Carbon Neutral: The New Green—
Substantiation Issues for the Next Generation of Environmental Claims

Randal Shaheen, Amy Ralph Mudge, and Matthew Shultz

In the early 1990s, consumer interest in the environment, particularly in the use and misuse of natural resources, began to grow. Industry raced to respond, and products began to appear with claims such as "biodegradable," "recyclable," and "made from recycled material." These terms, however, had little definition, and any limitations on such claims were often poorly understood by consumers. As a result, regulators, primarily at the state level, jumped in with legislation and enforcement actions intended to stem a tide of unsubstantiated or misleading environmental claims.[1] Efforts by industry to make legitimate environmental claims then became hampered by a patchwork of state laws that created often inconsistent and contradictory criteria for environmental terms. Anxious to preserve their ability to continue marketing products that met consumer demands for environmental responsibility, manufacturers petitioned the Federal Trade Commission to intervene and issue guidelines or rules that would provide a uniform federal standard and preempt state law.

In 1992, the FTC responded and issued guides for the making of environmental claims.[2] The Green Guides provided specific criteria for the use of terms, such as biodegradable, recyclable, and recycled, as well as guidance for use of more general terms, such as "environmentally friendly." The FTC environmental guides have withstood the passage of time well, and consumer interest in products with these claims and the number of products sporting such claims continues to grow. However, a new generation of environmental claims not contemplated when the FTC issued its original Green Guides have come in to vogue. Spurred on by former Vice President Gore's book and movie,[3] an above-average Atlantic hurricane season, and talk of melting polar

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[1] For example, in 1990, seven state attorneys general brought an action against Mobil Chemical Co. alleging that its claim that its Hefty trash bags were biodegradable was misleading because the bags would not biodegrade under normal landfill conditions. CAL. ATTORNEY GENERAL ET AL., THE GREEN REPORT: FINDINGS AND PRELIMINARY RECOMMENDATIONS FOR RESPONSIBLE ENVIRONMENTAL ADVERTISING 7–8 (1990), *available at* http://www.p2pays.org/ref/24/23677.pdf. Also in 1990, California enacted statutory provisions regulating environmental marketing claims. *See* Cal. Bus. & Prof. Code §§ 17580, 17581 (West 2007). These statutes were subsequently amended to make compliance with the FTC's Guides for the Use of Environmental Marketing Claims, 16 C.F.R. pt. 260 (2007), a defense. *See id.* § 17580.5(b).

[2] Guides for the Use of Environmental Marketing Claims, 16 C.F.R. pt. 260. Originally issued in 1992, 57 Fed. Reg. 36,363 (Aug. 13, 1992), the Guides were revised in 1996, 61 Fed. Reg. 53,311 (Oct. 11, 1996), and again in 1998, 63 Fed. Reg. 24,240 (May 1, 1998). On November 26, 2007, the FTC announced that it would be reviewing and soliciting comments on the Green Guides in 2008 instead of 2009 because of the recent increase in environmental advertising claims. See Press Release, Fed. Trade Comm'n, FTC Reviews Environmental Marketing Guides, Announces Public Meetings (Nov. 26, 2007), *available at* http://www.ftc.gov/opa/2007/11/enviro.shtm. The FTC has also published a booklet to assist advertisers in complying with the Green Guides. FTC, COMPLYING WITH THE ENVIRONMENTAL MARKETING GUIDES, *available at* http://www.ftc.gov/bcp/conline/pubs/buspubs/greenguides.pdf.

[3] AL GORE, AN INCONVENIENT TRUTH: THE PLANETARY EMERGENCE OF GLOBAL WARMING AND WHAT WE CAN DO ABOUT IT (2006); AN INCONVENIENT TRUTH (Paramount Classics 2006).

ice caps and rising seas, the American consumer has become more and more interested in the issue and the implications of global warming. Terms like "carbon footprint" and "carbon neutral" have become part of everyday parlance, as consumers try to assess the impact of carbon emissions on the environment and what they and business can do about it.

Once again the marketplace has responded. Companies have begun to calculate their carbon footprint and market products with claims of carbon neutrality. For example, in the spring 2007, Mohawk Fine Papers announced that several of its paper product lines are now carbon neutral.[4] Rene Geneva Design has announced that it has assigned a carbon value to each of its clothing articles and will be making corresponding donations to organizations that offset greenhouse gas emissions.[5] In August 2007, Dole Food Company announced that its Costa Rican subsidiary and the Costa Rica government will be collaborating to establish a carbon neutral banana and pineapple supply chain.[6] Indeed, even the former Vice President's movie was marketed with a claim that "100% of the carbon dioxide emissions from air and ground transportation and hotels for production and promotional activities" were offset "making the film the first carbon-neutral documentary ever."[7]

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In addition to companies trying to make their products more attractive based on their carbon offset, a stand-alone carbon offset industry has emerged for consumers interested in offsetting their own emissions. For example, when consumers buy plane tickets through Expedia.com, they are given the option to purchase TerraPass carbon offsets to offset the carbon emissions of their flight.[8]

We find ourselves in a similar position to where we were fifteen years ago when there was widespread use of terms like "biodegradable" and "made of recycled content" and the Green Guides had yet to be published. Many consumers are interested in buying carbon neutral products, and manufacturers are interested in advertising their efforts to reduce their contribution to global warming, but there is little in the way of a common definition for such terms and what limitations may be implicit in their use. For example, what do consumers understand is included in a calculation of a company's carbon footprint? Does it include only emissions by a manufacturer in making a particular product? What about the carbon emissions of third-party suppliers? Similarly, numerous questions arise with respect to the meaning and substantiation of a carbon neutral or carbon offset claim. What are the criteria for a legitimate carbon offset? Does it matter if the offset would have happened anyway or if it may not be permanent? Can an offset include funding research into possible ways to reduce carbon, and, if so, must the tentative nature of the offset be

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[4] *See* Press Release, Strathmore Writing, Strathmore Script, Beckett Concept and Beckett Expression Now Carbon Neutral (May 1, 2007); Press Release, Mohawk Launches New Carbon Neutral Beckett Expression and Beckett Concept (June 4, 2007), *available at* http://www.mohawkpaper.com/.

[5] Press Release, Fashionable Neutral Carbon Program to be Released at WWDMAGIC, http://mycorset.com/news/cvprogramPR.htm.

[6] Press Release, Dole Food Company, Inc. Announces Carbon Neutral Project in Collaboration with Costa Rica (Aug. 9, 2007), http://www.dole.com/CompanyInfo/PressRelease/PressRelease_Index.jsp?ID=1558.

[7] Press Release, *An Inconvenient Truth* Is the First Carbon-Neutral Documentary (June 6, 2006), *available at* http://www.climatecrisis.net/blog/index.php?paged=2. *Evan Almighty* (Universal 2007) billed itself as the first "big movie comedy" to be carbon neutral. *See* http://www.getonboardnow.org/comedy.html; Anne Thompson, *Studios Go Green, Scene by Scene*, VARIETY, Apr. 30, 2007, at 6. Released in 2004, *The Day After Tomorrow* (Twentieth Century Fox 2004) was reportedly the first carbon neutral movie. Anne Thompson, *supra*.

[8] *See* Fly Green with TerraPass, http://www.expedia.com/pub/agent.dll?qscr=tsdt&stat=5&ofid=6779; Press Release, Expedia Corporate Travel Goes Carbon Neutral (Mar. 7, 2007), http://press.expedia.com/index.php?s=press_releases&item=369; TerraPass and Expedia Partner to Bring Travelers Carbon Balanced Flight, http://www.terrapass.com/lp/expedia.html.

disclosed? Further, what obligations does a company have to investigate the legitimacy of carbon offsets that it purchases from a third party?

Another concept, "water neutrality," is in an even more nascent state. Coca-Cola, for example, just pledged to become "water neutral."[9] Such claims raise similar questions as to how one calculates a water footprint and how one substantiates a claim that water usage has been "offset."

In this article we investigate the questions that may arise as companies strive to make legitimate claims relating to carbon and water neutrality. We also suggest possible approaches to some claims based upon prior FTC guidance in the environmental area and elsewhere.

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Other regulators have already started asking some, but not all, of these questions. Congressman Edward Markey recently held a Congressional hearing to explore whether there should be regulation of the carbon offset industry and, after the hearing, sent a letter to the FTC urging it "to undertake a public process designed to update the Commission's Guides for the Use of Environmental Marketing Claims . . . so that consumer confidence in the offset market can be assured."[10] In his letter, Representative Markey also urged the FTC to examine standards already being developed by those in the industry.[11] In response, the FTC said that it has been monitoring the developing carbon offset market and would hold a public workshop in the coming months to "seek input on the consumer protection issues raised by carbon offset sales and the need for more direct FTC guidance than that already provided by the Green Guides and other advertising directives."[12] The FTC also said that it wanted "to better understand the market to avoid acting in a way that could restrain innovation or harm consumers" and would consider the industry's efforts to self-regulate.[13]

At the same time, state action to regulate carbon offsets is beginning.[14] Although the issues involved are complex and not always susceptible to easy answers, given these regulatory stirrings, consumers and industry alike are perhaps best served by the FTC stepping forward and issuing uniform federal guidelines so that claims of carbon and water neutrality can be made and relied upon with confidence.

Understanding Carbon Footprints and Carbon Neutrality

To understand the substantiation issues that arise with respect to claims of the size of a carbon footprint or carbon neutrality, we first need to examine how these terms have been used. A "carbon footprint" is intended to be a measure of the amount of carbon dioxide (or greenhouse gases) emitted as a result of the activities of an individual, a household, or a business. A product or serv-

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[9] *See* Press Release, Freshwater Conservation Pledge and Partnership (June 5, 2007), *available at* http://www.thecoca-colacompany.com/presscenter/presskit_conservation_partnership.html. Coca-Cola entered into a partnership with the World Wildlife Fund to set water efficiency goals for its manufacturing operations and take steps to recycle and replenish water supplies.

[10] Letter from Rep. Edward Markey, Chairman, Select Committee on Energy Independence and Global Warming, to Deborah Platt Majoras, Chairman, Fed. Trade Comm'n (July 18, 2007), *available at* http://globalwarming.house.gov/mediacenter/letters?id=0002.

[11] *Id.*

[12] Letter from Deborah Platt Majoras to Rep. Edward Markey (Aug. 9, 2007). The letter also noted that the Green Guides are scheduled to be reviewed in 2008. On November 26, 2007, the FTC announced that it will be holding a workshop on January 8, 2008, regarding carbon offsets and renewable energy certificates, focusing on consumer protection issues, and invited public comment. *See* Press Release, Fed. Trade Comm'n, FTC Reviews Environmental Marketing Guides, Announces Public Meetings (Nov. 26, 2007), *available at* http://www.ftc.gov/opa/2007/11/enviro.shtm (providing links to relevant documents).

[13] *Id.*

[14] *See, e.g.*, Assemb. B. 7352, 2007 Leg., Reg. Sess. (N.Y. 2007) (would require licensing and regulation of carbon offset providers); S.B. 6305, 2007 Leg., 230th Reg. Sess. (N.Y. 2007) (would require establishment of certification protocol for carbon credits).

ice can also be said to have a carbon footprint—or the amount of carbon dioxide emitted in the various activities involved in producing a product or providing a service.

The size of one's carbon footprint can be computed using a "carbon calculator," available at numerous Internet sites. For example, the Web site for the movie *An Inconvenient Truth* features a carbon calculator,[15] as does the Environmental Protection Agency's Web site.[16] Some carbon calculators capture only emissions of carbon dioxide, while others also attempt to capture emissions of other greenhouse gases.

Most carbon calculators are designed for individual or household use, prompting the user to enter information relating to electricity usage, home heating, driving, and flying. However, other more sophisticated calculators have been developed as tools for business. For example, CarbonCounted promotes software that businesses can use to calculate their total carbon footprint and footprint per product or unit.[17] This software allows a business to enter information relating to its carbon dioxide emissions from production, research and development, and administrative functions. Data from suppliers, including raw materials suppliers, can also be linked, as well as data for carbon emissions by retailers that sell the manufacturer's product. The manufacturer can then calculate its total carbon footprint or distribute that total per unit of product. CarbonCounted does not capture any carbon emissions associated with a product's use by consumers. Thus, for example, with this tool General Motors or ExxonMobil could calculate the carbon footprint associated with the manufacture and sale of a car or gasoline but not the actual use of those products. In addition, CarbonCounted's methodology focuses on activities and operations associated with the variable costs in producing a product and thus does not account for carbon dioxide emitted during the creation of fixed manufacturing elements, such as construction of buildings or the manufacture of equipment.[18]

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While the goal of many is reduction of carbon dioxide emissions, complete elimination of carbon emissions may not be practical or technically feasible. As a result, the concept of carbon offsets was developed as a way for companies to make up for their release of carbon dioxide into the atmosphere. In essence, it is like a dieter who eats a donut but then runs a mile to burn off the extra calories. Specifically for carbon, the offset involves investment in an activity to reduce carbon emissions (such as by planting trees that capture carbon from the atmosphere) by an amount equal to the carbon emissions sought to be offset (such as emissions associated with air travel). A company that offsets (or pays others to offset) all of its carbon emissions is said to be carbon neutral. This concept is well-established in emissions trading allowed under existing U.S. regulatory programs, particularly for air pollution control. For example, under the Clean Air Act Acid Rain program,[19] electric utilities have a set number of tons of sulfur dioxide (which contributes to acid rain) they are allowed to emit.[20] If they wish to emit more than that allowance, they can buy

[15] *See* Calculate Your Impact, http://www.climatecrisis.net/takeaction/carboncalculator/.

[16] *See* Personal Emissions Calculator, http://www.epa.gov/climatechange/emissions/ind_calculator.html. *See also* Carbon Calculators, http://www.carbonfund.org/site/pages/carbon_calculators/; Carbon Calculator Introduction, http://www.greentagsusa.org/GreenTags/calculator_intro.cfm.

[17] The CarbonCounted Standard 1.1 § 1.1 (Apr. 2007), http://76.162.167.141/downloads/CarbonCounted_Standard.pdf. CarbonCounted states that its standard is consistent with ISO 14064 and the World Business Council for Sustainable Development—GHG Protocol Initiative. *Id.* § 1.5.

[18] *Id.* § 2.7.

[19] *See generally* 42 U.S.C. §§ 7651–7651o (2007); 40 C.F.R. pts. 72–78 (2007).

[20] 42 U.S.C. § 7651b(a)(1); 40 C.F.R. pt. 73, subpt. B.

allowance credits from other electric utilities that have decided to emit less than they are allowed.[21] In this way, the purchased allowances from those who make an extra effort to reduce sulfur dioxide are used to offset the extra emissions from another company. Similarly, new manufacturing plants that are constructed in certain areas with poor air quality are required under the Clean Air Act to find a way to "offset" the new emissions they will add to the area, usually by paying another company to reduce its emissions by an equal amount.[22]

Most companies do not undertake to offset their carbon emissions directly. Instead they purchase offsets from third parties. Offsets come in many shapes and sizes but take three primary forms. Planting trees (or reforestation) is one such means. In 2005, U.S. forests sequestered the equivalent of 698.7 million metric tons of carbon dioxide.[23] Further, it is estimated that a single, fast-growing tree planted in the tropics will absorb an average of fifty pounds of carbon dioxide per year for at least forty years.[24]

A second method uses offsets related to renewable energy sources, such as wind power. Such offsets can take the form of credits or funding of renewable energy projects. In general, a renewable energy credit embodies the environmental benefits of—that is, the carbon dioxide emissions avoided by—generating a unit of electrical power from a renewable energy source as opposed to a traditional energy source, such as coal or natural gas.[25]

A third means is the funding of technology or research into methods of reducing emissions of carbon dioxide. Other more esoteric means of carbon offsetting have also been proposed. For example, one company "fertilizes" the ocean with iron in the belief that it promotes a plankton bloom, which in turn draws a significant amount of carbon dioxide out of the atmosphere.[26]

Today there are three dozen or more voluntary offset providers in the United States, including companies such as TerraPass, Bonneville Environmental Foundation (BEF), and Carbonfund.org. Worldwide, the voluntary offset market has an estimated volume of over $100 million. Some believe that by 2010 voluntary offsets may achieve reductions of several hundred million tons of carbon dioxide per year.[27] As compared to an estimated 25 billion tons of greenhouse gases emitted into the atmosphere every year by human activity, offsets make at most a modest contribution, yet represent a significant economic market.

Water neutrality is an emerging concept similar to carbon neutrality. This concept is not as well-defined as carbon neutrality. It encompasses efforts to reduce one's "water footprint"—the volume of freshwater used to produce goods or services—through conservation and efficiency gains and efforts to offset one's water footprint. A company can offset its water footprint by returning the water it uses to the environment at a quality that can support aquatic life and agriculture or by supporting efforts to establish, maintain, or improve freshwater sources.

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21 *See* 42 U.S.C. § 7651b(b).

22 *See* 42 U.S.C. § 7503(c).

23 U.S. EPA, Publ'n No. 430-R-07-002, Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2005 7-7 (2007); *available at* http://epa.gov/climatechange/emissions/downloads06/07CR.pdf.

24 *See* About Us: Global Cooling Center, http://www.treesftf.org/about/cooling.htm.

25 *See, e.g.*, Frequently Asked Questions: About BEF's Green Tags, https://www.greentagsusa.org/GreenTags/faq_pages/about_greentags.cfm.

26 See *Carbon Offsets: Keeping Faith with Climate-Conscious Consumers: Hearing Before the Select Comm. on Energy Independence and Global Warming* (July 18, 2007) (testimony of Russ George, President & CEO, Planktos, Inc.) [hereinafter *Carbon Offsets Hearing*].

27 *See id.* (testimony of Derik Broekhoff, Senior Associate, World Resources Institute).

With the exception of the Coca-Cola Company, which in June 2007 issued a press release heralding its goal of "water neutrality" featuring the familiar panda logo of its partner in the effort, the World Wildlife Fund, few companies appear to be using the notion of water neutrality to appeal to consumers. However, several initiatives aimed at getting companies involved in reducing their corporate water footprint were set in motion in 2007. In July 2007, the UN Global Compact, a UN organization encouraging "corporate citizenship," issued a "CEO Water Mandate" billed as "a strategic framework for companies seeking to address the issue of water sustainability in their operations and supply chains."[28] In August 2007 at World Water Week, organized by the World Business Counsel for Sustainable Development, the "World Water Tool" was launched. The tool allows a company to map its water "risk" and to calculate the volume and efficiency of water use in its operations.[29] Notably, the World Water Tool was developed by a slate of corporations which may look to appeal to consumers by achieving and then advertising a reduced water footprint, including Pepsico, Kimberly Clark, and Unilever.[30]

Both the calculation of one's carbon or water footprint and the use of carbon or water offsets create challenges with respect to consumer understanding of these terms and substantiation of their truthfulness. We discuss first below the FTC's general standards for substantiation of advertising claims as well as the general framework of the FTC's Green Guides and then turn to a more specific discussion of the issues associated with footprints and offsets, focusing on carbon. As it develops, the emerging concept of water neutrality will likely raise similar issues and questions. The experience of the FTC and the marketplace in grappling with claims of carbon footprints and neutrality may facilitate the use and understanding of future claims relating to water neutrality.

FTC Standards for Interpreting and Substantiation of Advertising Claims

The FTC has broad authority to prohibit "unfair or deceptive acts or practices."[31] The FTC's Deception Policy Statement provides that an advertisement is deceptive if it contains a misrepresentation or an omission that is likely to mislead consumers acting reasonably under the circumstances.[32] While to be actionable, a deceptive claim must be material to consumers' decisions to buy a product or service, the FTC does not need to prove actual injury to consumers. Deceptive claims may be express or implied. With express claims, the representation itself establishes the meaning of the claim.[33] Claims can also be implied based on the language of the claim coupled with the net impression created by the ad as a whole.[34] To demonstrate an implied claim, the FTC may rely on extrinsic evidence, such as a consumer survey, but it is not required to do so. The FTC is presumed to have sufficient expertise to determine whether an ad makes a deceptive implied

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[28] See United Nations Global Compact, Water Sustainability, *available at* http://www.unglobalcompact.org/Issues/Environment/Water_sustainability/index.html.

[29] *See* Business Running Ahead on Water—Summing up Stockholm (a summary of the discussions about water conservation among corporate participants in World Water Week, including a link to the World Water Tool), *available at* http://www.wbcsd.org/plugins/DocSearch/details.asp?type=DocDet&ObjectId=MjYxODA.

[30] *See* World Business Counsel for Sustainable Development Water Working Group membership list, *available at* http://www.wbcsd.org/Plugins/DocSearch/details.asp?DocTypeId=33&ObjectId=MjU2NTc&URLBack=%2Ftemplates%2FTemplateWBCSD2%2Flayout%2Easp%3Ftype%3Dp%26MenuId%3DMzcw%26doOpen%3D1%26ClickMenu%3DRightMenu.

[31] 15 U.S.C. § 45(a)(1) (2007).

[32] Cliffdale Assocs., 103 F.T.C. 110, 175–76 (1984) (appending Deception Policy Statement).

[33] *Id.* at 176.

[34] *Id.* at 179 & n.32.

claim.[35] Claims can be limited or modified with the use of disclosures or disclaimers, so long as the disclaimer language is clear and conspicuous.[36] Disclaimers cannot be used, however, to contradict express or implied claims.[37]

Advertisers must have a reasonable basis for making objective claims.[38] The level of substantiation will vary on a case-by-case basis depending on: (1) the type of claim; (2) the benefits of the claim if true or the consequences of the claim if false; (3) the type and availability of evidence adequate to substantiate the claim; (4) the type of product; and (5) the extent of consumers' reliance on the claim.[39] For certain claims, including environmental claims, competent and reliable scientific evidence is usually required, meaning "tests, analyses, research, studies, or other evidence based upon the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results."[40]

The Green Guides give specific guidance on the application of Section 5 of the FTC Act to environmental advertising and marketing practices.

The Commission issues industry guides, which are administrative interpretations of laws administered by the Commission, when it appears that "guidance as to the legal requirements applicable to particular practices would be beneficial in the public interest and would serve to bring about more widespread and equitable observance of laws administered by the Commission."[41]

Overview of FTC Environmental Marketing Guides

The Green Guides give specific guidance on the application of Section 5 of the FTC Act to environmental advertising and marketing practices.[42] The FTC gives guidance and alternatives for certain qualified claims, provided as "safe harbors" for marketers who seek certainty about how to make environmental claims.[43] The Green Guides do not specifically preempt state and local law governing the use of environmental marketing claims, but several states repealed or modified their existing laws to make them consistent with the FTC Guides.[44]

The Green Guides provide some guidance with respect to general environmental claims. For example, the FTC recognized that environmental claims may be made as to the packaging of a product or to the product itself and requires the claim make clear if the environmental benefit asserted relates to the product as a whole, the product's packaging, or a portion of the product, package, or service.[45] A green claim should not overstate the benefits to the environment. For

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35 Kraft, Inc., 114 F.T.C. 40, 121 (1991).

36 *See* Thompson Med. Co., 104 F.T.C. 648, 842–43 (1984), *aff'd*, Thompson Med. Co. v. FTC, 791 F.2d 189 (D.C. Cir. 1986); *see also* FTC, Dot Com Disclosures: Information about Online Advertising (2000), *available at* http://www.ftc.gov/bcp/conline/pubs/buspubs/dotcom/index.pdf.

37 *See Cliffdale Associates*, 103 F.T.C. at 180–81.

38 *Thompson Medical*, 104 F.T.C. at 839 (appending FTC's Advertising Substantiation Policy Statement).

39 Pfizer Inc., 81 F.T.C. 23, 64 (1972).

40 Brake Guard Prods., Inc., 125 F.T.C. 138, 217 (1998); 16 C.F.R. § 260.5 (2007).

41 16 C.F.R. § 1.6 (2007).

42 16 C.F.R. § 260.1. The FTC has also published a guide in conjunction with the U.S. Postal Service on how to make environmental claims on mailings. *See* U.S. Postal Serv. & FTC, Facts for Businesses: Making Environmental Marketing Claims on Mail (1998), http://www.ftc.gov/bcp/conline/pubs/buspubs/epamail.pdf.

43 16 C.F.R. § 260.3 (2007).

44 *See, e.g.*, Cal. Bus. & Prof. Code §§ 17580, 17580.5; *see also* Press Release, Fed. Trade Comm'n, National Environmental Guides Working Well for Businesses, Consumers FTC Staff Says in Reply to California Assembly Member (Apr. 8, 1997), http://www.ftc.gov/opa/1997/04/ca-green.shtm.

45 16 C.F.R. § 260.6(b) (2007).

example, it is misleading to state "50% more recycled content than before" if the manufacturer increased the recycled content of the package from two to three percent.[46] Similarly, comparative claims such as "20% more recycled content" or "less waste than the leading national brand" must be substantiated and make clear the basis of the comparison.[47]

The Green Guides frown on the use of general marketing claims because the FTC believes such terms convey that a product has far-reaching environmental benefits. Unless qualified, the FTC requires substantiation of such terms for their broadest possible meaning. Examples include "eco-safe," "environmentally friendly," "environmentally safe," "environmentally preferable," "essentially non-toxic," and "Earth Smart."[48] Marketers are advised to make clear exactly how their products are environmentally safe, friendly, or preferable. Similarly use of eco-seals or certifications from third parties should explain the basis for the award.[49]

However, the FTC also believed it beneficial to provide guidance as to the meaning and use of specific types of environmental claims, including degradable/biodegradable/photogradable,[50] compostable,[51] recyclable,[52] recycled content,[53] source reduction,[54] refillable,[55] and ozone safe/ozone friendly/no CFCs.[56] Presumably the FTC would also find it beneficial to provide specific guidance as to the use of newly emerging environmental claims.

Between 1990–2000, the FTC brought thirty-seven environmental cases.[57] In response to a request by a California state legislator to review the effectiveness of the Green Guides, then Bureau of Consumer Protection head Joan Bernstein wrote, "[W]e believe the Commission has established a consistent approach to environmental marketing regulation that has resulted in substantial benefits for consumers and businesses alike."[58] Can the FTC's sound approach to environmental marketing or "green" claims translate into the 21st century and the next generation of environmental claims?

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46 *Id.* § 260.6(c).

47 *Id.* § 260.6(d).

48 *Id.* § 260.7(a).

49 *Id.*

50 *Id.* § 260.7(b) (explaining that these terms mean that all of the materials in a product will break down over time and return to nature within a reasonably short time after disposal and requiring qualification if necessary as to the ability of the product to degrade in an environment where it is customarily disposed and the rate/extent of degradation).

51 *Id.* § 260.6(c) (defining composting as breaking down all materials in a product or package in a safe and timely manner to material that enriches the soil and returns nutrients to the earth and requiring qualification if composting is only possible at a municipal composting facility rather than at home).

52 *Id.* § 260.6(d) (defining recyclable (or "Please Recycle" claims) as applicable to a product and packaging that can be collected or separated from the solid waste stream and used again or reused in the manufacture or assembly of another product through an established recycling program and requiring qualification if the entire product is not recyclable or if the product is made from recyclable materials but not generally accepted in recycling programs for some reason).

53 *Id.* § 260.6(e) (allowing recycled content claims only for products that have been recovered from the solid waste stream during the manufacturing process or after consumer use and requiring qualification if less than 100 percent of the content is recycled).

54 *Id.* § 260.6(f) (defining that such claims mean a reduction in weight, volume, or toxicity of a product or package and requiring qualification as to the amount of source reduction and the basis for the claim).

55 *Id.* § 260.6(g) (explaining such a claim can be made only if a system is provided for the collection and return of the package for refill or the later refill of the package by consumers with product sold in another package).

56 *Id.* § 260.6(h) (defining the terms to mean that neither the product nor its packaging contributes to the depletion of the upper atmosphere ozone layer or to the formation of ground-level ozone).

57 *See* http://www.ftc.gov/appliances/ (for a listing of the cases follow the "Environment" hyperlink, then follow the "Enforcement" hyperlink).

58 Letter from Joan Z. Bernstein to Assemblymember Michael J. Machado (Apr. 7, 1997), *available at* http://www.ftc.gov/be/v970003.shtm.

Definition and Substantiation of Carbon Footprint and Carbon Offset Claims

Carbon Footprint. Perhaps the most important and most fundamental question with respect to the calculation of a carbon footprint is whether consumers understand that term to be limited solely to the emission of carbon dioxide. Carbon dioxide emissions are significant to consumers only because of the impact such emissions are believed to have on global warming. However, other so-called greenhouse gases, such as methane and nitrous oxide, are also believed to contribute to global warming.

Thus, when a company makes a claim as to the size of its carbon footprint or claims that it is carbon neutral, do consumers understand that claim in a broader implied sense to mean that the company does not otherwise contribute to global warming? As discussed, the FTC is presumed to have expertise in how claims are interpreted by consumers even without the use of reliable survey evidence. The FTC may choose to utilize its expertise to answer this question, much as it has done in the past with respect to the meaning of other environmental marketing terms. For example, in its Enforcement Policy Statement on Food Advertising, the FTC notes that when several nutrients all contribute to a health problem, for example, sodium, fat, and cholesterol: "A claim regarding one of these nutrients is likely to give rise to a misleading impression regarding the benefit of the food absent disclosure of the presence of the other nutrient. Under these circumstances, the failure to correct these misimpressions through adequate disclosures is likely to be deceptive."[59] This suggests that at least in some circumstances, absent disclosure, it may be misleading to make a claim about the size of a carbon footprint or carbon neutrality unless emissions of other greenhouse gases are accounted for or a disclaimer to the contrary is made clearly and conspicuously.

Perhaps the most important and most fundamental question with respect to the calculation of a carbon footprint is whether consumers understand that term to be limited solely to the emission of carbon dioxide.

There are at least two other definitional questions to consider. First, should the size of a carbon footprint include upstream emissions? For example, there is "line loss" associated with the transmission of electricity from a utility to a user. Should emissions associated with this "line loss" be included in the size of the user's carbon footprint? At least one carbon calculator, BEF's, attempts to capture such upstream emissions.[60] Second, to what extent should a company's carbon footprint include emissions by suppliers, at least to the extent that suppliers have not already offset them? As noted above, CarbonCounted's software program allows companies to include supplier emissions in their total footprint.

With respect to the latter question, the FTC's position with respect to Made in USA claims may provide some insight. Under the FTC's Made in USA guidelines, a Made in USA claim is substantiated primarily by demonstrating that "all or virtually all" of the costs of manufacturing a product are domestic.[61] With respect to inputs purchased from third-party suppliers, the FTC's policy suggests that the domestic content of such inputs must be included in the Made in USA calculation if there is a close relationship between the input and the finished product. However, inputs from suppliers do not have to be included if the input is not a significant component of the final product and undergoes significant transformation in the manufacturing process. The FTC's view is that "[f]oreign content incorporated early in the manufacturing process often will be less significant to consumers than content that is a direct part of the finished product or the parts or com-

[59] FTC, Enforcement Policy Statement on Food Advertising (1994), *available at* http://www.ftc.gov/bcp/policystmt/ad-food.shtm.

[60] Frequently Asked Questions, How Does the Calculator Work, https://www.greentagsusa.org/GreenTags/faq_pages/calculator.shtm.

[61] FTC, Enforcement Policy Statement on U.S. Origin Claims (1997), *available at* http://www.ftc.gov/os/1997/12/epsmadeusa.htm.

ponents produced by the immediate supplier."[62] Thus, even if the petroleum used to manufacture plastic is imported it need not be included in the Made in USA cost calculation, but the steel in a pipe or wrench should be considered. In our experience, application of this principle sometimes involves difficult line drawing, but it may well be that the FTC would require it of companies making claims relating to carbon footprints or carbon neutrality. Absent imposition of such a requirement, the carbon footprint of two companies making an identical product could be dramatically different depending upon the extent to which each relies upon third-party inputs.[63]

Carbon Offset and Carbon Neutrality Claims. There are also numerous questions associated with consumer understanding of the terms "carbon offset" and "carbon neutral" and how such claims can be substantiated. First, what are consumer expectations about how soon the greenhouse gas emissions will be offset? For example, if the carbon offset value of a tree is based upon carbon absorbed by the tree during its expected lifetime, will consumers understand that the carbon being emitted by the production of a good today is being offset by a tree over the course of the next forty years? Even if consumers have such an understanding by use of a disclaimer or otherwise, is the offsetting of carbon emissions over the course of many decades a legitimate contribution to an effort to reduce global warming? Similarly, what about the use of offsets, such as research into carbon emissions reduction, which hold the promise of reducing carbon but not the certainty? Can such offsets be legitimately used as part of a carbon neutral claim, even if in the end they yield no real reduction in overall carbon dioxide?

Second, should it matter if the trees that are planted or the renewable energy generated would have been planted or generated anyway?[64] For example, in the case of many renewable energy offset credits, the renewable energy source is already up and running. Is it legitimate for companies to claim environmental credit for funding activities that would have happened anyway?

The existing FTC Environmental Marketing Guides perhaps provide some idea how the FTC might resolve this question. With respect to claims that a product is made from recycled material, the FTC Green Guides state that such a claim is deceptive if the waste material ordinarily is reused by the manufacturer and would not have otherwise entered into the waste stream.[65] Similarly, the FTC may take the position that carbon offsets that would have been put in place anyway cannot be used to substantiate a claim of carbon neutral. However, the analysis in this situation may be more complex in that some carbon emission reductions that would have already taken place may be accelerated through offset funding.

Finally, some have questioned whether there is meaningful carbon offsetting if it is not known whether planting trees in one location will lead to chopping down trees in another so that there is little if any net increase in the number of trees.[66] However, it seems only fair to ask the same question as above—would those trees have been chopped down anyway? If so, then while there is no net gain in carbon offsetting, there is still a real benefit.

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62 FTC, Complying with the Made in USA Standard 8 (1998), *available at* http://www.ftc.gov/bcp/conline/pubs/buspubs/madeusa.pdf.

63 Questions might also be raised with respect to whether the carbon footprint should be limited to activities associated with production of a product; for example, should the footprint include emissions associated with construction of the manufacturing facility or should the footprint include emissions associated with consumer use of the product? In our view, it seems unlikely that most consumers would associate either type of emissions with a company's carbon footprint or carbon neutral claim for its product.

64 *See, e.g.*, Ben Elgin, *Another Inconvenient Truth: Behind the Feel-Good Hype of Carbon Offsets, Some of the Deals Don't Deliver*, Bus. Wk., Mar. 26, 2007, at 96 (reporting on several offset projects).

65 16 C.F.R. § 260.7(e); Complying with the Environmental Marketing Guides, *supra* note 3, at 10.

66 *See Carbon Offsets Hearing*, *supra* note 26 (testimony of Joseph Romm, Senior Fellow, Center for American Progress).

Perhaps the most important but also most difficult question is which carbon offsets legitimately reduce carbon dioxide or other greenhouse gases and what is the amount of such reduction. Even trees, which indisputably absorb carbon dioxide, have been questioned by some as carbon offsets because outside of the tropics, trees are typically darker than the landscape they replace so that more of the sun's heat is absorbed than previously, warming the atmosphere and thus negating some, if not all, of the benefits of increased absorption of carbon dioxide.[67] Other forms of carbon offsets pose even more difficult questions—for example, the use of iron to create plankton blooms. Clearly the FTC, with the additional benefit of outside scientific expertise, is up to the task of creating safe harbors for categories of carbon offset claims, but finding consensus in what is still a relatively nascent and controversial area may not be easy.[68]

[M]ost companies purchase carbon offsets from third parties. As a result, they often lack the expertise to evaluate the effectiveness and value of the carbon offsets they are purchasing or even to know whether the third parties they are dealing with are selling the same offsets to multiple parties.

The often complex scientific questions that surround carbon offsets also raise difficulties for companies wanting to make legitimate carbon offset claims. As noted above, most companies purchase carbon offsets from third parties. As a result, they often lack the expertise to evaluate the effectiveness and value of the carbon offsets they are purchasing or even to know whether the third parties they are dealing with are selling the same offsets to multiple parties.[69] Here, as well, the FTC has wrestled previously with a similar predicament. The Commission has long recognized that although advertising agencies have considerable expertise in evaluating the nature of any marketing claims they are less well equipped to evaluate the truthfulness of such claims, particularly when the substantiation for such claims consists of scientific or clinical studies. As a result, the FTC has stated that agencies need not do more than ascertain whether the substantiation is facially adequate and not obviously flawed.

Similar accommodation seems appropriate here in recognition of the fact that most companies are not equipped to evaluate closely the value of carbon offsets they are purchasing. The Commission may wish to consider assisting by creating safe harbors for certain carbon offset providers or programs, much as it did for the Children's Online Privacy Protection Act (COPPA).[70] Under the FTC's COPPA Rules, an industry group or other person can request Commission approval of self-regulatory guidelines. Once approved, compliance with such guidelines creates a safe harbor for COPPA compliance.[71] In a similar vein, providers of carbon offsets could request Commission approval of their offset program such that purchasers of offsets from approved providers are deemed to be compliant with any relevant FTC guides.

The FTC may also look to existing carbon offset and trading schemes in evaluating carbon offset and carbon neutral claims or in developing guidance for companies making such claims. Internationally, the Kyoto Protocol established an emissions offset market called the Clean Development Mechanism (CDM).[72] The CDM has developed methodologies for many types of

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[67] *Id.*

[68] Of course, the FTC would not be setting environmental policy; rather, it would be determining whether consumers are harmed by unfair or deceptive marketing claims. *See* Letter from Chairman Majoras to Rep. Markey, *supra* note 12.

[69] *See Carbon Offsets Hearing*, *supra* note 26 (statements of Reps. Markey & Sensenbrenner); Fiona Harvey, *Beware the Carbon Offsetting Cowboys*, FIN. TIMES, Apr. 26, 2007.

[70] 16 C.F.R. § 312.10 (2007).

[71] *Id.*

[72] *See* generally Clean Development Mechanism, http://unfccc.int/kyoto_protocol/mechanisms/clean_development_mechanism/items/2718.php.

offsetting projects that measure a project's baseline emissions.[73] "Additionality"—the emissions reductions that would not have occurred but for the offsetting project—is measured from this baseline and is used to determine the offset credits associated with the project.[74] In the absence of FTC regulation or guidance, the CDM methodologies provide companies with generally accepted means to exercise due diligence with respect to offsets they plan on purchasing.

In the United States, several states have begun to develop similar mechanisms. The Regional Greenhouse Gas Initiative (RGGI) is an effort by several Northeast and Mid-Atlantic states to establish a regional cap-and-trade system for carbon dioxide emissions from power plants.[75] In California, the Global Warming Solutions Act of 2006 mandated statewide caps on greenhouse gas emissions and allows the state's Air Resources Board to adopt market-based mechanisms, such as a cap-and-trade system, to accomplish the mandated emissions reductions.[76] As these state initiatives come on-line, they may provide additional guidance to the FTC and to companies exercising due diligence in their purchases of offsets.

Conclusion

While discussions of carbon footprints and carbon offsetting have become quite common in the marketplace, there are numerous questions that surround such claims. Establishing parameters for the definitions and substantiation of carbon claims is a difficult task. Yet it is a task the FTC has handled well previously in response to a prior generation of environmental marketing claims.

The FTC is understandably reluctant to regulate too quickly in this emerging area. The FTC's caution in this respect has served it well in the past. However, given the explosion of consumer interest in this area, the rapidly increasing economic value that carbon offsets and carbon claims represent, and the risk that states may jump in and create a potentially inhibiting patchwork of regulation, it may make sense for the FTC to issue guidance in this area sooner rather than later. ●

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73 Michael Wara, *How Sustainable Is My Company? Commercial Speech, Carbon Neutrality, and Offset Quantification*, TRENDS (ABA Section of Environment, Energy, and Resources), July/Aug. 2007, at 1, 14.

74 *Id.*

75 *See* About RGGI, http://www.rggi.org/about.htm.

76 *See* CAL. HEALTH & SAFETY CODE §§ 38500–38599 (West 2007).