ISO as sharing a common goal, which is: “...through communication of verifiable and accurate information that is not misleading on environmental aspects of products and services, to encourage the demand for and supply of those products

225 Id.
226 Id.
227 Id.
228 Id.
229 Id.
230 Id.
232 Type II labels are “informative environmental self-declaration claims,” or in other words, first party environmental claims and logos. They are internally developed labels that are based on the self-declarations of manufacturers, importers, distributors or retailers. The most common type of Type II label are general, single attribute claims about a product, such as words and phrases like “100% biodegradable” and “ozone friendly,” or “green” emblems made to look like an official logo, that are affixed to the packaging of a product. A less common form of Type II labels is best illustrated by Walmart’s proposed Sustainability Index, its controversial and highly-publicized effort to develop an environmental impact rating system, and put that rating on every product it sells. Type II labels are appealing, especially to smaller to mid-size companies, due to their low direct costs, as credible third party eco-labels can carry hefty application, verification, and licensing fees. Additionally, the time is takes for a product to become certified can also be prohibitive. However, the obvious problem with Type II labels is the fact that they themselves make up a large portion of corporate greenwashing. While credible first party labels do exist, the vast majority of first party claims are vague and misleading, and internally-developed rating system like Walmart suffer from lack of transparency and conflicts of interest. Therefore, often these “labels” turn out to be precisely the problem itself, rather than the solution to the problem. See generally United Nations Office for Project Services, A guide to environmental labels for procurement practitioners of the United Nations system, (2009), available at https://www.unep.org/Areas/Public/Downloads/Env_Labels_Guide.pdf.
233 Type III labels are “voluntary programs that provide quantified environmental data of a product, under pre-set categories of parameters set by a qualified third party and based on lifecycle assessment, and verified by that or another qualified third party.” This type of environmental labels only shows the objective data, and their evaluation is left to the buyer – this is the “report card” type of label. These are like Type I labels in the sense that they are voluntary, multi-criteria, and can be government sponsored or done by private organizations, however, Type III labels do not assess or weight the environmental performance of the products they describe. True Type III labels are found in nine countries only, not including the U.S., and require exhaustive life-cycle data sheets called “environmental product declarations” (EPD). Although not a true Type III label, the closest thing is SCS’s “Environmental Report Card” program. The main problem with Type III labels is practicability: too much information and the time consuming nature of a full LCA. This is why the ISO has suggested the concept of a single-issue Type III label, whereby the information is flexible enough to allow for adaptation to specific user needs and market applications. Further, it has been argued that the selection of relevant categories presented in the report card is subjective, which prevents true disclosure. Additionally, despite its intent of being content neutral, the Report Card may in fact confuse consumers into believing that it constitutes an endorsement of the product. However, if the assumption is that a consumer is able to process information effectively and that more information is better than less, the report card format seems to be the best approach. See generally United Nations Office for Project Services, A guide to environmental labels for procurement practitioners of the United Nations system, (2009), available at https://www.unep.org/Areas/Public/Downloads/Env_Labels_Guide.pdf; Determinants of Effectiveness, supra note 195, at 26, 63-64 (regarding consumer confusion.)
and services that cause less stress on the environment, thereby stimulating the potential for market-driven continuous environmental improvement."234

Type I labels are what are commonly referred to as eco-labels, and are the most common and promising form of market-based anti-greenwashing efforts.235 They are “voluntary, multiple-criteria-based, third-party program that awards a license that authorizes the use of environmental labels on products indicating overall environmental preference of a product within a particular product category based on life cycle,”236 and are generally the “seal of approval” type of label.237 Beyond ISO, there is also an informal fourth group, “Type I-like,” which has a verification and certification process similar to that of Type I eco-labels, and are therefore also “seals of approval,” but focus on single issues (e.g., energy consumption, sustainable forestry, etc.) rather than labeling a variety of product categories.238

In the U.S., a leading example of a private Type I “seal of approval” eco-label is Green Seal.239 In terms of governmental Type-I labels, at the federal level, the most notable example is EPA’s ENERGY STAR program, which, as previously discussed, is a government-backed voluntary eco-label indicating that a product meets a set of energy efficiency guidelines.240 At the state level, New York law creates official recycling emblems for voluntary use, enabling companies to market their products using the state-certified logo only after meeting strict standards based on the product and the type of environmental claim.241 Good examples of private Type I-like labels (single attribute eco-labels) are the United States Green Building Council’s (“USGBC”) Leadership in Energy & Environmental Design (“LEED”) green building system,242 and the Forest Stewardship Council’s (FSC) certification standards for sustainable timber,243 discussed below.

Because Type II labels are, practically speaking, one of the primary forms of greenwashing, and because Type III labels have yet to become widely used, the remainder of this paper will focus on Type I eco-labels.

2. Eco-Labels 101

Process and Structure

In general, eco-labels consist of three main components: (1) selection and determination of product categories, (2) development and adoption of appropriate criteria, standards, or guidelines, and (3)
certification and licensing.\textsuperscript{244}

Although there is some variation in their administrative structure, most legitimate “seal of approval” programs follow the same process. First, they require an independent, voluntary consensus entity, which can take the form of a formal standard setting organization (SSO), a trade/industry association, or a governmental entity.\textsuperscript{245} Multiple stakeholder participation representing a variety of social and economic interests is usually present, to varying degrees, in a typical “seal of approval” eco-labeling program, including: (1) government, (2) program managers, (3) industry and commercial associations, retailers and companies, (4) consumers, and (5) other interested parties, including academic experts, media, NGO’s and consumer groups.\textsuperscript{246}

Assuming the organization has been created and/or program manager have obtained the necessary stakeholders, the organization then selects the product categories to be certified, determining which products are eligible and the stringency of the certification criteria.\textsuperscript{247} Batteries, for example, will be treated differently depending on whether all batteries are considered rather than only rechargeable ones.\textsuperscript{248} A typical approach is to group products that routinely perform the same function.\textsuperscript{249} Proposals for categories are generally accepted from any source, but in practice,

most proposals arise from industry, or internally from the program managers. Trade, consumer, environmental and other public organizations can also request consideration of specific categories. After formal review, often with technical advisory groups, selections are then made. Most programs also have some guiding principles to assist in selection... [which] often include the environmental impact of the product, the degree of differentiation between products within the proposed category, and the importance of the product in the marketplace.\textsuperscript{250}

Next, to differing degrees, some version of product life-cycle analysis (LCA) is performed, which determines environmental costs and impacts “from the cradle to the grave.”\textsuperscript{251} A complete LCA consists of three stages: an inventory analysis, impact analysis, and improvement analysis.\textsuperscript{252} Inventory analysis attempts to identify and quantify the major raw material and energy inputs and environmental releases that occur at different points along a product's life cycle, from the extraction and processing of raw materials, through the manufacturing process, transportation and distribution stage, use and maintenance stage, the recycling process (if possible), to the final disposition of the product.\textsuperscript{253} The EPA defines “impact analysis” as “a systematic process to identify, characterize, and value potential ecosystem, human health, and natural

\textsuperscript{244}GEN Paper, supra note 231, at 13; Meidinger supra note 148, at 8.
\textsuperscript{245} Id at 9-11; see also Rodgers, Jeff, and Trevor Bowden. 2010 Global Ecolabel Monitor, Big Room and World Resources Institute 8 (2010), available at http://www.wri.org/publication/2010-global-ecolabel-monitor [hereinafter referred to as Global Ecolabel Monitor] (finding that 58% of the responding eco-labels were non-profits.)
\textsuperscript{246} GEN Paper, supra note 231, at 13
\textsuperscript{247} Id.
\textsuperscript{248} Id.
\textsuperscript{249} Id.
\textsuperscript{250} Id.
\textsuperscript{251} Id at 6.
\textsuperscript{253} Id.
resource impacts associated with the inputs and outputs of a product or process system.” Essentially, this stage evaluates the significance of the quantitative results of the inventory stage. The last stage, “improvement analysis,” entails determining whether any of the negative environmental impacts can be reduced through product or process redesign.

The differentiating parameters (e.g. energy use, toxicity, etc.) from the LCA are then used to develop the criteria and standards. Technical and scientific specialists, generally from both government and the private sector, prepare draft criteria that are then made available to interested parties for consideration and feedback. Comments are received and reviewed by program staff, technical experts or an advisory group, and are reflected when appropriate in the final criteria.

When certification standards/criteria are established, applicants that want to participate in an eco-labeling program (e.g., manufacturers, suppliers, distributors, importers, retailers) make an application and submit their products for certification under the program, which usually must include technical information. This certification can be done by the SSO itself, or a certifier independent of the SSO. In addition, the implementation body might also direct and/or perform an on-site audit or inspection. In some cases, independent verification is performed by the program, and in others, a declaration by the applicant is accepted on the assumption that competitors or environmental groups will notify program officials if there is a suspicion that inaccurate information has been provided. Applicants also typically pay application and certification fees.

Usually, the eco-label is either awarded or not awarded (pass/fail), but some labels are tiered with the eco-label displaying information on the relative performance of the company, and some labels provide a combination of both. Once the applicant is licensed to use the label on, or in association with, its certified product(s) or service, an annual fee is charged for use of the eco-label for a specific period of time. Use of the eco-label is restricted to the approved product(s), and is usually monitored/periodically reviewed by the SSO or independent certifier for continued compliance.

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254 EPA Conceptual Framework, supra note 252
255 See supra note 252
256 Id.
257 GEN Paper, supra note 231, at 13
258 Id.
259 Id. at 14.
260 Id. See also, Global Ecolabel Monitor, supra note 245, at 9.
261 GEN Paper, supra note 231, at 14.
263 There is a fair amount of variation in the length of time it takes a manufacturer to become certified. Among single-standard ecolabels, the most common response was three to six months, but the range was anywhere between next-day to 1-2 years. The time to certification among multiple-standard ecolabels has a more concentrated average of 3.48 months. Jay Golden, Corporate Sustainability Initiative, Nicholas Institute for Environmental Policy Solutions, Duke University, An Overview of Ecolabels and Sustainability Certifications in the Global Marketplace, 18 (2010), available at http://center.sustainability.duke.edu/sites/default/files/documents/ecolabelsreport.pdf, [hereinafter called Duke CSI].
264 Once a product is certified, there is no clear standard for the length of time the manufacturer is allowed to display the label before reassessment. Duke’s CSI survey found that the time varied considerably, even among single and multiple standard labels. Id. at 19.
265 See generally Global Ecolabel Monitor, supra note 245; Duke CSI supra note 264.
Example: LEED and FSC

The green building movement began in the 1990’s as a private sector initiative.\textsuperscript{267} In the U.S., the federal and state governments were not involved, and instead the US Green Building Council (USGBC) and other private entities became the source for “green” building guidance. The USGBC is a Washington, D.C.-based non-profit organization, comprised of 78 local affiliates, more than 20,000 member companies and organizations, and more than 100,000 LEED-accredited professions.\textsuperscript{268} In 1998, in the absence of government issued standards, the USGBC created the first version of LEED, a voluntary, consensus-based system that rates the environmental impact of buildings.\textsuperscript{269}

The LEED program is a rating system measures a building’s green features, comprised of several different certification tracks including New Construction (NC), Existing Buildings: Operations and Maintenance (EB: O&M), Commercial Interiors (CI), Core and Shell (CS), Homes (H), and Neighborhood Development (ND).\textsuperscript{270} A governing committee established by the USGBC creates requirements for certification through a template that distributes points into several categories based on consensus-based sustainable practices.\textsuperscript{271} The points assigned to each category create a weighting system for the different attributes and lay out minimum standards for compliance.\textsuperscript{272} A project receives certification when it demonstrates that all of the points earned in each of the different categories at least meet the thresholds established by the committee.\textsuperscript{273} The LEED program also provides additional recognition options, noted as Silver, Gold, or Platinum, when a project attains higher point totals than required for basic certification.\textsuperscript{274}

First, an applicant must register the project and pay a registration fee.\textsuperscript{275} Eventually, as the design and construction process moves along, the applicant applies for LEED certification and technical review.\textsuperscript{276} When an applicant submits its plan for this review, the verification process requires documents, attestations, data, and other information that supports compliance with each point applied toward the total needed for certification.\textsuperscript{277} After a final review, there is a determination as to the certification, level awarded, or denial of overall certification or individual credits.\textsuperscript{278}

Up until 2012, LEED’s certified wood credit under its Materials and Resources (MR) category only recognized wood products certified by the Forest Stewardship Council (“FSC”), an international not for-profit, multi-stakeholder organization established in 1993 to promote responsible and sustainable


\textsuperscript{268} Id.

\textsuperscript{269} Id.

\textsuperscript{270} Id.

\textsuperscript{271} Id.

\textsuperscript{272} Id.

\textsuperscript{273} Id.

\textsuperscript{274} Id.

\textsuperscript{275} Id.

\textsuperscript{276} Id.

\textsuperscript{277} Id.

\textsuperscript{278} Id.
management of the world’s forests and timber. In 2012, the MR credit was reduced to a requirement of at least 50% FSC-certified wood. FSC’s governing members are either individuals or organization representatives, who all come from diverse backgrounds such as environmental NGOs, the timber trade, community forest groups, and forest certification organizations. Members apply to join one of three chambers – environmental, social and economic. Each chamber is divided into northern and southern sub-chambers, and votes are weighted to ensure that north and south each have 50% of the votes. It also has three levels of decision making bodies: The General Assembly, the Board of Directors, and the Executive Director. The standards combine the three chamber’s requirements into 10 ‘principles’ and 56 ‘criteria’ that further define the principles, and the criteria is given further detail in standards developed for specific countries and regions and certification protocols. Certification of compliance with FSC standards is done by certifiers that are organizationally independent of both the FSC and the forest owner. Only an FSC accredited certification body can evaluate, monitor, and certify companies to FSC standards, and are charged annual fees to renew their accreditation. If the forest management is in full compliance with FSC requirements, the FSC certificate is awarded, but if the forest management is not in full compliance, certain conditions must be met before the FSC certificate can be awarded. After certification is awarded, the FSC accredited certification bodies audit each FSC certificate at least once a year. If the certification body finds that a company is not complying with FSC requirements, Corrective Action Requests (CARs) are issued and the company is required to make the prescribed changes within a given timeframe or lose its FSC certificate.

Advantages and Disadvantages

Advantages

Environmental labeling differs from regulation because it rewards environmental leadership. It is “a market-based and consumer-orientated approach to dealing with various environmental issues.” The theory behind eco-labeling generally is that it is a way for producers and consumers to mutually benefit while reducing their environmental impacts. These labels allow people to make more informed purchasing decisions that reflect their environmental values. “Product labels are informational devices that signal a specific quality of a product, which in most cases cannot be directly observed by the consumer. In doing so,

280 Id.
281 Id.
282 Id.
283 Id.
284 Id.
285 Id.
286 Id.
287 Id.
288 Id.
289 Id.
environmental labels reduce the complexities surrounding the production and distribution of goods and transpose them into a dichotomous claim of meeting a standard or not.” 291 In turn, environmental labels allow manufacturers to advertise the reduced environmental impacts of their products, which may be difficult for the average shopper to determine, giving them an edge over the competition.292 By differentiating their products as environmentally superior, consumer demand increases, and manufacturers will be able to charge a price premium, which in turn encourages the development of new technology and innovation.293 As Boström and Klintman note,294 “green labeling essentially relies on symbolic differentiation... The label says implicitly that this product is different from other products.”

Consumers, producers, and the economy are not the only beneficiaries from eco-labels. The primary objective of environmental labels is to generate net environmental benefits by substituting “conventional” products with eco-labeled ones.295 When done right, an environmental label can “encourage[e] the efficient management of renewable resources to ensure their availability to future generations; promot[e] efficient use of non-renewable resources; facilitate[e] the reduction, reuse, and recycling of industrial, commercial, and consumer waste; encourage[e] the protection of ecosystems and species diversity; and encourage[e] the proper management of chemicals in products.”296

The benefit of having an eco-labeling program run by a third party is greater consumer acceptance and less corporate greenwashing activity. Recent surveys have indicated that although consumers are seeking environmentally responsible products, they are distrustful of environmental claims.297 If experts do the technical footwork that goes beyond the capacities of the average consumer, the consumer does not have to expend as much energy, time and cost in sifting through environmental data and researching claims.298 Shifting consumer preferences to products with third party certification will then encourage manufacturers to have their environmental claims certified, resulting in a reduction of greenwashing activity.299 The benefit of a private third party label over a government-sponsored label is beneficial to the government because it reduces the time, staff, effort, and cost involved in implementing and overseeing the program.

Disadvantages

291 Koos supra note 69, at 131. See also, Cone Tracker, supra note 186, at 6-7 (finding that of the various resources available that provide information about a products environmental claims, 45% of Americans said that the product package or label is their most likely choice); See also, id. at 5 (40% said that when they see a product advertised as “green” or “environmentally friendly,” they believe it means that the product has a positive impact on the environment.)


293 Bostrom, supra note 290, at 29.

294 GEN Paper, supra note 231, at 5.

295 Id. However, empirical proof that eco-labels have led to “increase conservation of natural capital and intergenerational equity,” in other words more sustainable consumption, is difficult to come by, and difficult to quantify. Ralph E. Horne, Limits to labels: The role of eco ‐ labels in the assessment of product sustainability and routes to sustainable consumption, 33 IOWJ CONSUMER STUD. 179 (2009)

296 Cone Tracker, supra note 186, at 6 (find that only 46% of Americans surveyed trust companies to tell them the truth).

297 Cone Tracker, supra note 186, at 6 (finding that 71% of Americans surveyed wish companies would do a better job helping them understand the environmental terms they use to talk about their products, such as “compostable,” “recyclable,” and “all natural”).
Eco-labels do not solve all of concerns, however. For example, consumer confusion over environmental claims, terms, and verification may ultimately continue. “Ironically, the potentially importance of eco-labels has led to a proliferation of them, and to a multitude of types and degrees of meaningfulness and integrity.”

Competitor products can often sport two to three different eco-labels each, leaving the consumer in the dark to attempt to discern the first party claims from the third party eco-labels, the legitimate eco-labels from the illegitimate ones. Not all labels are created equally. On the opposite end of the spectrum from Green Seal, which is generally highly regarded, are eco-labels which, for example, allow companies to display the label on the product immediately following registration, charge licensing fees as low as $15 dollars, fail to perform a thorough LCA analysis, or to periodically audit manufacturers to ensure continued compliance. The rapid increase in proliferation of eco labels in the market is also accompanied by a high level of redundancy. Competing private eco-labels, or overlapping government and private eco-labels, co-exist to the detriment of consumers. Consumer confusion is also compounded by “false labels,” which use an image that looks like an official third party label, when no third party endorsement actually exists. In the U.S., most regulations have focused on curbing the perceived abuses arising out of first party, Type II claims. To date, with the exception of the 2012 Green Guides’ language around seals of approval, and limited EPA involvement, there has been little government oversight of third-party labeling claims. And there are more eco labels than ever, with over 400 currently in existence. This lack of legislation and the increase in companies wishing to enter the third-party certification market presents the problem of multiple labels with differing standards, varying degrees of legitimacy, and overlapping coverage competing for consumer recognition, making it difficult for consumers to determine which eco-labels to trust. Competing private labels may cause labeling schemes in

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301 Green Seal is a U.S. member and co-founder of GEN, meets the requirements for standard setting organizations of ANSI, and meets the guidelines for eco-labeling programs of ISO standards 14020 and 14024. See generally section IX(5) below.
302 Global Ecolabel Monitor, supra note 245, at 9 (finding 7% of eco-labels did so).
303 Terrachoice 2010, supra note 11, at 20
304 Duke CSI, supra note 264
305 Global Ecolabel Monitor, supra note 245, at 10.
306 Duke CSI, supra note 264, at 16 (28% of responding eco-labels recognized other labels as being equivalent, while 33% of responding labels were recognized by other labels as equivalent.)
307 See generally, Duke CSI, supra note 264; Global Ecolabel Monitor, supra note 245
308 For example, Green Seal certification for appliances was going well before the government-run ENERGY STAR program was launched. Since then, market interest in the Green Seal for energy appliances has largely evaporated. Duke CSI, supra 264, at 35.
309 Cone Tracker, supra note 186, at 6 (finding that 48% of Americans surveyed feel overwhelmed by the amount of environmental messages they hear and see).
310 Dorothee Brecard, LEMNA, Université de Nantes, Consumer confusion over the profusion of eco-labels: lessons from a double differentiation model, 2-4 (2012), available at http://hal.inria.fr/docs/00/75/87/60/PDF/LEMNA_WP_201246.pdf. A notable example is the case of mattress company EcoBaby. EcoBaby’s promotional materials included a seal of approval from the National Association of Organic Mattress Industry (“NAOMI”). However, according to a 2010 FTC’s complaint, NAOMI is simply an alter ego of EcoBaby, which awards seals to its own products. Thus, NAOMI is not an independent third-party, although a consumer might reasonably believe it is. See In the Matter of Ecobaby Organics, Inc., A Corp., C-4416, 2013 WL 6113241 (F.T.C. Nov. 8, 2013).
311 16 C.F.R. § 260.6
312 See e.g. U.S. EPA, Formaldehyde Emissions from Composite Wood Products, http://www.epa.gov/opptintr/chemtest/formaldehyde/#first
313 Oversight of 3rd party eco-labels is mostly done by domestic and international non-profit organizations in a non-regulatory, un-harmonized matter. Oversight of 3rd party claims is more thoroughly discussed in section III (E) below.
314 The most complete list of eco-labels for all sorts of product categories worldwide can be found at The Global Eco-labeling Network (GEN), Ecolabelindex.com also lists and describes over 400 eco-labels currently in existence.
general to lose their coherence and credibility, for the same reasons that the profusion of vague, first party “greenwashing” claims in the early 1990s led to the FTC and federal government to step in and a trend toward third party certifications.\textsuperscript{315} The result of too many labels could therefore, ironically, be consumer confusion and distrust. Additionally, some companies argue that the lack of a label in a product category can be construed by the consumer as a denial of a label, when in fact the product actually has little impact on the environment.\textsuperscript{316} Consumers may believe that all products are reviewed, rather than recognizing that most labels are voluntary, and not take into account that cost or time could have prevented use of the label.\textsuperscript{317}

The adoption of eco-labels is seen variously as an opportunity for increased sales through product differentiation, increased accountability, or increased choice for consumers in a greening retail environment. The reality often is too many products, too much information, too little time, and a paucity of independent, accessible, readily accessible and understandable information about environmental performance.\textsuperscript{318}

The leading method of environmental labeling assessment, Life Cycle Analysis (LCA), may also present a problem.\textsuperscript{319} LCA has not been perfected, nor is there a generally accepted technique for conducting the calculation, particularly at the impact analysis and investigation analysis stages.\textsuperscript{320} Additionally, the “complexity and limitations of full-life cycle assessment methodologies have resulted in the use of relatively simpler and less comprehensive methods of environmental performance review”, whereby “after consideration of the life cycle of a product, programs usually focus on a few key attributes… and assess the range of industry performance in those areas.”\textsuperscript{321} Therefore, programs using LCA are varying in their use and applying varying degrees of comprehensiveness.\textsuperscript{322} Given that there are no eco-labels that currently conduct a true comprehensive life-cycle assessment, each is open to challenges that its criteria selection is based on too few attributes.

Lack of industry participation is another noted disadvantage.\textsuperscript{323} Voluntary environmental labeling programs are subject to voluntary participation by industry. However, the costs, both in terms of direct costs and potential civil and criminal liability exposure, of obtaining a third party eco-label or developing a propriety first party label may be prohibitive to small and mid-sized manufacturers, and competing labels and the regulatory schemes may make companies wary of obtaining a label.\textsuperscript{324} It has also been suggested that

\begin{itemize}
  \item \textsuperscript{316} George Richards, Environmental Labeling of Consumer Products: The Need for International Harmonization of Standards Governing Third-Party Certification Programs, 7 GEO. INTL. ENVTL. L. REV. 8 (1994-1995)
  \item \textsuperscript{317} Id.
  \item \textsuperscript{318} Id; see also Horne, supra note 296, at 180
  \item \textsuperscript{319} Richards, supra note 316, at 7.
  \item \textsuperscript{320} Id; GEN Paper, supra note 231, at 14
  \item \textsuperscript{321} Richards, supra note 316, at 7.
  \item \textsuperscript{322} Id.
  \item \textsuperscript{323} Richards, supra note 316, at 8.
  \item \textsuperscript{324} Id.
\end{itemize}
price considerations will overcome any environmental benefits in the final product decisions by consumers. Moreover, it has been argued that an environmental labeling program may in fact reduce ongoing innovation because of insufficient and unpredictable consumer demand, and because manufacturers may only seek to achieve innovation at the level established by the standards. This problem is particularly concerning with government imposed mandatory labels. Although standards can be periodically reviewed and updated, the process takes time.

Finally, while voluntary certification programs offer a “carrot” for environmentally friendly companies, unlike regulations or mandatory labels, they don’t provide a “stick” to deter false claims. There are no fines to pay or injunctions to face – the manufacturer merely faces the risk of losing market share to products that satisfy consumer’s environmental preferences.

IV. Credible Third Party Certification: Not the End of the Road

All questions aside regarding which forms of eco-labels are the most effective, use of a voluntary eco-label, whether governmental or privately issued, appears to be a promising way for a company to avoid greenwashing liability. However, the choice to use eco-labels is not always a straightforward one – any company that chooses to do so must also consider several other potential legal consequences. Clearly, independent eco-labeling helps prevent greenwashing, but not all independent eco-labeling is good eco-labeling. The governmental agencies and private standard setting organizations that issue these eco-labels must themselves comply with general bodies of established law. Therefore, companies that rely on voluntary eco-labels also run the risk of facing imputed liability from their participation in these programs.

A. Unfair/Deceptive Advertising Practices under the Consumer Protection Laws

Private third party eco-labels and the companies that rely on them, can be subject to the same type of deceptive advertising disputes that currently burden first party manufacturer greenwashing claims. As discussed in section II, there is a large spectrum of credibility when it comes to eco-labels. The problem is that even a highly regarded private third party eco-label can be the subject of deceptive advertising scrutiny. A 2009 FTC complaint filed by the Coalition for Fair Forest Certification (CFFC) is highlights this issue.

325 Id.
326 Richards, supra note 316, at 8.
327 Id.
328 Id.
329 For example, one author has identified four themes can be identified which indicate strength of eco-labels: (1) coverage (range of environmental issues covered, carrying capacity, range of label products covered of relevant issues); (2) inclusion of stakeholder needs (participative democracy); (3) uptake, independence and acceptance (evidence of influence of the label and participative democracy); and (4) measured environmental/sustainable consumption outcomes (demonstrating conservation of natural capital and intergenerational equity). See Horne, supra note 296, at 176.
331 The 2012 revisions to the Green Guides make clear that the claims made through standards and seals such as FSC are advertising, subject to the FTC Act. 16 C.F.R. § 260.6 (2012).
332 In October of 2009, the Coalition for Fair Forest Certification (CFFC), filed a complaint with the FTC, alleging anti-competitive behavior by the FSC and the USGBC. It alleged deceptive and unfair trade practices arising out of FSC’s certification standards, as well as anticompetitive activities and monopolization arising out of LEED’s exclusive endorsement of FSC-certified products. Letter from Thomas C. Collier, Steptoe & Johnson, LLP,
The CFFC asked the FTC’s Bureau of Competition, via Section 5 and the Green Guides, to investigate the FSC label for several reasons.333 One allegation was that the variance of national and regional standards promulgated by the FSC, coupled with the fact that FSC labels do not disclose under which standard a wood product may have been certified, makes it difficult for consumers to substantiate FSC product claims in a meaningful way.334 It highlighted that in North America alone, there are 13 different regional standards, with nine of those in the U.S. making for a highly complex and scattered system.335 Moreover, it noted, in countries without an accepted national standard, FSC permits certification bodies to certify according to their own “interim” standards, which do not meet with ISO or ISEAL Alliance requirements.336 Also troubling is that “depending on geographic region, the FSC standards may be stringent or lenient,337 and can differ significantly in form and content.”338 This complex web allegedly makes it “extremely difficult for consumers to understand under what conditions FSC-certified products are grown.”339 Adding to that confusion is that fact that under this widely varying system, timber grown in one of FSC’s nine U.S. regions may meet standards in the region in which it was grown, but perhaps not in a neighboring region.340 Likewise, some timber grown internationally may meet a FSC standard offshore, but not in the U.S.341 “Nevertheless, all timber meeting the applicable local FSC standard is marketed under the same label.”342 Other allegations include evidence that FSC’s auditors and certifying bodies were not holding certified sources to FSC’s standards, and that FSC’s claim that it’s Controlled Wood standard, integral to FSC’s “Mixed Sources” label (which allows manufacturers to mix FSC certified material with non-certified material) was actually inflated and in fact allowed wood “prohibited” categories to be certified.343

This example highlights the fact that reliance on third party eco-labels is not the end of the deceptive advertising inquiry.344

B. Antitrust Law

While a manufacturer may find reliance upon green certification from a voluntary program appealing to reduce the risk of deceptive advertising litigation, the manufacturer and all parties involved in the process to the Federal Trade Commission on Behalf of the Coalition for Fair Forest Certification, (Oct 20 2009) available at http://www.greenbuildinglawupdate.com/uploads/file/FTC%20complaint.pdf [hereinafter called CFFC complaint].

333 Id. at 2.
334 Id. at 3-4
335 Id.
336 Id.
337 Id. (noting that the FSC mandatory set aside in Sweden is 5%, in the UK 15%, but in the U.S. pacific coasts it is 50% for plantations).
338 Id. (noting variances such as limitations on harvest size and in-stand retention requirements).
339 Id.
340 Id.
341 Id.
342 Id.
343 Id. at 4
344 Another complaint illustrative of this point is the 2013 complaint filed with the FTC by the Washington Forest Law Center against SFI, FSC’s biggest competitor. Specifically, it alleged that in violation of the Green Guide provisions, (1) SFI’s claim that it is an “independent nonprofit public charitable organization” is deceptive, is likely to mislead the public, (2) SFI’s forest management standards were not developed by a “voluntary consensus body,” and (3) that because SFI’s standards are so vague that an auditor cannot apply them objectively, its claims of third-party certification are deceptive. Letter from the Washington Forest Law Center, (WFLC) to the Federal Trade Commission on behalf of ForestEthics and Greenpeace, (May 29, 2013), available at http://forestethics.org/sites/forestethics.huang.radicaldesigns.org/files/ForestEthics-WFLC-Complaint-FTC-Spring2013.pdf [hereinafter called WFLC complaint].
should be mindful of their participation in these cooperative endeavors to ensure that participation is structured to comply with antitrust standards.345 346

The three major antitrust laws that affect standard-setting are the Sherman Act, the Clayton Act, and the Federal Trade Commission Act.347 Depending on the circumstances, antitrust challenges to standard setting can be brought by private litigants, the FTC, the DOJ, and state Attorneys General.348 Although standard-setting activities are typically litigation-centered, government review of proposed standard-setting activities may also be brought on a voluntary basis through the DOJ business review or FTC advisory opinion processes.349

Antitrust analysis of allegations regarding adoption and implementation of standards usually involves a need to determine whether the anticompetitive effects of a standard outweigh its precompetitive benefits.350 This analysis ultimately focuses on who sets the standard.351 This is an important question because different antitrust rules may apply to different types of economic actors.352 Standards are generally sourced from three different areas: the government, cooperative industry collaborations, and uncoordinated, unilateral processes in the competitive marketplace.353

Cooperative standard setting would include the formal SSO bodies and industry associations that issue eco-labels. “How cooperatively a standard is developed and by who, as well as the actual substance of the standard,” are all important to assessing the antitrust liability.354 Challenges relating to cooperative efforts may raise both collusion and exclusion concerns.355 Collusion claims are claims that the standards enable, or themselves create improper coordination among competitors.356 Exclusions claims are claims that the

345 The antitrust analysis here is limited to voluntary eco-label programs (Type I and Type I-like), as Type II and III labels typically do not involve standard setting activity.
346 See Meidinger, supra note 148, at 23; Stephen Del Percio, Revisiting Allied Tube and Noerr: The Antitrust Implications of Green Building Legislation & Case Law Considerations for Policymakers, 34 WM. & MARY ENVTL. L. & POL’Y REV. 239 (2009) [hereinafter called Revisiting Allied Tube]; In Third Parties We Trust?, supra note 267, at 191-236The good news is that the Standards Developing Organization Advancement Act of 2004 provides qualified standards developers with an opportunity to file for, and obtain, a limited exclusion from antitrust liability for treble damages. This type of protection is also available under the National Cooperative Research and Production Act since 1993 to those utilizing a consortium, or other informal process to develop standards. However, the Act is limited to protection of the standards developing organization, and does not provide protection for the companies or individuals that participate in a standards development activity. See 15 U.S.C.A. §§ 4301-4305 (West 1998 & Supp. 2006); see also Memorandum from David Karmol, ANSI, Vice President, Public Policy and Government Affairs, to ANSI Accredited Standards Developers, Frequently Asked Questions (FAQ) Regarding Public Law 108-237, The Standards Developing Organization Advancement Act of 2004 (HR 1086), (Sept. 9 2004), available at http://publica.ansi.org/sites/apdl/Documents/Government%20Affairs/Significant%20Laws%20and%20Policies/FAQ-10861.pdf
348 Id at 27. Private litigants may also assert common law claims against the SSOs and/or their participants. Id (citing Found. For Educ. Interior Design Research v. Savannah Coll. Of Art & Design, 244 F.3d 521, 524 (6th Cir. 2011), making breach of contract, fraud, and breach of fiduciary counterclaims against accrediting body for denying it accreditation.)
351 Id. at 3.
352 Id.
355 Id. (citing Addamax Corp. v Open Software Found., 152 F.3d 48.50.55 (1st Cir. 1998); Nat’l Ass’n of Review Appraisers v Appraisal Found., 64 F.3d 1130,1133 (8th Cir. 1995); Jessup v Am. Kennel Club, 61 F. Supp. 2d 5,10 (S.D.N.Y. 1999).)
standards improperly exclude or disadvantage a firm or firms and thereby harm the competitive process.357 Challenges to cooperative standard setting practices are most often brought under Section 1 of the Sherman Act358, which prohibits agreements in restraint of trade, but can also be brought under Section 2 of the Sherman Act359, which prohibits monopolization, attempted monopolization, and conspiracy to monopolize.360 Challenges can also be brought by the FTC under Section 5 of the Federal Trade Commission Act361, which prohibits unfair methods of competition and deceptive trade practices.362 In evaluating standard setting activities among competitors, the FTC and DOJ typically apply the principles outlined in the Antitrust Guidelines for Collaborations Among Competitors (the Competitor Collaboration Guidelines.)363

There are several aspects of cooperative eco-label standard-setting and certification activity that may cause anti-competitive effects. One major area where disputes may arise that is particularly relevant to this subject of this paper is regarding the composition or membership of an SSO or trade association.364 “In some cases, a plaintiff may claim that an SSO… improperly excluded certain industry participants or competitors from the organization and the standard-setting process. In others cases, a plaintiff may challenge the decision of an SSO… not to admit, or to discipline, suspend, or expel the plaintiff from the organization for failure to adhere to the organizations by laws or membership criteria.”365 Another area of contention is the selection and enforcement of the standards.366 In developing a standard, an SSO or trade association will often select a particular product, technology, or methodology and reject alternatives.367 “The decision to adopt one element over another may cause ‘excluded’ competitors to claim that the SSO or the ‘winning’ firm violated the antitrust laws. Similarly, once a standard is adopted, an SSO may evaluate whether a particular product meets the requirements of the standard and may “certify” compliance with the standard with its ‘seal of approval.’ Manufacturers whose products are denied certification sometimes brings antitrust claims against the SSO or those firms whose products are certified.”368 A third area of concern is corruption of the standard-setting process, which involves claims that the standard setting or certification process was improperly manipulated.

357 Id.
358 Id. at 25-26; see 15 U.S.C. § 1
359 Id.; see 15 U.S.C. § 2
360 ABA Handbook, supra note 347, at 25-26
361 Id. at 27; see 15 U.S.C. § 45 (a)(1)
362 ABA Handbook, supra note 347, at 27. Remember, greenwashing claims are also brought under Section 5, albeit in a consumer protection/deceptive advertising context.
363 Id. (citing U.S. Dep’t of Justice & Federal Trade Comm’n, Antitrust Guidelines for Collaborations among Competitors (2000), reprinted in 4 Trade Reg. Rep. (CCH) 13,161.) [hereinafter called Competitor Collaboration Guidelines]. As a threshold matter, a plaintiff asserting a claim under Section 1 of the Sherman Act would need to demonstrate an agreement “between separate entities.” Id (citing Copperweld Corp. v Indep. Tube Corp., 467 U.S. 752 (1984)). “Often, courts seem to assume that actions taken by an SSO involve the requisite agreement among the organizations members or between the organization and its members…Once an agreement is established, typically a rule of reason mode of analysis is conducted, with the conduct evading antitrust scrutiny as long as it is reasonably related to efficiency-enhancing integration and reasonably necessary to achieve pro-competitive benefits.” Id (citing SCFC ILC, Inc v Visa USA, Inc., 36 F.3d 958 (10th Cir. 1994)); See also Competitor Collaboration Guidelines, supra note 363, at sec 3.2. Courts and government regulators typically apply the rule of reason by weighing the anticompetitive harm against the pro-competitive benefits. Id (citing United States v Visa U.S.A., Inc., 163 F. Supp 2d 322 (S.D.N.Y. 2001), modified on other grounds, 183 F. Supp. 2d 613 (S.D.N.Y. 2001), aff’d, 344 F.3d 229 (2d Cir. 2003) ).
364 ABA Handbook, supra note 347, at 50-55.
365 Id.
366 Id. at 55-59.
367 Id.
in order to gain competitive advantage over rivals.\(^{369}\) A fourth area of concern is restrictions on access to standards.\(^{370}\)

Turning to government-imposed standards, “local, state, and federal governments often adopt (or encourage adoption of) standards that were initially created by private SSOs.”\(^{371}\) In doing so, the actions of federal government agencies are exempt from antitrust challenge.\(^{372}\) Conduct by a state is \textit{typically} shielded from antitrust immunity under the \textit{Parker} “state action doctrine,” but not always.\(^{373}\) The \textit{Parker} state action doctrine “has been extended in certain circumstances to private activity undertaken pursuant to a state statutory scheme.”\(^{374}\) “Where competitors are excluded by a state-imposed standard or the standard results in decreased industry competition, a question arises as to whether the standard is immune from successful antitrust attack under the state action doctrine.”\(^{375}\) This will depend on the degree of state involvement in establishing or implementing standards.\(^{376}\) “If a private SSO sets a standard that is not expressly adopted by the state and claims that the standard implements a state policy, this private conduct will only receive \textit{Parker} immunity if it meets the two part \textit{Midcal} test.”\(^{377}\)

In addition to state action, solicitation of government action can raise antitrust concerns.\(^{378}\) SSOs “routinely petition governmental or quasi-governmental entities to adopt standards or codes that may affect many different aspects of business and industry….” While \textit{Parker} recognized the states own ability to engage in anti-competitive regulation, it did not immunize from antitrust liability private parties who petition governmental or quasi-governmental entities to adopt anticompetitive regulation.”\(^{379}\) “While petitioning activity is generally immune from antitrust liability under the \textit{Noerr-Pennington} doctrine, related conduct causing competitive harm not flowing from the adoption of a standard by a government entity is not
The central issue is whether the challenged conduct qualifies as petitioning of government authorities, rather than independent commercial conduct. Applying this analysis to the USGBC’s LEED system and the FSC certification system discussed earlier, controlling antitrust law suggests that a claim could be brought against the USGBC and FSC, and its individual members, based on LEED’s exclusive endorsement of FSC products. FSC’s processes do not escape antitrust scrutiny either—it’s also been claimed that FSC’s bylaws and organization structure is designed to “suppress the concerns of forest owners and industry interests…”

C. International Trade Law

The primary criticism of eco-labeling when it comes to international trade law is the fear that it may act as an unjustified non-tariff barrier to trade in certain instances. There are a number of reasons for this concern. First, domestic producers of products are in a better position than exporters to influence the choice of product groups and criteria used for developing standards and awarding labels. Second, because these standards are rarely established in consistency with established international standardization rules that emphasize non-discrimination and transparency, many times foreign producers are forced to meet criteria that are not relevant in their country of production, therefore imposing extra costs. Third, developing countries are more vulnerable to this discriminatory trade impact as often they lack resources to undertake the costly testing, verification, plant inspection, and certification procedures required for compliance” with some of the stricter labels. In addition to the high cost of compliance is the lack of adequate knowledge about such labels—often foreign producers are unaware of certification needs or where and by whom certification is provided.

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380 Id. at 20. In ERR Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961), recognizing the fundamental constitutional right under the First Amendment to “petition the government for a redress of grievances,” the Supreme Court held that the federal antitrust laws generally do not regulate the conduct of private individuals, entities, and organizations seeking action in petitioning government or quasi-governmental bodies, even when such petitioning results in a restraint of competition. Noerr-Pennington immunity is broad, covering any concerted effort to influence public officials regardless of intent or purpose, and covering injuries or effects flowing from the resulting government action. There are relatively few cases where courts have applied Noerr immunity to standard-setting conduct, but they do provide insight into the factors the courts have seen as most relevant. Id.

381 Id. (citing Allied Tube & Conduit Corp. v Indian Head Inc., 486 U.S. 492 (1988); Massachusetts School of Law supra note 73)

382 See generally Revisiting Allied Tube, supra note 346 (an interesting and detailed theoretical application of the antitrust laws to the USGBC’s LEED system and its exclusive FSC endorsement); In Third Parties We Trust, supra note 267; CFFC Complaint, supra note 332, at 9-13.


385 Id., supra note 283, at 2

386 Id.

387 Id.

388 Id.

389 Id.
The status of the certification programs in international trade law is “somewhat ambiguous.” 390 There are several Agreements under the WTO that have rules related to eco-labels: the GATT, the General Agreement on Trade in Services (GATS), and the Agreement on Technical Barriers to Trade (TBT). 391 Each of these agreements has its own set of rules but there are overlaps between sets. 392 “However, as these agreements were negotiated mostly without specific knowledge of or concern about eco-labeling, a good deal of uncertainty remains about which agreements applies to eco-labels, under what circumstances, and to what extent. For the WTO, the key point is that labeling requirements and practices should not discriminate either between trading partners (most favored nation principles), or between domestically produced goods and services and imports (national treatment).” 393

Drawing upon recent GATT decisions and “working group” reports conducted under by the GATT and the OECD, the question of whether an environmental labeling program constitutes an illegal, non-tariff trade barrier ultimately hinges on two factors: whether it is mandatory or voluntary; and whether it governs a product characteristic or a PPM (particular production or process method). 394 These concerns have led to the OECD UNCTAD, and the WTO to advocate international harmonization, mutual recognition, and greater transparency in the operation of labeling programs. 395

D. Tort Law

Tort law can also be a source of liability for certification organizations and companies. 396 Several cases have held standard setting organizations liable for injuries proximately caused by practices that conformed to their standards but were found by courts not to constitute due care. 397 Although not an eco-label case, a notable example is injuries in swimming pools meeting standards. 398 It is also possible that a certifying organization could be sued for failing to detect a substandard practice in a firm that it inspects. 399

E. Eco-Label Oversight, Harmonization, and Best Practices

390 Meidinger supra note 148, at 20-22 (“This ambiguity depends to some extent on the particular relationship of certification programs to states, since the international trade regime focuses primarily on the activities of states in promoting and regulating trade. So long as certification programs are seen as completely independent of states, their status under international trade law is relatively unproblematic. They are ‘purely voluntary’ standards, and traders can conform to them or not as they choose. As seen above, however, certification programs tend to be entangled with states in various ways, and to become more so over time. The question thus naturally arises whether they should be viewed as truly independent of states, or rather as attributable to them and therefore covered by the World Trade Organization (WTO) agreements.”)

391 Id.

392 Id.

393 Id. (citing King v. Nat’l Spa & Pool Inst., Inc., 570 So. 2d 612 ( Ala. 1990), holding that the Institute had a duty to exercise reasonable care in the interests of consumers when setting voluntary standards for swimming pools.)

394 Id. at 25.
Currently, over 400 eco-labels are operative in 197 countries and 25 industry sectors and, as is hopefully evident by now, not all are created equal. Consumer protection, antitrust, international trade, and tort law and policy all reinforce the importance of inclusive, technically sound, consensus processes in developing environmental standards. Several sources and organizations provide definitions of different types of eco-labels and set out parameters and best practices, all with the goal of developing high quality eco-labels that consumers can trust and that don’t run afoul of the various domestic and international laws touched on above. Domestic efforts include the FTC’s Green Guides, the Standards Development Organization Advancement Act of 2004, and ANSI. The three main international expert sources are the ISO, GEN, and ISEAL. National and international efforts to standardize eco-label practices and standards is vitally important given the multitude of eco-labels in existence and the fragmented regulatory environment. However, much like the ironic fate that eco-labels suffer by often producing more consumer confusion, the standardization efforts themselves often overlap, creating potential conflicts not only with one another, but also with U.S. legislation.

1. Oversight and Harmonization

International Organization for Standardization (ISO)

Developed in 1947, ISO is the world’s largest developer and publisher of international standards for products, services, and best practice. It unites a network of national standards institutes from 164 countries to build consensus of global standard setting. Relevant to eco-labels is the ISO 14020 series of standards that define parameters for developing environmental labels and declarations. This series includes ISO 14024, 14021 and 14025, which define the parameters for Type I, II, and III eco-labels, respectively. The series is considered to be international best practice on environmental labeling and declarations on products and services.

GEN

GEN is a member-based non-profit association of third-party environmental performance recognition, certification, and labeling organizations (Type-I ecolabeling organizations) founded in 1994 to

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400 Supra note 172.
402 David A. Wirth, The International Organization for Standardization: Private Voluntary Standards as Swords and Shields, 36 Boston College Environmental Affairs Law Review (2009), available at SSRN: http://ssrn.com/abstract=1337266 (discussing the relative effectiveness and disadvantages of the ISO standards and noting that “the ISO 14000 standards have entered an arena of public policy which, in the United States and many other countries, is already governed by a complex web of governmentally mandated standards. This feature is not necessarily undesirable from a normative point of view, but it suggests that the relationship between ISO standards and governmental regulatory requirements is, at least potentially, a delicate one.”).
403 About ISO, INTERNATIONAL ORGANIZATION FOR STANDARDIZATION, http://www.iso.org/iso/home/about.htm; See generally Wirth, supra note 400.
404 Id.
405 Id.; see also ISO, supra note 231.
407 Wirth, supra note 400.
“improve, promote and develop the eco-labeling of products and services.”

While GEN does not actually develop criteria or certify products, it defines different types of eco-labels, categorizes existing eco-labels, and sets generic environmental criteria for specific product and service categories. Currently comprised of twenty-six national ecolabeling organizations that operate around the world, membership is limited to those that share the GEN’s objectives and meet its general criteria, providing assurance to the public that its member organizations are meeting their parameters for eco-labeling.

ISEAL Alliance

ISEAL is a global association for social and environmental standards. It helps established and emerging voluntary standard systems to develop and strengthen their standards, and helps companies, governments, and non-profit organizations properly reference voluntary standards. They have developed a set of principles for defining what makes an eco-label, standard, certification, and accreditation credible, called the ISEAL Codes of Good Practice, as well as the Credibility Principles, which capture the essentials of how to improve the uptake and effectiveness of standards to ensure standards systems deliver positive impacts.

Federal Trade Commission

The 2012 revisions to the Green Guides added a new subsection called Certification and Seals of Approval. To avoid misleading consumers, Example 2 says that marketers must meet standards that have been “developed and maintained by a voluntary consensus standard body.” With respect to antitrust concerns, footnote 2 references OMB Circular A-119 for the definition of voluntary, consensus standards. With respect to deceptive advertising concerns, the revisions stress that third-party seals fall under the FTC’s Endorsement Guidelines.

Standards Development Organization Advancement Act of 2004

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408 http://www.globalecolabelling.net
410 Id.
411 See About Us, ISEAL ALLIANCE, http://www.isealalliance.org/about-us
412 Id.; See also Making credible claims about standards systems, ISEAL ALLIANCE, http://www.isealalliance.org/our-work/defining-credibility/making-credible-claims-about-standards-systems
415 16 C.F.R. § 260.6 (2012).
416 Id.
417 Id. (citing to OMB Circular A-119, § 4, http://www.whitehouse.gov/omb/circulars_a119) Voluntary, consensus standards are defined as those produced through (1) openness; (2) a balance of interests; (3) due process; (4) an appeals process; and (5) consensus decisions.
418 16 C.F.R § 260.6(b); See also id. at § 255 (providing guidance on the FTC Act’s application to third-party endorsements in advertising); Press Release, United States Federal Trade Commission, FTC Publishes Final Guides Governing Endorsements, Testimonials, (Oct. 5 2009), available at http://www.ftc.gov/opa/2009/10/endortest.shtm
The Standards Development Organization Advancement Act of 2004, which as mentioned previously, provides a limited antitrust “safe harbor” for standards development organizations, conditions that protection on an SDO’s participation in a voluntary, consensus processes. It also references OMB Circular A - 119. By explicitly linking standard setting activity to antitrust law, the Act provides some useful guidance on avoiding antitrust litigation.

American National Standards Institute (ANSI)

ANSI is a private non-profit organization that oversees the development of voluntary consensus standards for products, services, processes, systems, and personnel in the U.S. In addition to facilitating the formation of standards in the U.S., ANSI “promotes the use of U.S. standards internationally, advocates U.S. policy and technical positions in international and regional standards organizations, and encourages the adoption of international standards as national standards.” It does so in its capacity as the official U.S. representative to the ISO, of which it is a founding member. ANSI itself does not develop standards — it oversees and accredits standards that are developed by government agencies, consumer groups, companies, and other standards organizations. It also provides accreditation to organizations that provide product certification under international standards.

2. Best Practices

Although each of the above organizations differ in their criteria used to evaluate label claims and certifying group’s standard development procedures, several key best practices emerge for eco-label programs to follow that are common to all.

Environmentally meaningful, attainable, and verifiable standards

“Maintenance of stringent technical requirements based on good ecological science assures consumers that they can trust the eco-label and licensing applicants that they will be treated fairly.” These standards

419 See SDOAA supra note 401.
420 Id. A voluntary, consensus process is defined as: (1) Notice to all parties of the standards development activity; (2) Providing “all parties known to be affected” by a standard with the opportunity to participate in its development or modification; (3) Balancing interests so that standards development activities are not dominated by any single group of interested persons; (4) Readily available access to essential information regarding proposed and final standards; (5) The requirement that substantial agreement be reached on all material points after the consideration of all views and objections; and (6) The right to express a position, to have it considered, and to appeal an adverse decision. Id; See also Matthew L. Cantor & Adam T. Nyhan, Congress Limits Antitrust Liability for Standard Setting Groups, 233 NEW YORK L. J. (June 2005), available at http://www.constantinecannon.com/pdf_etc/nylj060705CongressLimits.pdf.
421 See supra note 417 and previous paragraph; see also SDOAA supra note 401.
422 ANSI is comprised of government agencies, organizations, companies, academic and international bodies, and individuals, and represents the interests of more than 125,000 companies and 3.5 million professionals. See also ANSI Membership, AMERICAN NATIONAL STANDARDS INSTITUTE, http://www.ansi.org/membership/overview/overview.aspx?menuid=2www.ansi.org/membership.
425 Id.
426 Supra, note 422
427 Id.
428 See GEN Paper, supra note 231, at 6-8.
should be verifiable by the certifying group or another independent inspection organization. Product environmental criteria should be based on life-cycle considerations to ensure that all aspects of a product’s development, delivery, use, and end-of-life options have been taken into account. Given that the ISO 14000 series of standards is considered international best practice, eco-label programs should strive to achieve consistency with these principles.

Flexibility
“In order to be credible and effective, programs must operate in a business-like and cost-effective manner consistent with market forces and requirements. They must be able to respond in a timely way to technological and market changes. This requires, for example, periodic review and, when necessary, update of both environmental award criteria and categories, taking into account technological and marketplace developments. Periodic review (usually every three years) ensures that standards and criteria levels keep pace with new developments.”

Consistency
“An eco-label used on one product should have the same meaning if used on other products. Standards should be verifiable in a consistent manner for different products.”

Transparency and Accountable Process.
A transparent and accountable program will be open to observation, monitoring, and questioning at any time. “The organization behind an eco-label should make information about organizational structure, funding, board of directors, and certification standards available to the public.” Additionally, an open process necessitates public comment. “All certification standards should be developed with input from multiple stakeholders including consumers, industry, environmentalists and social representatives in a way that doesn't compromise the independence of the certifier. Industry representatives, for example, can play an important advisory role without having direct financial, decision making or management ties to the certifier.”

Independence and Multi-stakeholder Participation
A credible program should be free of vested commercial interests, which should extend to the processes of selecting product category and award criteria. To avoid the perception of excessive and imbalanced influence from a particular industry or stakeholder, it is crucial that multiple different stakeholders and interested groups are represented, including members from industry, environment, consumer, academic and

429 Id; see also Consumer Reports, What makes a good eco-label?, GreenerChoices.org, http://www.greenerchoices.org/eco-labels/eco-good.cfm [hereinafter called Consumer Reports].
430 GEN Paper, supra note 231, at 6-8
431 Id.
432 Id.
433 Consumer Reports, supra note 429; see also GEN Paper, supra note 231, at 6-8.
434 Id.
435 Id.
436 Id.
scientific, and government sectors. In addition, “certifying organizations and their employees should not have any ties to, and should not receive any funding, sales fees, or contributions, from logo users except fees for certification.” Affiliation between employees of companies whose products are certified, or who are applying for certification, with the certifier, whether the certifier is the SSO or a third party, should be scrutinized and monitored.

V. Conclusion

As consumer consciousness of environmental issues continues to drive green purchasing habits, greenwashing claims will continue to pervade the market. Although there are several methods of combatting greenwashing, each with varying degrees of effectiveness, the reality is that the current framework for policing greenwashing is an intricate, fragmented, and often redundant web of many bodies of law and market based solutions. Moreover, reliance on credible independently-issued eco-labels, while currently the most promising anti-greenwashing tool, is not without risks. Further complicating the area is that the efforts to standardize those eco-labels suffer from the same redundancy that the regulations and eco-labels themselves do. Given that reality, and the fact that a streamlining of anti-greenwashing and eco-label regulation does not appear to be in the immediate future, both manufacturers and third party endorsers must structure their involvement in the green marketing space very carefully. Fortunately, there are steps and best practices that each can take to minimize the risk of litigation.

437 Id.
438 Id.
439 Id.