A Summit on Private Environmental Governance: Facing the Challenges of Voluntary Standards, Supply Chains, and Green Marketing

by Deborah P. Majoras

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Summary

Corporations and other nongovernmental entities now regularly work to develop voluntary agreements, standards, and other practices aimed at fostering sustainability and reducing environmental impacts. This growth in "private governance" is implemented through various vehicles, including collective standard-setting, certifications, supply-chain agreements, and other mechanisms. On June 10, 2013, ELI, the Advertising Self-Regulatory Council, and the Council of Better Business Bureaus cosponsored a conference to provide an overview and to initiate a dialogue about the legal issues taking shape amidst the growing popularity of private governance approaches. Deborah P. Majoras offered the conference keynote.

Good morning. Many thanks to the Advertising Self-Regulatory Council (ASRC) and the Environmental Law Institute for inviting me to share a few thoughts as we kick off discussions on this important topic. And thanks to Monica Melendez from Procter & Gamble (P&G), who helped me pull these thoughts together.

As I have gone from private antitrust lawyer to enforcer of antitrust and consumer protection law to now General Counsel, I have gained increasing respect for the power of consumers. Their powerful, collective voice drives business behavior, such that what they want, they will get. And today, consumers have, through social media and other digital tools, more ways than ever to make sure that their voices are heard.

Consumers have made clear that they want to deal with companies they trust. And, for many, that means dealing with companies that address the societal impact of their business practices responsibly and with integrity. In no area is this more apparent than in the environmental area. Consumers are increasingly demanding greener products and services, delivered through responsible environmental practices. According to the Food Marketing Institute's 2012 Trends study, almost one-third of shoppers report that a product's environmental profile impacts their purchasing decisions.[1]

In addition, though, according to our data at P&G, only 10% are willing to accept a trade off in the form of a decrease in performance or a higher price to purchase a product that claims to be more environmentally friendly. So, we know we need to make sure that we are meeting the needs of the 70% of consumers we refer to as "sustainable mainstream consumers"—consumers who want an environmentally friendlier product but will not sacrifice performance or price. This is a challenge, but it is also an impetus to more innovation that can have a positive consumer, environmental, and business impact.

Last year, P&G celebrated our 175th anniversary. We have sustained our company's growth over such a long period of time by staying focused on improving consumers' lives. With the opportunity to improve lives comes a responsibility to do it in a way that also preserves the planet. In 2007, we made our commitment to sustainable development explicit when we added to "improving consumers' lives"—"now and for generations to come." To grow and thrive for another 175 years requires us to accelerate our sustainable innovation.

With growing sustainably a key focus for P&G, our vision includes powering our plants with renewable energy, using renewable or recycled materials for products and

1. Food Marketing Institute, U.S. Grocery Shopper Trends 2012 Executive Summary (2012), *available at* http://www.icn-net.com/docs/12086_FMIN_Trends2012_v5.pdf.

packaging, having zero waste go to landfills, and delighting consumers with products that meet their needs while enabling them to conserve resources. The goals we have set move us closer to achieving this vision every year. We recently created our Global Sustainability Commercial Network, a commercially oriented sustainability team, to better embed sustainability into the fabric of our 50 leadership brands and to leverage sustainability as a competitive advantage. We are committed to designing products that both delight consumers and maximize the conservation of resources—all while spurring company growth and delivering cost savings. In 2007, we announced a goal to develop $50 billion in Sustainable Innovation Products, which are products that have at least a 10% reduction in their environmental footprint compared to a previous or alternative version of the product, yet still deliver great product performance. Last year, we announced that, over five years, we had developed and marketed over $52 billion in sales of these products. We accomplished this by focusing on making meaningful sustainability improvements on our biggest brands, like Tide and Pampers.

While we are very proud of what we have achieved, we know there is much more to be done—the range of environmental challenges is vast. We also know that we cannot achieve our long-term sustainability vision on our own; rather, we are committed to partnering with others to identify needs and to create new opportunities and solutions for some of the world's toughest sustainability challenges. For example, last year, we announced our partnership with Nike, The Coca-Cola Company, Ford, and Heinz in creating the Plant PET Technology Collaborative.[2] We expect this partnership to allow P&G to advance the commercial use of sustainable plant PET significantly faster, at a much lower cost, and at higher quality than were we to do this alone. We have also partnered with the World Wildlife Fund (WWF) and the Forest Stewardship Council (FSC) to ensure we support critical programs that help us, and others, to meet the challenges we face today. One example is a partnership with WWF to enable small landowners in Brazil to achieve FSC certification of their wood supply. The complexity and cost of achieving FSC certification for these landowners is a barrier to our primary suppliers' ability to pursue certification. We are collaborating with WWF Brazil and FSC to help develop systems that will allow the landowners to ultimately achieve the certification and to restore fragmented Atlantic Forest located on the properties of these landowners.

Inevitably, and fortunately, consumer demand for more attention to environmental factors has led to increased competition, as companies try to differentiate their products and services on the green factors that consumers care about. And the stiffer the competition, the more businesses will work to innovate on those green aspects to compete more effectively, creating a virtuous circle. We see this more and more, as companies work to integrate sustainability innovation into their business strategies. I am always surprised when I hear someone say, "we do not compete on sustainability; we care about sustainability because it's the right thing to do." But not only are the two not incongruous, competition may be the more reliable of the two. If concerns over the sustainability of our planet and our communities do not prompt businesses to act, particularly on a long-term, continuous basis, they will ultimately be pushed by competition in the marketplace from those who *are* acting. Competition in this arena is a good thing—in fact, nothing is more effective at serving consumers than competition, not even good intentions.

But for competition to be most effective, consumers must be armed with information that enables them to make well-informed purchasing decisions; that is, it must be truthful, and it must be understandable. An educated consumer is an empowered consumer that can change business behavior—as well as their own. For example, in the United Kingdom (U.K.), P&G partnered with the Energy Saving Trust to promote our "Turn to 30" campaign for Ariel Cool Clean laundry detergent, which is designed to deliver the cleaning performance consumers expect from hot water washing while reducing energy consumption and greenhouse gas emissions. Where the average washing temperature in the U.K. had been 43.5⁰ Celsius, this campaign urged consumers to wash at 30⁰ Celsius. Our studies show that significantly more households in the U.K. now wash in cold water than did at the launch of our campaign: a win for them, for us, and for the environment.

But collectively, we need to do more. Consumers need help at the point of sale to understand the environmental profiles of products and services. The 2012 Cone Green Gap Trend Tracker indicated that 73% of consumers want companies to provide more environmental information on product packaging to help inform their purchasing decisions, and 71% want companies to do a better job at explaining the environmental terms they use.[3] This is not surprising, because terms and their usage vary widely, and because consumers cannot easily verify the truth of claims about such environmental impact. And that also, apparently, leads to cynicism of companies' environmental

2. PET, also known as polyethylene terephthalate, is a durable, lightweight plastic used in products and materials, including plastic bottles, apparel, footwear, and automotive fabric and carpet. At P&G, we use PET in our bottles, nonwoven fibers, and films.

3. Cone Communications, 2012 Cone Green Gap Trend Tracker (Mar. 27, 2012), *available at* http://www.conecomm.com/2012-cone-green-gap-trend-tracker.

claims. The same 2012 report indicated that only 44% of consumers trust companies' environmental claims.[4] So, at least for some, green marketing has become synonymous with "greenwashing."

In addition, 77% of consumers expressed a willingness to boycott a company if they felt misled by that company's environmental claims.[5] The impact on business, and in turn, the environment, could be significant if consumers give up because they deem companies' environmental claims untrustworthy. Developing and marketing innovative, environmentally friendlier products and services are expensive and risky. Companies need the ability to tout their advances in these areas so that they will have the incentives to make the investments and to take the risks. Aggressive but truthful marketing is the best way to give consumers the information they need to make decisions regarding the products and services they believe will best serve their interests. But consumers have to be able to trust the information.

Thus, the importance of creating standards of excellence and best practices to guide us through the growth in this area has never been greater. We, as stakeholders, must think carefully about the standards that we develop and apply to measure and communicate the sustainability progress we make. The key is to recognize what principles and practices will allow us to effectively communicate how we are addressing environmental issues, while encouraging innovation and protecting consumers.

As a starting point, the Federal Trade Commission's (FTC's) Green Guides already provide companies with general principles for making environmental claims. This guidance is welcomed and appreciated. While I understand the FTC's point that the Guides are environmentally neutral—in the sense that they reflect advertising, not environmental policy—in fact, the well-informed consumer that the Guides promote is one of the best vehicles for advancing environmental policy across the widest range of products with the smallest chance of unintended consequences. With the issuance of Revised Green Guides last October, the FTC is working to ensure that the Green Guides keep up and adapt to market changes and new learnings. We must maintain the dialogue between the FTC and marketplace participants to ensure that this guidance continues to keep up with the marketplace. And, of course, a multitude of government regulations also exist—both in effect and pending—that influence how companies manage their environmental practices.

But as with many marketplace issues, we have to recognize that government cannot, and I would argue, should not, do it all for us. As marketplace participants, we have more knowledge, both about the products we sell and their environmental impact, and about the consumers we serve, and we have the ability to innovate. So, we need to make sure that we have appropriate measures and benchmarks that allow companies to advance sustainability causes and to communicate with the public in a credible, consistent manner.

Certainly, credible standards, certifications, and labels can be powerful tools in providing guidance to marketers seeking to make truthful claims and guidance to consumers in making purchasing decisions. Done well, standards and certifications facilitate the functioning of the market. But the lack of a leading standard can result in a proliferation of competing standards, including individual company standards—which is what we are seeing today in green marketing. This, in turn, can create confusion in the marketplace—both for consumers and manufacturers—and this confusion can diminish the important market and environmental effect of standards and certifications.

Take, for example, eco-labels on food. According to a recent *Forbes* article, there are more than 200 eco-labels in the global food industry alone.[6] A search on Ecolabel Index, which currently tracks 435 eco-labels in 197 countries, revealed 75 "organic" certifications.[7] It is little wonder that consumers want more help figuring this out. It is not that businesses, NGOs, and governments are not trying to help communicate, but the efforts are fragmented. With a void in ubiquitous or leading standards, we develop our own or band together with a subgroup of stakeholders. And I don't mean to suggest that's all bad—various private standards and certifications do provide information to consumers and drive individual company innovation and competition. P&G certainly has created its own internal standards of conduct for marketing environmental claims specific to our operations, and we continually endeavor to refresh our knowledge so that these standards are as current and well-informed as possible.

But perhaps greater collaboration among industry, NGOs, government, and other partners to advance creative multi-stakeholder initiatives and effective self-regulation can help all of us to achieve our sustainability visions. This is an area in which open discussion and collaboration is welcome and needed.

It is no secret that both during my time in government and in the private sector, I have strongly supported effective self-regulation, because it can, in the right instances, address problems more quickly, creatively, and flexibly than government regulation. Taking advantage of the accumulated judgment and hands-on experience of relevant stakeholders, self-regulatory bodies can devise workable rules that address issues more quickly and capably than the government could. The result can be an approach that is at once more effective, less burdensome, and less likely to inadvertently impede innovation.

Further, if the rules or guidelines developed represent a broad cross-section of stakeholder views, they can achieve the level of compliance and responsibility that results from a strong, collaborative partnership among those involved

4. *Id.*
5. *Id.*
6. Beth Hoffman, *Are Consumers Growing Weary of "Eco-Labels?,"* FORBES, Jan. 14, 2013, http://www.forbes.com/sites/bethhoffman/2013/01/14/are-consumers-growing-weary-of-eco-labels/ (last visited Dec. 18, 2013).
7. Ecolabel Index, http://ecolabelindex.com/ecolabels/?search=organic&as_values_042 (last visited Dec. 18, 2013).

in the process. Most companies want to follow the rules and do what is right—but from a competitive standpoint, they want other companies to be held to the same standards. Self-regulation is tailor-made to accomplish this, because those who are involved have agreed to the relevant principles and workable rules to which each participant will be held accountable. Self-regulation is also cost-effective, for the parties (and thus for consumers) and for government agencies.

I know that some have expressed concerns that the antitrust laws are a barrier to increased cooperation in this area of "green" offerings that increasingly compete on the basis of their "greenness." But, in fact, standards and certification programs can effectively encourage competition as companies draw on them to strengthen the competitiveness of their products in the marketplace. Of course any standard-setting process must be conducted in a way that respects antitrust law and does not actually revert, accidentally or otherwise, to being anticompetitive.

There are several things that can be done to provide a credible standard-setting process that is well within the antitrust laws and, indeed, fosters competition:

First, inclusion of all relevant stakeholders. Self-regulation is most effective when efforts are supported by the accumulated wisdom and hands-on experience and judgment of a broad cross-section of stakeholders. Self-regulation also needs critical mass to function effectively, as refusal to participate by a significant segment can undermine the entire endeavor. Sure, we all have somewhat divergent interests, but in the end, we share the common ground of wanting to be able to fairly compete for the business of well-informed, green-conscious consumers. Accomplishing something together means setting aside any mistrust and skepticism to focus on this common ground. Industry initiatives in the mobile marketing industry are a great, recent example of successful, collaborative efforts that represent a broad cross-section of industry views. The Mobile Marketing Association has developed leading industry guidelines for responsible mobile advertising. By obtaining the support and participation of the industry, including, advertisers, agencies, service providers, and retailers, these guidelines are well-attuned to the realities of the market and are widely followed by affected industry members.

Having a highly inclusive process for setting standards also avoids accusations of antitrust violations, because it prevents companies from being able to argue that they had a standard that they cannot or will not meet foisted upon them. It also ensures that smaller companies, which alone may not have the resources to develop standards, are included and not disadvantaged by the fact of the standard-setting. If companies or segments choose not to participate in a credible, inclusive process, they may have little room to complain if noncompliance with a standard results in lost sales.

Second, standards must be based on objective scientific input from experts, which clearly addresses the environmental problems we seek to remedy. When faced with the magnitude of environmental challenges, protecting consumers and preserving the ability of companies to innovate and compete, we should go back to science. A scientific foundation is the most objective way to drive agreement among the various perspectives. A solid understanding of the cause of our sustainability challenges and how these issues will continue to evolve will give us the foundation to create innovative approaches that advance our sustainability visions. Private standards that are not scientifically based risk undermining the effectiveness of self-regulation. Thus, it is crucial that an organization has the technical expertise necessary to address environmental issues before embarking on standard-setting.

At P&G, before we issued our Supplier Sustainability Scorecard, P&G experts collaborated with technical and commercial resources from over 20 leading global external business partners representing broad industries. The scorecard relied on accepted worldwide measurement standards and sound science, including protocols from the World Resources Institute, the World Business Council for Sustainable Development, and the Carbon Disclosure Project. Because we knew we were imposing standards on our suppliers, collaboration with experts in the field was key in ensuring the appropriateness of these standards. The scorecard aims to encourage our suppliers' own improvements, build better collaboration through the supply chain, and accelerate innovation. In the first year alone, 38% of our suppliers submitted ideas for sustainable innovation. As a fellow supplier facing similar standards, P&G is supportive of industry efforts that obtain the technical expertise necessary before embarking on standard-setting.

Third, the standard-setting process must be transparent and use clear and fair procedures that lend credibility to the organization. Transparent self-regulatory efforts inspire greater trust and cooperation from stakeholders and the public at large. Transparency can both help avoid imposition of a standard that greatly advantages one or more members of the group to the detriment of other stakeholders, and help prevent "hold-up" problems. "Hold-up" occurs when an intellectual property rights owner that is involved in a standard-setting process fails to disclose the existence of patents essential to a potential standard. After the standard is widely implemented, the patent holder comes forward demanding excessive royalties. If the ability of a patent holder to charge a high royalty rate results from the reduction in competition that occurs after a standard is chosen, such actions may be considered anticompetitive. In the European Union, for example, industry is currently facing this type of standard-setting issue as organizations work to design and implement new, environmentally friendlier technologies in view of existing intellectual property rights. But this can be avoided if members agree on a transparent process from the beginning.

Finally, any standards set or certifications established must not be static; rather they must be flexible and adaptable enough so that they encourage innovation going forward and do not stunt it. This is critically important, as innovation in this space will drive continuing gains in environmental responsibility, and the issues of concern to consumers today may not be the issues of tomorrow.

Individual and small group efforts to address the sustainability issues we face today, and those that will continue to develop, are admirable and effective as far as their limited reach can go. But a broader partnership among stakeholders has the potential to achieve even greater gains. And while we do have some differences in our interests, there is significant intersection that allows us to work together in this highly complex and constantly evolving area.

To be clear, the government has an important role to play in ensuring the effectiveness of self-regulatory directives. Support for effective self-regulation from enforcers and regulators is always a good start that boosts these efforts, which are not easy. And in a world of scarce resources, it is hard to imagine why government agencies would not welcome the help, given the advantages it offers to consumers, government, and industry. Indeed, FTC Chairwoman Edith Ramirez recently confirmed that "the FTC views robust self-regulation as an important tool for consumer protection that potentially can respond more quickly and efficiently than government regulation," as long as the self-regulation is strong, enforceable, and not a pretext to establishing barriers to entry.[8]

Consumers today have the option to purchase and use products that may not have been foreseen five years ago. And consumer perceptions of green claims will continue to significantly evolve. With things changing so quickly, it is impossible (not to mention unwise) for a government agency to provide immediate guidance on everything. Markets function in real time, but government agencies necessarily must follow rules and procedures that take more time. Government agencies also must be cautious and ensure that they do not inadvertently discourage incentives to self-regulate by too quickly enacting regulatory programs or unintentionally encouraging litigation that punishes good deeds. Likewise, industry must be mindful of existing regulations in this area and of how voluntary actions may impact those regulations or cause new regulations to be enacted.

And, of course, government does play a role in ensuring compliance with self-regulatory directives. The incentive to comply is high when the failure to participate may lead to government intervention. We need only look as far as the rulings of the National Advertising Division of the Council of Better Business Bureaus, which, as I understand from Lee Peeler, has a 90% voluntary cooperation rate, reflecting in part the FTC's support for the process.[9]

Self-regulation is not perfect; but, respectfully, neither is government regulation.

Private standards have played, and will continue to play, a valuable role in addressing the world's toughest environmental problems. To be most effective, though, standard-setting requires collaboration and collective responsibility from all stakeholders to create innovative solutions to sustainability issues that span the value chain. This means bringing together the disciplines and best thinking on sustainability, advertising, and competition law to work together—and today's conference is a good start as you will explore the intersections among the three. I look forward to seeing what comes out of these discussions.

Thank you again for the opportunity to speak with you this morning.

8. FTC Chairwoman Edith Ramirez, Federal Trade Commission Workshop on Enforceable Codes of Conduct: Protecting Consumers Across Borders (Nov. 29, 2012), http://www.ftc.gov/speeches/ramirez.shtm (last visited Dec. 18, 2013).

9. C. Lee Peeler is the President and CEO, Advertising Self-Regulatory Council and Executive Vice President, National Advertising, Council of Better Business Bureaus.