

C O M M E N T S

Private Governance of Green Claims in the Marketplace: The Role of NAD and Advertising Self-Regulation

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Private environmental governance encompasses a broad range of private actors creating systems and mechanisms for promoting various environmental or “green” attributes. Increasingly, companies are conducting life-cycle analyses, evaluating supply chains, partnering with nongovernmental organizations (NGOs), developing environmental standards, and utilizing certification schemes designed to ensure third parties and consumers that certain criteria for reducing environmental impact have been met. What is the driving force behind these efforts? A key factor is consumer demand. According to a recent Harris Interactive poll, 78% of U.S. consumers say they buy green products and services.¹ Additionally, a 2013 Nielsen survey found that 50% of global shoppers are actually willing to spend more on brands “that have implemented programs to give back to society.”² But although consumers say they want green products and services, the marketing of green products is often unclear and unreliable.³

When it comes to the truth and accuracy of communicating “green” to consumers, the stakes are high. When green marketing is truthful, consumers can have confidence that their purchasing choices reflect their values and may have a meaningful impact on the environment, on health and safety, or even on social change. In turn, companies will have greater incentive to invest in meaningful sustainability initiatives. But when green marketing is misleading or confusing, consumers lose confidence in

the messaging, brands lose their credibility, and corporate reputation suffers as companies are accused of greenwashing by consumers and, in some cases, by regulators. Consequently, the efforts to ensure that green marketing is truthful and properly substantiated form a crucial element of private environmental governance. Contributing to this effort is the National Advertising Division (NAD), the investigatory arm of the advertising industry’s voluntary system of self-regulation.

NAD is a part of the Advertising Self-Regulatory Council (ASRC) and is administered by the Council of Better Business Bureaus, Inc. (CBBB). NAD provides a review process by which anyone can challenge the truth and accuracy of claims made in national advertising. This voluntary self-regulatory process provides a cost-effective means for competitors to resolve disputes relating to the truth and accuracy of advertising. NAD also conducts self-monitoring of advertising to ensure that advertising is not misleading and that claims are adequately substantiated. NAD’s findings and recommendations on claim substantiation, published in NAD/Children’s Advertising Review Unit (CARU) Case Reports, are an important source of guidance for advertisers.⁴ The Federal Trade Commission (FTC) has been vocally supportive of the advertising self-regulatory process.⁵ Effective industry self-regulation helps foster an environment of fair competition, and allows government agencies to focus their enforcement efforts on the more egregious violations of consumer protection law.

Although, NAD reviews a wide variety of advertising claims for different kinds of products, claims relating to environmental benefits or aspects of sustainability repre-

1. *U.S. Consumers Increase “Green” Purchases; But Are They Willing to Pay More?*, PRNEWswire.COM, June 5, 2013, <http://www.prnewswire.com/news-releases/us-consumers-increase-green-purchases-but-are-they-willing-to-pay-more-210221081.html> (last visited Jan. 2, 2014).

2. *Consumers Who Care*, NIELSEN.COM, Aug. 6, 2013, <http://www.nielsen.com/us/en/reports/2013/consumers-who-care.html> (last visited Jan. 2, 2014).

3. According to Cone Communications, which issued a 2013 report tracking green trends, 48% of consumers say they are “overwhelmed” by environmental messages and 22% said they do not know if companies’ environmental claims are accurate, <http://www.conecomm.com/2013-green-gap-trend-tracker-1>.

4. See <http://case-report.bbb.org/>.

5. See Robert Pitofsky, Chairman, Fed. Trade Comm’n, Remarks at the D.C. Bar Association Symposium: Self-Regulation and Antitrust (Feb. 18, 1998), available at <http://www.ftc.gov/speeches/pitofsky/self4.htm>; J. Thomas Rosch, Comm’r, Fed. Trade Comm’n, Remarks Before the NAD Annual Conference 2008: Self-Regulation and Consumer Protection: A Complement to Federal Law Enforcement (Sept. 23, 2008), available at <http://www.ftc.gov/speeches/rosch/080923Rosch-NADSpeech.pdf>.

sent a special category of cases. Green claims are especially important, not only because they have become ubiquitous in the marketplace, but also because they represent the kind of advertising claim that cannot be verified directly by consumers. Green claims have been described by the FTC as “credence claims” because consumers cannot determine for themselves whether a product, package, or service is “recyclable,” or “made with renewable energy,” or possesses another environmental attribute that is being promoted.⁶ In recent years, NAD has issued dozens of decisions involving environmental or “green” marketing claims for products ranging from paints to plastics to frying pans.

In issuing recommendations on environmental claims, NAD seeks to harmonize its efforts with the guidance provided by the FTC, notably the Commission’s Guides for the Use of Environmental Marketing Claims (the Green Guides).⁷ For example, NAD cited the Green Guides when it recommended that the maker of cookware discontinue its general environmental benefit claim that the product was “eco-friendly.”⁸ NAD has applied the Green Guide’s definition of “biodegradable” in guiding marketers on the use of the term in advertising.⁹ Significantly, NAD’s recommendations are not limited to consumer advertising. It has reviewed business-to-business advertising and recommended that the maker of a plastic additive, advertising in a trade publication, discontinue the claim that the additive would render plastic “biodegradable” as the claim lacked sufficient evidentiary support.¹⁰ NAD noted that although the claim was made to a business audience, the ultimate purpose was to provide a green message to consumers.

The proliferation of green seals and certifications (i.e., “eco-logos”) in the marketplace represent a challenge for NAD and marketers alike. Given the volume and variety of eco-logos in the marketplace, they also provide a potential source of confusion for consumers. Some eco-logos are claims made by a manufacturer and others are made by a third-party: a trade group, a laboratory, the government, or an independent organization. As the advertising industry’s self-regulatory body, NAD does not directly create environmental policy. That is to say, it does not determine which seals and certifications adhere to the most rigorous standards or which ones provide the strongest indicia of sustainability. The role of NAD is to review the advertising or packaging claims in the context in which it appears, to examine what messages are communicated to consumers, and then to determine whether those claims are reasonably supported by competent and reliable scientific evidence. For example, NAD determined that Transfair USA’s “Fair Trade Ingredients” certification was accurate, but only when the label bearing the mark clearly listed those ingredients that qualified as “fair trade.”¹¹

Inevitably, companies that compete in the marketplace will utilize different measures of sustainability and apply different mechanisms for communicating attributes of sustainability. The advertising self-regulatory system helps provide guidance for marketers and a system for adjudicating disputes—key components of private environmental governance. Ultimately, the sustainability initiatives undertaken by companies, and expected by consumers, are communicated to consumers. Advertising self-regulation helps to ensure that green messages are adequately substantiated and communicated fairly and accurately.

6. See Keynote Speech of FTC Commissioner Julie Brill, NAD Annual Conference (Oct. 4, 2010), available at <http://www.ftc.gov/speeches/brill/101004nadspeech.pdf>.

7. 16 C.F.R. §§260 et seq. (2012).

8. GreenPan, Inc., NAD/CARU Case Reports, #5519 (2012).

9. Biodegradable claims should not be made for any product typically disposed of in a landfill because it will not biodegrade in a “reasonably short period of time” (i.e., within one year). 16 C.F.R. §260(8)(c). See Pactiv Corporation, NAD/CARU Case Reports, #5472 (2012); FP International, NAD/CARU Case Reports #5256 (2010).

10. Ecologic, LLC, NAD/CARU Case Reports, #5388 (2011).

11. Transfair USA, NAD/CARU Case Reports, #5337 (2011). On appeal, the self-regulatory forum’s appeal panel, the National Advertising Review Board (NARB) went further and, noting that consumers would not necessarily know that the percentage of fair trade ingredients might be as low as 5%, recommended additional disclosures. NARB Panel #174 (2012).