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# Greenwashing and Self-Declared Seafood Ecolabels

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# Greenwashing and Self-Declared Seafood Ecolabels

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*The credibility and veracity of an environmental claim depends on a high degree of transparency, clarity, and trust. Businesses that utilize ecolabels to market the environmental performance of their seafood products often turn to third-party certifications to minimize the potential for greenwashing and provide a level of verification and independence. Others rely on a riskier approach by developing their own self-declared or first-party ecolabels. Seafood retailers and suppliers considering the creation and use of an ecolabel, certification, or seal to be used in the marketing of seafood products should ensure compliance with applicable Food and Drug Administration and United States Department of Agriculture labeling rules. Furthermore, entities pursuing self-declared or first-party seafood ecolabels should consult the Federal Trade Commission's Green Guides, closely follow developments in greenwashing litigation under federal and state consumer protection and unfair competition laws, and heed the early advice of legal experts in the field.*

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## I. INTRODUCTION

As the concept of seafood sustainability gains traction, there has been a proliferation of both ecocertifications and self-declared ecolabels in the marketplace. In addition to various wild fisheries and aquaculture certification schemes verified by independent third parties, a number of seafood retailers and branded manufacturers are seeking a competitive

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advantage by creating their own brand labels or claims that describe products as “sustainable,” “all natural,” and/or “responsibly sourced,” among other things. These first-party or self-declared ecolabels create challenges for businesses and consumers alike and may compromise efforts to advance seafood sustainability.

Consumers are increasingly faced with a multitude of labeling schemes lacking clarity or transparency into how they compare in terms of environmental rigor or credibility. Meanwhile, businesses are under increasing competitive pressure to brand themselves as “environmentally friendly” while balancing the legal and reputational risks and rewards associated with making green marketing claims. How individual retailers and branded manufacturers define adjectives on first-party labels varies greatly, and the accuracy of these claims may be questionable.

The increase in unverifiable and non-third-party certified ecolabels creates confusion in the marketplace and can undermine the value of well-intentioned certification and labeling schemes that seek to highlight environmentally friendly options and provide models for seafood sustainability. At the same time, first- and third-party labels are not mutually exclusive, and some first-party claims may be premised on more verifiable independent third-party certifications. Still, nonconformance with domestic regulations and/or internationally accepted standards for ecolabels<sup>1</sup> established by the Food and Agriculture Organization of the United Nations (FAO) Ecolabelling Guidelines,<sup>2</sup> International Social and Environmental Accreditation and Labeling (ISEAL) Codes of Good Practice,<sup>3</sup> and/or the International Organization for Standardization (ISO)<sup>4</sup> impede the uptake of a certification scheme in the marketplace. With the proliferation of seafood ecolabels in recent years, the need and trend in the market is to streamline and clarify the labeling and certification landscape rather than add more programs or claims.<sup>5</sup>

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1. International standards for certifications and ecolabels are critical to the market relevance of self-declared ecolabels and are reflected in the U.S. legal framework governing ecolabels and certification; however, they are not addressed in this Article.

2. Sally Washington & Lahsen Ababouch, *Private Standards and Certification in Fisheries and Aquaculture: Current Practice and Emerging Issues*, FAO FISHERIES & AQUACULTURE TECHNICAL PAPERS 131-50 (2011), <http://www.fao.org/3/a-i1948e.pdf>.

3. *See Our Codes of Good Practice*, ISEAL ALLIANCE, <http://www.isealalliance.org/our-work/defining-credibility/codes-of-good-practice> (last visited Aug. 26, 2014).

4. *See* ISO, <http://www.iso.org/iso/home.html> (last visited Aug. 27, 2014).

5. *See* GSSI, *Global Sustainable Seafood Initiative Brings Together Businesses, Governments, Academia and NGOs To Develop Universal Benchmark To Ensure Sustainable Seafood for Expanding Global Population*, KROGER CO. 1 (Feb. 18, 2013), <http://www.thekroger>

As seafood buyers, namely retailers and branded manufacturers, contemplate the development of their own brand ecolabels, it is important that they understand the legal obligations, regulatory hurdles, and potential liabilities associated with self-declared seafood ecolabeling. It is also important to note that current federal regulations, guidelines, and case law address the ecolabeling issue broadly and do not exclusively target seafood ecolabels. As such, comparisons with ecolabeling of other product categories can provide important insight and guidance. This short Article discusses the legal framework governing self-declared seafood ecolabels in the United States,<sup>6</sup> including the relevance of the Federal Trade Commission's (FTC) Guides for the Use of Environmental Marketing Claims (Green Guides) and recent case law.

## II. FEDERAL REGULATION AND FTC GREEN GUIDES

A major form of voluntary, privately sponsored labeling consists of self-declared or first-party claims, some of which state a single attribute like "sustainable" or, more recently, make an environmental claim based on a number of self-created standards. "A self-declaration environmental claim is an environmental claim that is made, without independent third-party certification, by manufacturers, importers, distributors, retailers, or anyone else likely to benefit from such a claim."<sup>7</sup> The proliferation of self-declared ecolabeling schemes has caused widespread consumer confusion and skepticism over the veracity of environmental claims, leading many manufacturers and retailers to turn to independent third-party entities to certify that environmental product claims are valid.<sup>8</sup> Due

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co.com/docs/default-document-library/20130218\_press-release-gssi\_final.pdf. The Global Sustainable Seafood Initiative (GSSI)—a multistakeholder effort supported by leaders in the seafood industry, governments, and nongovernmental organization (NGO) community—has set out to create an ecocertification benchmarking tool based in large part on the FAO Code of Conduct. *Id.* The high level of multistakeholder engagement in this process indicates that, in the future, the market will likely require seafood certification programs to meet elements of the GSSI benchmarking tool. See *GSSI Partners*, GLOBAL SUSTAINABLE SEAFOOD INITIATIVE, <http://www.ourgssi.org/structure-and-governance/gssi-partners/> (last visited Aug. 27, 2014), for a list of organizations and businesses committed to the GSSI process, which includes many of the largest and most influential seafood buyers, suppliers, and producers in the United States.

6. This Article does not address international trade concerns that may arise as a result of self-declared seafood ecolabeling, an issue that merits future research.

7. Atsuko Okubo, *Environmental Labeling Programs and the GATT/WTO Regime*, 11 GEO. INT'L ENVTL. L. REV. 599, 608 (1999) (quoting TOM TIBOR & IRA FELDMAN, ISO 14000, A GUIDE TO THE NEW ENVIRONMENTAL MANAGEMENT STANDARDS 162 (1996) (internal quotation marks omitted)); see also *id.* ("Such a declaration can take such forms as statement symbols, package labels and advertising").

8. Elliot B. Staffin, *Trade Barrier or Trade Boon? A Critical Evaluation of Environmental Labeling and Its Role in the "Greening" of World Trade*, 21 COLUM. J. ENVTL. L. 205, 216-17 (1996) (citing U.S. ENVTL. PROT. AGENCY, STATUS REPORT ON THE USE OF

to the potential legal liabilities and reputational risks posed by self-declared or first-party ecolabels (e.g., seals of approval or certifications) on seafood (e.g., “wild-caught” and “farmed”), businesses should familiarize themselves with the legal framework governing such labels and explore how independent third-party certification schemes can help to advance their goals around seafood sustainability.

### A. Regulatory Authority over Seafood Labels

The Food and Drug Administration (FDA),<sup>9</sup> United States Department of Agriculture (USDA), and FTC are authorized to regulate food labeling, including seafood.<sup>9</sup> The FDA regulates food labels, including nutritional labeling, nutrient claims, and health claims,<sup>10</sup> and also regulates the intentional mislabeling of seafood (by the substitution of one species name for another).<sup>11</sup> The USDA regulates country-of-origin labeling for fish and seafood,<sup>12</sup> which specifically addresses the distinction between farmed and wild-caught labels.<sup>13</sup> Beyond mislabeling, nutritional labeling, nutrient and health claims, and country-of-origin labeling (including wild-caught and farmed labels), the FTC has the broadest authority to regulate the content of labeling on seafood and fish

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ENVIRONMENTAL LABELS WORLDWIDE 6-7 (1993) [hereinafter EPA, STATUS REPORT]; see also Avi Gesser, *Canada's Environmental Choice Program: A Model for a "Trade-Friendly" Eco-Labeling Scheme*, 39 HARV. INT'L L.J. 501, 512 (1998) (“Understandably, consumers are skeptical about the truthfulness of environmental claims made by the manufacturers themselves. As a result, unregulated first-party environmental labeling programs provide little assistance for many environmentally conscious consumers. This is not only because producers may make misleading claims about the environmental friendliness of their products, but also because they may lack the resources and expertise to properly evaluate their goods.”).

9. Though the United States Environmental Protection Agency (EPA) lacks regulatory authority over ecolabels, it has certainly shown an interest in the field as exemplified in the EPA's Sustainable Products Network comments on the revised Green Guides and its publication of the EPA, STATUS REPORT, *supra* note 8, at iii, 4-5. The National Oceanic and Atmospheric Administration (NOAA) has an office of sustainable fisheries, and there is statutory authority to regulate sustainable fishing. See, e.g., Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801 (2012). To date, the NOAA has not played a role in ecolabeling schemes, with the exception of dolphin-safe labeling. 50 C.F.R. § 216.90 (2013). However, individual states, like California, can and have pursued seafood ecolabeling legislation. *California Sustainable Seafood Initiative*, ST. CAL. OCEAN PROTECTION COUNCIL, <http://www.opc.ca.gov/2010/03/california-sustainable-seafood-initiative/> (last visited Aug. 31, 2014).

10. Fair Packaging and Labeling Program, 15 U.S.C. §§ 1451-1461 (2012); Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. § 343(r) (2012); 21 C.F.R. §§ 101.1-.108 (2014).

11. 15 U.S.C. §§ 1451-1455; 21 U.S.C. §§ 321(k), (m)-(n), 321d(a), 321(a)-(b), 343, 348, 371; Public Health Service Act, 42 U.S.C. §§ 243, 264, 271 (2012); 21 C.F.R. § 101.18. Pursuant to 21 U.S.C. §§ 332(a), 333(a)(1), the FDA may seek injunctions and penalties for those who misbrand or adulterate food.

12. Farm Security and Rural Investment Act of 2002, 7 U.S.C. § 1638a(3) (2012); 7 C.F.R. §§ 60.200-300 (2014).

13. 7 U.S.C. § 1638(3), (9); 7 C.F.R. § 60.300.

packaging as well as other advertising and marketing materials, as discussed below.

Notably, the FDA and FTC have overlapping authority to the extent that by mislabeling fish, marketers are also engaging in a deceptive practice in order to induce purchases.<sup>14</sup> In an October 31, 2011, letter to the FTC Chairman Jon Leibowitz, Representatives Edward Markey and Barney Frank inquired whether mislabeling of seafood was a violation of section 5 of the Federal Trade Commission Act (FTCA).<sup>15</sup> Markey and Frank asked Leibowitz to explain what enforcement powers the FTC had over seafood fraud and whether the FTC had pursued action against identified cases of seafood fraud. They also asked how the FTC coordinates its efforts with other relevant government agencies.<sup>16</sup>

Leibowitz affirmed that the mislabeling of seafood is likely to constitute a deceptive act under section 5 of the FTCA.<sup>17</sup> He went on to give several recent examples where FTC inquiries led companies to change their labeling practices. According to Leibowitz, the FTC does not have authority to seek civil penalties, but it may issue cease and desist orders, the violation of which can lead to civil penalties. The FTC may also request that a federal district court “order consumer redress or disgorgement of profits.”<sup>18</sup>

Leibowitz also indicated that because of their overlapping authority, the FDA and FTC have a memorandum of understanding, under which the FDA has primary responsibility to regulate labels and the FTC has primary responsibility over advertisements.<sup>19</sup> As an example, Leibowitz

14. The NOAA does concern itself with enforcing the mislabeling of seafood products. *See, e.g., NOAA Investigations into Mislabeling Seafood Protects Consumers and Fishermen*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (NOAA) (Feb. 4, 2011), [http://www.noaa.gov/stories/2011/20110204\\_seafoodmislabeling.html](http://www.noaa.gov/stories/2011/20110204_seafoodmislabeling.html).

15. Letter from Edward J. Markey & Barney Frank, U.S. House of Representatives, to Jon Leibowitz, Chairman, FTC, SAVING SEAFOOD (Oct. 31, 2011), <http://www.savingseafood.org/images/documents/washington/frank%20markey%20letter%20on%20seafood%20labelling-1.pdf>.

16. *Id.*

17. Letter from Jon Leibowitz, Chairman, FTC, to Edward Markey & Barney Frank, U.S. House of Representatives, SAVING SEAFOOD 1 (Dec. 5, 2011), <http://www.savingseafood.org/images/documents/washington/ftc%20response%20markey%20frank%20seafood.pdf>.

18. *Id.* at 2-3.

19. *Id.* at 3; *see also Enforcement Policy Statement on Food Advertising*, FED. TRADE COMM'N (May 13, 1994), <http://www.ftc.gov/Public-statements/1994/05/enforcement-policy-statement-food-advertising> (mentioning Working Agreement Between FTC and Food and Drug Administration, 4 Trade Reg. Rep. (CCH) ¶¶ 9850.01-03, at 17,351-053 (13th ed. 1988)); *see id.* (“Since 1954, the FTC and the FDA have operated under a Memorandum of Understanding, under which the Commission has assumed primary responsibility for regulating food advertising, while FDA has taken primary responsibility for regulating food labeling.” (footnotes omitted)). In his letter to Representatives Markey and Frank, Leibowitz is likely referring to the FDA’s

cited a situation in which a fast-food chain, Long John Silver's, advertised and sold "Lobster Bites" when in fact the product was made out of langostino lobster.<sup>20</sup> The FTC staff determined that "to avoid misleading consumers, the term 'langostino' must appear adjacent to the word 'lobster' and must be sufficiently prominent that consumers notice and understand the term to be part of the product name."<sup>21</sup> Because Long John Silver's cooperated with the FTC, enforcement action was not necessary.<sup>22</sup>

### B. *FTC Green Guides*

Congress has authorized the FTC to regulate "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce."<sup>23</sup> Due to specific concerns with the veracity of environmental claims and consumer complaints, both FTC and congressional investigations were held to determine whether "green" marketing was an area requiring federal regulation.<sup>24</sup> Although Congress

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authority over misbranded food. See 21 U.S.C. § 343 (2012). Recent developments in DNA testing have helped identify the pervasive misbranding of seafood. See Elisabeth Rosenthal, *Some Foul Play at Fish Market, New Genetic Technology Reveals Widespread Fraud in Labeling of Seafood*, N.Y. TIMES, May 27, 2011, at B1, B4, available at [http://www.nytimes.com/2011/05/27/science/earth/27fish.html?\\_r=1](http://www.nytimes.com/2011/05/27/science/earth/27fish.html?_r=1); John Schwartz, *A Fish Story with a DNA Hook: Students Find Bad Labels*, N.Y. TIMES, Aug. 22, 2008, at A1, A16, available at <http://www.nytimes.com/2008/08/22/science/22fish.html>. The FTC clearly has the authority to regulate ecoclaims on food packaging under the Federal Trade Commission Act, 15 U.S.C. § 45(a)(2) (2012), but the scope of FDA authority to regulate ecoclaims under the FFDCA remains unresolved.

20. Letter from Jon Leibowitz to Edward Markey & Barney Frank, *supra* note 17, at 2.

21. Letter from Mary Koelbel Engle, Assoc. Dir., FTC, to Phillip Allen, Div. Counsel, Long John Silver's, FED. TRADE COMM'N 1 (June 23, 2009), [http://www.ftc.gov/sites/default/files/documents/closing\\_letters/long-john-silvers/090623lobsterclosingletter.pdf](http://www.ftc.gov/sites/default/files/documents/closing_letters/long-john-silvers/090623lobsterclosingletter.pdf).

22. *Id.* at 2.

23. 15 U.S.C. § 45(a)(1). Additionally, the Lanham Act creates a civil cause of action, which could be brought by a consumer or a competitor, for false advertising. *Id.* § 1125(a).

24. Staffin, *supra* note 8, at 215 (citing EPA, STATUS REPORT, *supra* note 8, at 1, 5).

failed to act on this specific issue,<sup>25</sup> the FTC did promulgate nonbinding guidelines concerning environmental marketing claims.<sup>26</sup>

The FTC published the Green Guides<sup>27</sup> “to enlighten marketers and explain how [the] FTC will enforce section five of [the] FTCA in the environmental marketing and advertising context.”<sup>28</sup> “These guidelines seek to provide marketers with a ‘safe harbor’ concerning certain ‘green’ claims . . . so that they will know when a claim is potentially deceptive or misleading.”<sup>29</sup> Thus, while the Green Guides are not statutorily mandated, following these guidelines falls in the middle space between legally mandatory and truly voluntary. Additionally, they receive some deference from the courts.<sup>30</sup>

First published in 1992, the Green Guides were revised in 1996 and 1998.<sup>31</sup> More recently, in 2010, the FTC conducted surveys and considered comments on the Green Guides, which led to several proposed revisions that “strengthen, add specificity to, or enhance the

25. Kimberly C. Cavanagh, *It's a Lorax Kind of Market! But Is It a Sneetches Kind of Solution?: A Critical Review of Current Laissez-Faire Environmental Marketing Regulation*, 9 VILL. ENVTL. L.J. 133, 160-61 (1998) (citing National Waste Reduction, Recycling, and Management Act, H.R. 3865, 102d Cong. (1991); Environmental Marketing Claims Act of 1991, S. 615, 102d Cong. (1991)) (noting that “Congress considered two bills which granted [the] EPA the power to create voluntary national guidelines for environmental marketing terminology;” but that “[n]ot garnering enough Congressional votes, both bills died in the Senate”). In 2011, Senate Bill 50, the “Commercial Seafood Consumer Protection Act,” was introduced to the United States Senate, but was not enacted. The bill proposed “enhancing labeling requirements and methods of assuring compliance with such requirements to clearly identify [sic] species and prevent fraudulent practices.” S. 50, 112th Cong. (2012).

26. Given the lack of the federal law and the existence of the FTC Green Guides, there is yet another option for voluntary standards for self-declared ecolabels: ISO standards. The International Organization for Standardization (ISO), a private entity that develops voluntary standards through industry consensus, has developed guidelines for self-declared, or type II, environmental law. INT’L ORG. FOR STANDARDIZATION, REFERENCE NO. ISO 14021:1999(E), ENVIRONMENTAL LABELS AND DECLARATIONS—SELF-DECLARED ENVIRONMENTAL CLAIMS (TYPE II ENVIRONMENTAL LABELLING) (1999); see also David A. Wirth, *The International Organization for Standardization: Private Voluntary Standards as Swords and Shields*, 36 B.C. ENVTL. AFF. L. REV. 79, 81, 89 (2009). As a consequence, according to ISO standards, ecolabels must be “accurate, verifiable, relevant and not misleading” and “based on scientific methodology that is sufficiently thorough and comprehensive to support the claim.” INT’L ORG. FOR STANDARDIZATION, REFERENCE NO. ISO 14020:2000(E), ENVIRONMENTAL LABELS AND DECLARATIONS—GENERAL PRINCIPLES §§ 4.2.1, 4.4.1 (2000).

27. 16 C.F.R. §§ 260.1-.17 (2014).

28. Cavanagh, *supra* note 25, at 155 (citing 16 C.F.R. § 260.1 (1994)).

29. Staffin, *supra* note 8, at 215 (citing 16 C.F.R. § 260.3 (1995)); see also Cavanagh, *supra* note 25, at 155-56.

30. See *infra* Part III.

31. David Gibson, *Awash in Green: A Critical Perspective on Environmental Advertising*, 22 TUL. ENVTL. L.J. 423, 423 (2009) (citing Guides for the Use of Environmental Marketing Claims, 61 Fed. Reg. 53,311 (Oct. 11, 1996); Guides for the Use of Environmental Marketing Claims, 63 Fed. Reg. 24,240 (May 1, 1998)).



accessibility of the current guidance on general ‘green’ claims and environmental seals” and “propose new guidance regarding emerging claims not currently addressed in the Guides, such as renewable materials, renewable energy, and carbon-offsets.”<sup>32</sup> These most recent revisions went into effect in October 2012.<sup>33</sup>

The Green Guides do not have the force of law,<sup>34</sup> but rather, they represent the FTC’s official stance on how marketers can best comply with legal requirements when making “environmental claims in labeling, advertising, promotional materials, and all other forms of marketing in any medium, whether asserted directly or by implication, through words, symbols, logos, depictions, product brand names, or any other means.”<sup>35</sup> While compliance is voluntary, “if a marketer makes an environmental claim inconsistent with the guides,” the FTC may take action if it determines that the conduct violates section 5 of the FTCA.<sup>36</sup>

The Green Guides reflect the FTC’s five general requirements for all advertising claims: (1) claims must be substantiated, (2) claims may not be overbroad and unqualified, (3) comparative claims must state the basis for comparison, (4) “claims should not exaggerate or overstate attributes or benefits,” and (5) claims should not use “symbols or seals of approval whose significance the public doesn’t understand.”<sup>37</sup> The Green Guides clarify the meaning of these general requirements for environmental claims in particular. When a party makes an express or implied assertion of an environmental attribute, the party should rely upon a reasonable basis that substantiates the claim.<sup>38</sup> For environmental claims, the reasonable basis will often need to be “competent and reliable scientific evidence,” defined as “tests, analyses, research, or studies,” or other evidence based on the expertise of professionals in the relevant area, “that have been conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield

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32. Guides for the Use of Environmental Marketing Claims, 75 Fed. Reg. 63,552 (Oct. 15, 2010) (codified at 16 C.F.R. pt. 260).

33. *FTC Issues Revised “Green Guides,”* FED TRADE COMM’N (Oct. 1, 2012), <http://www.ftc.gov/opa/2012/10/greenguides.shtm>.

34. 16 C.F.R. § 260.1(a)-(b) (2014).

35. *Id.* § 260.1(a), (c).

36. *Id.* § 260.1(a). For more details about conduct that the FTC will consider to be deceptive, see Letter from James C. Miller III, Chairman, FTC, to the Honorable John D. Dingell, Chairman, Comm. on Energy & Commerce, U.S. House of Representatives (Oct. 14, 1983), reprinted in *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174-76 (1984).

37. J. Thomas Rosch, Comm’r, FTC, Address at the American Conference Institute’s Regulatory Summit for Advertisers and Marketers 6-8 (June 18, 2008) (transcript available at <http://www.ftc.gov/public-statements/2008/06/responsible-green-marketing>).

38. 16 C.F.R. § 260.2.

accurate and reliable results.”<sup>39</sup> To prevent deception, marketers should ensure that “qualifications and disclosures [are] clear, prominent, and understandable.”<sup>40</sup> Claims should not expressly or impliedly overstate environmental attributes, nor should they make comparative statements without expressly indicating the basis for comparison.<sup>41</sup>

The Green Guides offer a nonexhaustive survey of noncompliant environmental claims.<sup>42</sup> In many instances, first-party ecolabels of seafood products imply claims of broad environmental benefits (e.g., sustainable or responsibly sourced); however, the Green Guides require that all implied claims be substantiated. Therefore, it is often better to avoid and/or qualify broad environmental claims, lest they be interpreted as deceptive pursuant to FTC guidance.<sup>43</sup> Without sufficient qualification, broad environmental claims can “convey that the product, package, or service has specific and far-reaching environmental benefits.”<sup>44</sup> The Green Guides offer an example of a noncompliant general environmental claim that results from an unqualified ecolabel:

Example 6: A product label contains an environmental seal, either in the form of a globe icon or a globe icon with the text “EarthSmart.” . . . Either seal likely conveys that the product has far-reaching environmental benefits . . . . If the marketer cannot substantiate these claims, the use of the seal would be deceptive. The seal would not be deceptive if the marketer accompanied it with clear and prominent language clearly conveying that the certification refers only to specific and limited benefits.<sup>45</sup>

The FTC has pursued enforcement “actions against companies that made deceptive, misleading, false or unsubstantiated green claims regarding the makeup of products or the degradability of certain products.”<sup>46</sup> In 2010, the FTC investigated and brought an action against

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39. *Id.* For further detail on the reasonable basis, the Green Guides refer to the FTC Policy Statement Regarding Advertising Substantiation Program, 49 Fed. Reg. 30,999, 30,999-31,001 (Aug. 2, 1984).

40. 16 C.F.R. § 260.3(a).

41. *Id.* § 260.4(a)-(c).

42. *See id.* §§ 260.4-.17.

43. *See id.* § 260.4(b)-(c).

44. *Id.* § 260.4(b).

45. *Id.* § 260.6 ex. 6.

46. *See* Michelle Diffenderfer & Keri-Ann C. Baker, *Greenwashing: What Your Client Should Know To Avoid Costly Litigation and Consumer Backlash*, 25 NAT. RESOURCES & ENV'T 21, 22-23 (2011) (citing Complaint at 1, *In re* Kmart Corp., 147 F.T.C. No. C-4263 (July 15, 2009); Complaint at 1, *In re* Tender Corp., 148 F.T.C. No. C-4261 (July 13, 2009); Complaint at 2, *In re* Dyna-E Int'l, Inc., 147 F.T.C. No. 9336 (May 20, 2009); Complaint at 2, *In re* Pure Bamboo, LLC, 148 F.T.C. No. C-4278 (Dec. 15, 2009); Complaint at 2, *In re* Sami Designs, LLC, 148 F.T.C. No. C-4279 (Dec. 15, 2009); Complaint at 2-4, *In re* CSE, Inc., 148 F.T.C. No. C-4280 (Dec. 15, 2009); Complaint at 2-4, *In re* M Group, Inc., 148 F.T.C. No. 9340 (Aug. 7, 2009)).

an organization that offered “Tested Green” certification.<sup>47</sup> For a fee, a company could display the Tested Green logo. “Tested Green” was allegedly “endorsed by the National Green Business Association (‘NGBA’) and the National Association of Government Contractors (‘NAGC’), two organizations which [the defendants] own and operate.”<sup>48</sup> All of the above-mentioned enforcement actions ended in settlement agreements.

The most recent revisions to the Green Guides strengthen the FTC’s stance vis-à-vis general environmental claims and offer guidance concerning certification and seals of approval. Whereas the previous version of the Green Guides allowed for general environmental claims as long as express or implied claims were substantiated, the Green Guides revised in 2012 state, “It is deceptive to misrepresent, directly or by implication, that a product, package, or service offers a general environmental benefit.”<sup>49</sup> Unqualified claims can be interpreted in many ways and the context may give the claim additional meanings. As such, the revised Green Guides specify that even when the advertiser can substantiate the environmental claims, “it is highly unlikely that marketers can substantiate all reasonable interpretations of these claims.”<sup>50</sup> Whereas the previous Green Guides contained a single example of a noncompliant “environmental seal,” the revised Green Guides dedicate an entire section to certifications and seals of approval:

- (a) It is deceptive to misrepresent, directly or by implication, that a product, package, or service has been endorsed or certified by an independent third party.
- (b) A marketer’s use of the name, logo, or seal of approval of a third-party certifier or organization may be an endorsement, which should meet the criteria for endorsements provided in the FTC’s Endorsement Guides, 16 CFR part 255, including Definitions (§ 255.0), General Considerations (§ 255.1), Expert Endorsements (§ 255.3), Endorsements by Organizations (§ 255.4), and Disclosure of Material Connections (§ 255.5).
- (c) Third-party certification does not eliminate a marketer’s obligation to ensure that it has substantiation for all claims reasonably communicated by the certification.
- (d) A marketer’s use of an environmental certification or seal of approval likely conveys that the product offers a general environmental benefit (see § 260.4) if the certification or seal does not convey the basis for

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47. Complaint at 145-49, *In re Nonprofit Mgmt. LLC*, 151 F.T.C. 144 (2011).

48. *In re Nonprofit Mgmt. LLC*, 151 F.T.C. at 159.

49. 16 C.F.R. § 260.4(a).

50. *Id.* § 260.4(b).

the certification or seal, either through the name or some other means. Because it is highly unlikely that marketers can substantiate general environmental benefit claims, marketers should not use environmental certifications or seals that do not convey the basis for the certification.

- (e) Marketers can qualify general environmental benefit claims conveyed by environmental certifications and seals of approval to prevent deception about the nature of the environmental benefit being asserted. To avoid deception, marketers should use clear and prominent qualifying language that clearly conveys that the certification or seal refers only to specific and limited benefits.<sup>51</sup>

The revised Green Guides offer several examples of deceptive seals of approval. The examples illuminate that a seal of approval or certification, without qualification, would reasonably appear to have been granted by a third party after that party had evaluated the product. Such seals or certifications are deceptive if they do not reveal “with clear and prominent language” that the advertiser itself created the seal or certification, that the advertiser is a member of the group that conducted the third-party certification, or that the organization granting the seal of approval is an industry group, even if the advertiser is not a member.<sup>52</sup>

The revised Green Guides do not provide specific guidance concerning the use of the term “sustainable” because the FTC “lacks a sufficient basis to provide meaningful guidance on the use of sustainable as an environmental marketing term.”<sup>53</sup> Nevertheless, “[m]arketers . . . are responsible for substantiating consumers’ understanding of this claim in the context of their advertisements.”<sup>54</sup> When including “sustainable” in an ecolabel, marketers should be aware that although the term is not strictly defined in the Green Guides, its use may fall under the provisions for general environmental claims noted above, particularly if the on-product “sustainable” claim eclipses that of a third-party certification.

In July 2013, the FTC pursued actions against three mattress companies that misrepresented the green virtues of their products.<sup>55</sup> Of interest to seafood marketers, the FTC’s actions focused on the claims that the mattresses were “free of” volatile organic compounds or other

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51. *Id.* § 260.6(a)-(e).

52. *Id.* § 260.6 exs. 1-3, 5.

53. Guides for the Use of Environmental Marketing Claims, 75 Fed. Reg. 63,552, 63,583 (Oct. 15, 2010) (codified at 16 C.F.R. pt. 260).

54. *Id.*

55. Leslie Fair, *FTC to Mattress Companies: Don’t Pad Your Green Claims*, FTC BCP BUS. CENTER BLOG (July 25, 2013, 11:08 AM), <http://www.business.ftc.gov/blog/2013/07/ftc-mattress-companies-dont-pad-your-green-claims>.

chemicals, and in the case of one of the companies, the FTC found that a seal of approval misrepresented that a third-party certifier was independent when in fact it was an alter-ego of the company.<sup>56</sup> These cases illustrate that seafood marketers should take care to qualify “free of” claims, such as “mercury free,” and be prepared to substantiate the claims to demonstrate that they meet the Green Guides’ standards. Additionally, marketers must take care that seals of approval do not falsely give the impression that an independent entity has evaluated or tested the product.

The FTC clarified that its guidelines also apply to seafood marketed with third-party certifications. In May 2013, the FTC sent the Marine Stewardship Council (MSC) a letter in which it clarified “that the MSC’s ‘Certified Sustainable Seafood’ label . . . must comply with the Federal Trade Commission Act, 15 U.S.C. §§ 41 *et seq.*”<sup>57</sup> Additionally, the MSC’s seal “should comport with the Green Guides.”<sup>58</sup> The FTC urged the MSC and any other certifier, when developing certification standards and seals, to consider what reasonable consumers would consider the seal to mean.<sup>59</sup>

### III. LITIGATION

Although the FTC cannot directly seek civil penalties and section 5 of the FTCA does not create a civil cause of action, states have adopted the Green Guides into their consumer protection and false advertising laws.<sup>60</sup> For instance, in California, “[i]t is unlawful for any person to make any untruthful, deceptive, or misleading environmental marketing claim, whether explicit or implied.”<sup>61</sup> Under this statute, California law provides that the marketer may use compliance with the Green Guides as a defense to a misleading environmental marketing claim. Violators may face jail time and/or fines up to \$2,500.<sup>62</sup>

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56. *Id.*

57. Letter from Donald S. Clark, Sec’y, FTC, to Program Improvements Manager of Marine Stewardship Council, FED TRADE COMM’N (May 30, 2013), [http://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/federal-trade-commission-letter-marine-stewardship-council-concerning-considering-consumer/130531mscletter.pdf](http://www.ftc.gov/sites/default/files/documents/advocacy_documents/federal-trade-commission-letter-marine-stewardship-council-concerning-considering-consumer/130531mscletter.pdf).

58. *Id.*

59. *Id.*

60. See Robert S. Huie, *FTC’s ‘Green Guides,’ Businesses, Beware*, NAT’L L.J. 23 (May 12, 2008), <http://www.law.com/jsp/nlj/legaltimes/PubArticleFriendlyLT.jsp?id=1202421231408&slreturn=20120722203026>; see also Cavanagh, *supra* note 25, at 177-84; Staffin, *supra* note 8, at 216 (citing EPA, STATUS REPORT, *supra* note 8, at 4).

61. CAL. BUS. & PROF. CODE § 17580.5(a) (2014).

62. *Id.* §§ 17580.5(b), 17581.

California law also allows for causes of action, with associated civil penalties, under its Unfair Competition Law,<sup>63</sup> Consumers Legal Remedies Act,<sup>64</sup> and common law fraud.<sup>65</sup> Competitors and consumers may also invoke the cause of action for false advertising created by the Lanham Act:

- (1) . Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—
  - (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
  - (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.<sup>66</sup>

In *Koh v. S.C. Johnson & Son, Inc.*, plaintiff Wayne Koh brought a class action suit against the defendant manufacturer of Windex, the packaging of which bears the seal of approval “Greenlist.”<sup>67</sup> The plaintiff alleged that Greenlist “is not a designation bestowed by a non-profit environmental group, or even a neutral third-party, *but instead is the creation of Defendant SC Johnson itself.*”<sup>68</sup> In determining whether the plaintiff’s allegation that the Greenlist seal was deceptive should survive a motion to dismiss, the court cited the FTC’s current Green Guides and held that there was a sufficient question of fact about whether the Greenlist seal was, like the example of the noncompliant “EarthSmart” label in the Green Guides, “likely to convey to consumers that the

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63. *Id.* § 17200.

64. *Id.* §§ 1750-1756.

65. *See* Hill v. Roll Int’l Corp., 128 Cal. Rptr. 3d 109, 111 (Ct. App. 2011).

66. 15 U.S.C. § 1125(a)(1)(A)-(B) (2012).

67. Order Granting Plaintiff’s Motion To Quash and/or for a Protective Order at 1, Koh v. S.C. Johnson & Son, Inc., No. C09-00927 RMW (N.D. Cal. filed Feb. 18, 2011) (citing First Amended Complaint (Class Action) at 2, Koh v. S.C. Johnson & Son, Inc., No. 09-cv-00927 HRL (N.D. Cal. filed May 1, 2009)).

68. *Id.* at 2 (quoting First Amended Complaint (Class Action), *supra* note 67, at 3).

product is environmentally superior to other products' and would be deceptive '[i]f the manufacturer cannot substantiate this broad claim.'"<sup>69</sup>

At least one commentator has noted that state "mini FTC" laws and common law causes of action could provide plaintiffs with a context in which to argue that an advertiser's noncompliance with the Green Guides is a breach of a "green" standard of care.<sup>70</sup> While noncompliance with the Green Guides does not automatically mean that the advertiser is liable for common law fraud or for a violation of any number of false advertising, unfair competition, and consumer protection laws, the *Koh* case demonstrates that state courts may consider the Green Guides to represent best practices in environmental claims. Further, *Koh* provides that in California at least, compliance with the Green Guides can be evoked as a defense against false advertisement claims. Because California's consumer protection laws "provide[] for: (1) actual damages; (2) injunctive relief; (3) restitution; (4) punitive damages; (5) other relief deemed proper; (6) potential additional monetary damages for senior citizens and disabled persons; (7) treble damages; and (8) attorney fees,"<sup>71</sup> noncompliance with the Green Guides could be considered a high-stakes risk.

Beyond federal and state consumer protection and unfair competition actions, competitors may seek a decision by the Better Business Bureau's National Advertising Division (NAD).<sup>72</sup> While compliance with NAD rulings is voluntary, failure to comply may result in NAD referring the case to the FTC for enforcement. For instance, when a marketer of

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69. Order Denying Defendant's Motion To Dismiss First Amended Complaint, or in the Alternative To Stay or Transfer at 4, *Koh v. S.C. Johnson & Son, Inc.*, No. C-09-00927 RMW (N.D. Cal. filed Jan. 6, 2010) (alteration in original) (quoting First Amended Complaint (Class Action), *supra* note 67, at 7). *But see Hill*, 128 Cal. Rptr. 3d at 116, 118 (finding that a depiction of a green drop alone did not reasonably signify a general environmental claim). For commentary on the *Koh* and *Hill* cases, see Neal Marder & Christian E. Dodd, *The "Reasonable Consumer's" View of the Green Labels—Lessons from Two Greenwashing Cases*, GCI 48-50 (Mar. 2012), <http://cdn2.winston.com/images/content/1/1/v2/1120/GCI1203-MarderDodd.pdf>.

70. See Patrick J. Perrone & Christopher J. Archer, *"Green" Standards of Care: The FTC's Green Guides*, TSTF09 ALI-ABA 97, 98 (2012). For more on mini FTC acts (a.k.a. "little FTC acts"), see PHILIP J. CRIFIELD, *Deceptive Advertising*, in 1 BUSINESS TORTS 7-100 n.68 (Joseph D. Zamore et al. eds., 2012) (citing FLA. STAT. ANN. § 501.204; 815 ILL. COMP. STAT. 505/2; 73 PA. STAT. ANN. § 201-9.2) (noting that Florida, Illinois, and Pennsylvania statutes incorporate the FTCA as well as create civil causes of action).

71. *Diffenderfer & Baker*, *supra* note 46, at 22 (citing CAL. CIV. CODE § 1780).

72. *National Advertising Division*, COUNCIL OF BETTER BUS. BUREAUS, <http://www.bbb.org/council/the-National-partner-program/national-advertising-review-services/national-advertising-division/> (last visited Aug. 30, 2014).

“humanely raised” chicken failed to discontinue its false claims, NAD reported the details of the case to the FTC.<sup>73</sup>

As a result of such risks of being reported to the FTC, Winston and Strawn lawyers Neal Marder and Christian Dodd make the following recommendations for companies that wish to make environmental claims on their labels:

- First, a company should select symbols and wording that reflect the product itself and its own green features and avoid those that could be associated with an independent organization, such as a third party environmental group, if the product has not in fact been endorsed or recognized by that organization or group.
- Second, the symbol should not suggest or imply that the product has been ranked by a rating system unless an independent, third party organization has, in fact, rated the product.
- Third, companies that market their products as green should familiarize themselves with, and adhere to, the FTC Green Guides, as plaintiffs who bring greenwashing claims, and courts assessing whether those claims have merit, often resort to the Green Guides for guidance as to what types of environmental claims are potentially misleading.<sup>74</sup>

Self-declared ecolabels and claims indicating that seafood is sustainably sourced or harvested in ecofriendly manners should, at a minimum, comply with the standards set forth in the Green Guides. Compliance with the Green Guides is necessary not only because of the possibility of enforcement by the FTC but because competitors and plaintiffs may use noncompliance with the Green Guides in lawsuits alleging violation of the Lanham Act, state mini-FTC acts, or various other state consumer protection and unfair competition laws. General environmental claims, including those that a reasonable person could infer from certification names or seals, should be qualified and substantiated by reliable scientific evidence. The revised Green Guides provide guidance concerning certifications and seals with the appearance of having been granted by third parties. Marketers should strive to provide clear labels that illuminate their connection to the certification or seal, whether it is through self-certification, a partnership, or an organization to which the marketer belongs. While it is possible that a noncompliant self-created ecolabel is nevertheless not deceptive, the

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73. See *NAD Refers Allen Harim Foods to FTC Following Compliance Review of ‘Humanely Raised’ Ad Claim*, ADVER. SELF-REGULATORY COUNCIL (Nov. 13, 2013), <http://www.ascreviews.org/2013/11/nad-refers-allen-harim-foods-to-ftc-following-compliance-review-of-humanely-raised-ad-claim/>.

74. Marder & Dodd, *supra* note 69, at 50.



risks of FTC enforcement and civil actions are great enough to warrant compliance with the Green Guides.

#### IV. CONCLUSION

Self-declared ecolabels are generating increasing confusion and concern within the United States and abroad.<sup>75</sup> As such, many commentators and scholars are advocating for public standards.<sup>76</sup> While the Green Guides provide important interpretive guidance for what may or may not be considered deceptive or misleading and receive deference from the courts, they are nonbinding and occupy a deferred-to-middle space between legally mandatory ecolabeling requirements and truly voluntary standards. With the growing awareness and scrutiny over ecolabels, companies would do well to familiarize themselves with the Green Guides and the FTC's standards for express or implied claims, pay careful attention to greenwashing litigation, and heed the early advice of legal experts in the field. They should also proceed with caution before developing any self-declared ecolabels and explore alternative strategies, such as independent third-party certification, that may provide a higher level of clarity and credibility to any environmental claims.

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75. See, e.g., *Environmental Claims on Supermarket Seafood*, CLIENTEARTH 5 (Jan. 2011), <http://www.clientearth.org/reports/environmental-claims-on-supermarket-seafood.pdf> (discussing seafood ecolabeling in the United Kingdom).

76. As a result of confusion, many are in favor of public standards. See *De-Coding Seafood Eco-Labels: Why We Need Public Standards*, FOOD & WATER WATCH, at iv (Nov. 2010), [http://documents.foodandwaterwatch.org/doc/De\\_Coding\\_Eco\\_labels.pdf#\\_ga=1.87878680.1424135173.1408653706](http://documents.foodandwaterwatch.org/doc/De_Coding_Eco_labels.pdf#_ga=1.87878680.1424135173.1408653706); Cavanagh, *supra* note 25, at 178-80, 183-84.