

*Summer 2009*

# Construction Law Report

Green Building in Construction

This newsletter is one of a number of publications produced by the firm. For a wide selection of other such publications, please visit us online at [www.seyfarth.com](http://www.seyfarth.com).  
© 2009 Seyfarth Shaw LLP. All rights reserved.

SEYFARTH  
ATTORNEYS SHAW LLP

Breadth. Depth. Results.



## Caveat Viridis

When the going gets tough, and it sure is tough these days, there is an increased temptation to jump on the currently fashionable bandwagon. In the construction industry, as elsewhere, that bandwagon is colored green.

But those who would be green must also be careful, lest they get beaten black and blue, and, worse, wind up the financial red. In this issue we address two major areas of concern—advertising greenness and contracting drafting issues arising in green construction.

First, Eric Boyd describes the work of the Federal Trade Commission and its Green Guides. Second, David Blake, a LEED AP, looks at the new AIA Document A201-2007 General Conditions through a green lens. As always, you should consult knowledgeable counsel of your choice. And Caveat Viridis.

Finally, we are pleased to note that *Chambers USA* has recognized the Seyfarth Shaw Construction Practice Group as among the best in the nation in its 2009 guide.

Roger Price  
[rprice@seyfarth.com](mailto:rprice@seyfarth.com)

Mark Johnson  
[majohnson@seyfarth.com](mailto:majohnson@seyfarth.com)

# The Federal Trade Commission Gets Serious About Green Marketing Claims

Citing a “virtual tsunami” of environmental marketing claims during the past few years, the Federal Trade Commission (FTC) recently announced several initiatives designed to ensure that such claims do not confuse or mislead consumers. These initiatives are particularly relevant to anyone promoting green developments, touting building materials as green, or otherwise attempting to obtain a green certification for a project.

## *The Role of the FTC*

On June 9, 2009, James A. Kohm, Associate Director of the Enforcement Division in the FTC’s Bureau of Consumer Protection, testified before a subcommittee of the Committee on Energy and Commerce of the U.S. House of Representatives. Mr. Kohm’s testimony described the three roles the FTC plays with respect to companies that tout green attributes (such as the recycled material content) of their products and services:

- First, the agency promulgates rules and guides (the “Green Guides”) to make the “rules of the road” clear for businesses.
- Second, the FTC challenges fraudulent and deceptive advertisements through enforcement actions.
- Third, the FTC publishes materials to help consumers make informed purchasing decisions.

Mr. Kohm’s then described in detail the FTC’s work in each of these three areas.

Mr. Kohm explained that the FTC is currently reviewing its Green Guides to make sure they address new green marketing claims that were not in use when the Green Guides were first issued (in 1992) or later revised (in 1996 and 1998). The Green Guides, which apply to all forms of environmental marketing, consist of general principles, specific guidance, and examples on the use of environmental claims. The Green Guides are not enforceable regulations. If, however, a marketer makes claims that are inconsistent with the Green Guides, the FTC can take action under Section 5 of the FTC Act, which prohibits unfair or deceptive practices.

The FTC recently held a series of public workshops and sought public comments to explore three new green marketing issues: carbon offsets and renewable energy, green packaging claims, and claims for green building and textiles. Mr. Kohm explained that the FTC plans to conduct its own research on consumer perceptions of such terms as “green,” “renewable,” “eco-friendly,” “sustainable,” and “carbon neutral,” and expects to revise the Green Guides based on its research and input from the public workshops later this year.

Mr. Kohm also described recent enforcement actions challenging green marketing claims involving the construction industry. For instance, the FTC recently targeted marketers of home insulation claiming that the marketers overstated the insulating properties of their products. In addition, the FTC has gone after marketers claiming their products were biodegradable when the products do not “decompose into elements found in nature within a reasonably short period of time after customary

disposal.” Similar enforcement cases can be expected involving other building materials. In such enforcement actions, the FTC typically seeks civil penalties and injunctive relief.

Finally, Mr. Kohm described several consumer education products relevant to the construction industry. For instance, the FTC has issued guidance entitled, “Sorting out Green Advertising Claims.” The agency’s interactive website, [Saving Starts @ Home](#), also offers tips to help consumers conserve energy and save money when purchasing insulation, heaters, and similar building products.

These recent FTC initiatives with respect to green claims involving building products are not surprising. When the FTC announced the public workshops focusing on green claims involving building materials, it noted the increased demand for green construction and the fact that green marketing claims had become “prevalent for a wide range of building products including flooring, carpeting, paint, wallpaper, lighting, insulation, and windows.” The FTC also mentioned that such claims are often supported by third-party certification programs which have grown substantially since the last revision of the Green Guides. The FTC’s goal is to make sure that such claims and certifications are not misleading to customers.

Examples of green building certification programs include the Green Building Council’s Leadership in Energy and Environmental Design program (LEED); the National Association of Homebuilders’ Green Building Standard; and Green Globes’ Green Building Initiative. Builders also can obtain an “environmentally friendly” certification from the federal government through the Energy Star program, which certifies homes based on energy use.

## *The Danger of Greenwashing*

Until the FTC provides additional guidance, the construction industry and marketers of building products need to make certain that any claims about the green attributes of their products or services are clear, truthful, and independently substantiated. If a company engages in “greenwashing,” the term being used to describe vague or misleading green marketing claims, it may face more consequences than simply potential FTC enforcement. Companies engaged in greenwashing could be subject to claims by consumers or competitors based on breach of contract, fraud, unfair competition, or detrimental reliance. They could find themselves restricted from selling their products through retailers who have announced plans to assess independently the green attributes of the products they sell. They could also experience consumer backlash and brand dilution if the green claims are perceived by the public as bogus. Consumer blogs are happy to identify and rate green marketing claims. See, for example, <http://www.greenwashingindex.com/>. So, while consumer demand will continue to require building product and construction companies to advertise the green attributes of their products and services, they need to be sure that any such green claims are legitimate.

Eric E. Boyd  
[eboyd@seyfarth.com](mailto:eboyd@seyfarth.com)

## Contract Issues and Drafting Tips for Green Projects

Green projects are generally defined by three primary characteristics: the construction process has a minimal impact on the environment; the completed building requires less energy and water to operate than a similar, non-green building; and the indoor environment provides enhanced occupant comfort. Several organizations have created specific standards for determining if a project is green, the most popular being the U.S. Green Building Council (USGBC). These organizations provide different levels of certification depending upon the degree to which the project is green (e.g., certified, silver, gold, and platinum).

Green construction continues to rise sharply. It is estimated that green projects accounted for \$8 billion worth of construction in 2006, and will account for \$60 billion and \$100 – 140 billion worth of construction in 2010 and 2013, respectively. These numbers are in part being driven by legislation, as there are approximately 12 federal agencies, 31 states and 188 counties, cities and towns across the country that have passed regulations that either require, or provide incentives for, green construction.

Many people are using their standard contracts for green projects. This is risky because green projects involve numerous contractual issues that are not specifically addressed by most form contracts or standard clauses. This article summarizes those issues, identifies standard contract clauses that should be modified, cross-references those clauses to the popular AIA Document A201-2007, and suggests certain custom provisions for green projects.

Topic	Issue	Reference in AIA Document A201-2007
Basic Definitions	The parties should add a provision that identifies the sustainable standard that has been chosen, or which is required by law or regulation, for the project (e.g., LEED 2009 for NC, Silver Level).	§1.1
Instruments of Service	In most instances, it will be necessary to use Instruments of Service to establish achievement of the sustainable standard applicable to the project. Often, however, it is unclear whether Instruments of Service can be used for this purpose. For example, some clauses provide that Instruments of Service may be used “solely and exclusively for execution of the Work.” Does this include submitting drawings and specifications to the USGBC as part of the LEED Certification process? This and similar provisions should be modified to address the expanded use of Instruments of Service for green projects.	§1.5.2
Permits and Approvals	Most contracts contain a Permits and Approvals Clause that discusses who is responsible for obtaining and paying for permits and required “approvals.” Is certification from the USGBC an approval within the scope of this clause? Is the party who is responsible for paying for approvals responsible for paying the fees charged by the USGBC? Certification fees alone can exceed \$20,000. Accordingly, the parties should modify the Permits and Approvals Clause to specifically address who will pay for the various fees charged by the USGBC and similar organizations.	§§2.2.2, 3.7.1

Topic	Issue	Reference in AIA Document A201-2007
Tests and Inspections	The typical Tests and Inspections Clause provides that the Contractor shall make arrangements for, and shall bear the cost of, all required tests, inspections and approvals. This raises similar issues, and should be adjusted in the same manner, as the Permits and Approvals Clause.	§§13.5.1, 13.5.3
Compliance with Laws	Many contracts contain a clause that states the Contractor is not required to ascertain that the Contract Documents are in accordance with applicable laws. This clause is especially relevant to green construction because hundreds of local jurisdictions across the country have laws and regulations that require green construction. The parties should discuss whether this clause should be adjusted if the Contractor agrees to determine how to satisfy aspects of a legally required green standard.	§3.2.3
Substitutions	The Contractor is typically allowed to make “substitutions” with the consent of the Owner. Substituted materials may, however, invalidate certain credits under the USGBC’s Rating Systems. For example, there are credits for using low Volatile Organic Compound (“VOC”) materials, materials with recycled content, and regionally manufactured materials. Substituting a material with a high VOC content for one that has a low VOC content could prevent this credit from being achieved. Assuming the Owner consents to such a substitution, who is responsible for the loss of this green credit? This and similar issues should be addressed in the Substitutions Clause.	§3.4.2
Skilled Workers	Contracts often contain a provision that states the Contractor shall not employ persons or Subcontractors not properly skilled in the tasks assigned to them. Does an employee or Subcontractor who has not previously worked on a green project fall into this category? This issue should be specifically addressed in the Skilled Workers Clause.	§§3.4.3, 3.9.1
Allowances	Sometimes there are green materials, equipment and systems that are not selected by the Owner until after the Contractor has executed its contract with the Owner. An Allowance Clause can be used to structure the payment for these items. Issues such as payment caps, payment for actual costs, and approvals should be addressed in the Allowance Clause.	§3.8
Scheduling	There are many green activities associated with a sustainable project that should be included in the project schedule. These may include commissioning, the flush-out period for the HVAC system, procurement of green materials and equipment with long lead times, and submission of the supporting documentation for LEED Certification. While some of these are extensions of issues that are usually addressed on schedules (e.g., procurement of long lead-time items), others are unique to green projects (e.g., submission of supporting documentation for LEED Certification). Scheduling Clauses should be modified to address green activities.	§3.10

Topic	Issue	Reference in AIA Document A201- 2007
Submittals	Much of the information required of Contractors and Subcontractors to support an application for LEED Certification can be obtained through the typical submittal process. The Submittals Clause should be modified to address the inclusion of the product data necessary for the various credits that are within the scope of the Contractor's/Subcontractor's scope of work. Certain data, however, such as material costs necessary to support specific credits, can only be obtained at the end of the project and can be addressed in the Final Payment Clause, discussed below.	§3.12
Cleaning Up	Most contracts contain a fairly generic clause that requires the Contractor and Subcontractors to keep the site clean and free of construction debris. While simply throwing all such debris in construction dumpsters and hauling them to a landfill may satisfy this clause, it will almost certainly prevent the Contractor from satisfying the LEED credit for Construction Waste Management, which requires that a certain percentage of construction waste be diverted from landfills. Accordingly, the standard Clean Up Clause needs to be tailored for green projects that are pursuing the LEED credit for Construction Waste Management.	§3.15.1
Separate Contractors	Most contracts allow the Owner to perform aspects of the work with its own forces or separate contractors. This raises significant issues on a green project because the credits under the LEED Rating Systems are based upon all work performed. As a result, the work performed by an Owner's separate contractor will impact these credits, and may prevent them from being achieved. For example, if the Owner's separate contractor had all its construction waste hauled to a landfill, the Construction Waste Management credit might not be satisfied. The Contractor should not be held responsible for this result. Similarly, if the separate contractor sent all of its waste to a landfill, the Contractor should not be required to divert more of its waste from landfills than it had reasonably planned in order to compensate for the separate contractor's conduct, at least not without compensating the Contractor for its additional efforts. The Separate Contractors Clause should be adjusted, and carefully managed, to account for these issues.	§6.1
Substantial Completion / Contract Time	Substantial Completion is typically defined as the point in time when the Owner can occupy or utilize the project for its intended purpose. Further, Contract Time is typically defined as the amount of time allotted for Substantial Completion of the work. Two issues concerning these clauses are whether LEED Certification is a prerequisite for Substantial Completion, and, therefore, whether LEED Certification needs to be achieved within the Contract Time. The standard clauses for Substantial Completion and Contract Time should be modified to address these issues. This is particularly critical given the contractual link that is often found between Substantial Completion and the imposition of delay damages.	§§8.1.1, 9.8.1

Topic	Issue	Reference in AIA Document A201-2007
Final Completion	Final Completion is typically defined as the point in time when the Contractor/ Subcontractor has completed all of its work in accordance with the Contract. As with Substantial Completion, there is an issue as to the proper correlation between Final Completion and LEED Certification. This concept is not addressed in the standard Final Completion Clause, which should be modified to account for this issue.	§9.10.1
Final Payment	Most Final Payment Clauses include a list of items that Contractors and Subcontractors must provide at the end of a project before they are entitled to receive their Final Payment. The documentation of certain LEED credits requires information that is only available at the end of the project. The list of items found in the Final Payment Clause should be supplemented to include this information. Further, the parties should address whether any amount will be withheld pending Certification.	§§9.10.1, 9.10.2
Bonds	Many contracts state that, at the Owner's election, the Contractor must furnish a performance bond that covers the faithful performance of its contract. Further, some local governments require that certain types of projects achieve LEED Certification and require a performance bond that can be called upon by the local government if the Certification is not achieved. Can the Owner use the Bond Clause to require the Contractor to provide the "green bond" required by a local law or regulation? The parties should specifically address this issue in their contract.	§11.4.1
One Year Warranty	Contractors are typically required to correct defective work that is discovered within one year of Substantial Completion. The entity that decides whether a project has met the requirements for LEED Certification may not complete its evaluation until that one year period has expired, or almost expired. If Certification is denied because of "defective work," but that decision is communicated more than one year after Substantial Completion, does the Contractor have any obligation to correct the defective work so that Certification can be achieved? The parties should specifically address this issue in the One Year Warranty Clause.	§12.2.2.1
Consequential Damages	Many of the damages that may result if Certification is not achieved or if the Owner does not receive a green building could be classified as consequential damages. Accordingly, the parties need to pay special attention to the Waiver of Consequential Damages Clause that appears in most contracts.	§15.1.6



Topic	Issue	Reference in AIA Document A201-2007
Allocation of Responsibility	Achievement of LEED Certification, or satisfaction of other sustainable standards, is a multi-party effort that involves at least the Owner, Architect and Contractor. No one party holds all the cards, and great care must be taken to avoid contract clauses that impose overall responsibility on one party to achieve LEED Certification. The parties should carefully identify the specific tasks required to satisfy the green standard chosen or required for a particular project and then assign them to the party best suited to accomplish each. This can be accomplished through a detailed LEED Responsibility Matrix.	Not addressed, custom provision
LEED Documentation	An application for LEED Certification requires the compilation and submission of a significant amount of data. The parties should include a well crafted provision that specifically addresses each party's responsibility with respect to this process.	Not addressed, custom provision
Liquidated Damages	Given the uncertainty concerning the damages that may result if LEED Certification is not achieved or if the building is not as green as required, the parties should consider a liquidated damages clause for green damages.	Not addressed, custom provision

David A. Blake, LEED AP  
[dblake@seyfarth.com](mailto:dblake@seyfarth.com)



## News You Can Use

### HUD Expands Refinancing Options for Hospitals with FHA-Insured Loans

On July 1, 2009, the U.S. Department of Housing and Urban Development (HUD) issued a notice announcing the expansion of its hospital mortgage insurance program. HUD will now permit refinancing of hospital mortgage debt (including acquisition financing) with federally guaranteed loans under Sections 242 and 223 (f) of the National Housing.

### E-Verify Federal Contractor Rule Delayed Until September 8, 2009

The federal government has extended, for a fourth time, the effective date of the E-Verify requirement for federal government contractors. The regulation is now set to take effect on September 8, 2009.

Following the latest extension, U.S. Citizenship and Immigration Services (USCIS) has instructed federal contractors not to use E-Verify to verify current employees until the rule becomes effective and they are awarded a contract that includes the Federal Acquisition Regulation's E-Verify clause. The new final E-Verify rule will require federal contractors to agree, through language inserted into their federal contracts, to use E-Verify to confirm the employment eligibility of all persons hired during a contract term, and to confirm the employment eligibility of federal contractors' current employees who perform contract services for the federal government within the United States.

## Construction Practice Notices

Michael McKeeman will be speaking at the Precast/Prestressed Concrete Institute's Annual Convention in San Antonio on September 14, 2009. His three-hour program is titled "*The Economic Stimulus Era and its Impacts on the Concrete Structures Industry.*"

John Bergin will speak at the Washington, D.C. chapter of the Associated Builders & Contractors Inc. on September 15, 2009. His topic is "*Cost-Effective Litigation in Any Economy.*"

Gina Ferrari and Michael McKeeman will present a program at the California Association of General Contractor's Legal Advisory Committee's Annual Conference in Dana Point, California on October 24, 2009. That program is titled "*Understanding the Changes in Government Contracting Under the American Recovery and Re-investment Act.*"



### Seyfarth Shaw's Construction Practice Group is Recognized as a Leader in 2009 *Chambers USA*

We are pleased to report that Seyfarth Shaw's Construction Practice Group is heralded in the 2009 edition of *Chambers USA: America's Leading Lawyers for Business* as among the best in the nation. *Chambers* noted that "Seyfarth Shaw boasts the depth and resources to take any project from start to finish. The 40-strong construction team is spread across the firm's coast-to-coast network of offices and comprises numerous lawyers with architectural or engineering backgrounds, providing clients with valuable technical knowledge as well as legal expertise."

# Seyfarth Shaw Construction Attorneys

**Eric Barton**

*Atlanta*

ebarton@seyfarth.com

**Rebecca A. Davis**

*Atlanta*

rdavis@seyfarth.com

**Civia Gerber**

*Atlanta*

cgerber@seyfarth.com

**Chip Ingraham**

*Atlanta*

cingraham@seyfarth.com

**Anna R. Palmer**

*Atlanta*

apalmer@seyfarth.com

**Cliff Welch**

*Atlanta*

cwelch@seyfarth.com

**Joseph A. Barra**

*Boston*

jbarra@seyfarth.com

**Peter Brooks**

*Boston*

pbrooks@seyfarth.com

**Emily R. Donovan**

*Boston*

edonovan@seyfarth.com

**Jonathan Hausner**

*Boston*

jhausner@seyfarth.com

**Todd McGrath**

*Boston*

tmcgrath@seyfarth.com

**Leah A. Rochwarg**

*Boston*

lrochwarg@seyfarth.com

**John Anderson**

*Chicago*

janderson@seyfarth.com

**Eric Boyd**

*Chicago*

eboyd@seyfarth.com

**Jerome F. Buch**

*Chicago*

jbuch@seyfarth.com

**Phil Comella**

*Chicago*

pcommella@seyfarth.com

**Jeffrey Jahns**

*Chicago*

jjahns@seyfarth.com

**Mark L. Johnson**

*Chicago*

majohnson@seyfarth.com

**Mark A. Lies, II**

*Chicago*

mlies@seyfarth.com

**Lawrence Moss**

*Chicago*

lmoss@seyfarth.com

**Roger L. Price**

*Chicago*

rprice@seyfarth.com

**Misty Blair**

*Houston*

mblair@seyfarth.com

**Karl E. Neudorfer**

*Houston*

kneudorfer@seyfarth.com

**David Waddell**

*Houston*

dwaddell@seyfarth.com

**Larry Watts**

*Los Angeles*

lwatts@seyfarth.com

**Robert W. Dremluk**

*New York*

rdremluk@seyfarth.com

**Dennis Greenstein**

*New York*

dgreenstein@seyfarth.com

**Jerry Montag**

*New York*

jmontag@seyfarth.com

**Gilbert Rotkin**

*New York*

grotkin@seyfarth.com

**Don Featherstun**

*San Francisco*

dfeatherstun@seyfarth.com

**Giovanna A. Ferrari**

*San Francisco*

gferrari@seyfarth.com

**Michael T. McKeeman**

*San Francisco*

mmckeeman@seyfarth.com

**John T. Bergin**

*Washington, D.C.*

jbergin@seyfarth.com

**David A. Blake**

*Washington, D.C.*

dblake@seyfarth.com

**Sara Beiro Farabow**

*Washington, D.C.*

sfarabow@seyfarth.com

**Bennett D. Greenberg**

*Washington, D.C.*

bgreenberg@seyfarth.com

**Jeffrey M. Hummel**

*Washington, D.C.*

jhummel@seyfarth.com

**Steven J. Kmiecik**

*Washington, D.C.*

skmiecik@seyfarth.com

**Patrick G. Lutz**

*Washington, D.C.*

plutz@seyfarth.com

**Richard McKim Preston**

*Washington, D.C.*

rpreston@seyfarth.com

**Z. Taylor Shultz**

*Washington, D.C.*

tshultz@seyfarth.com

**Daniel P. Wierzba**

*Washington, D.C.*

dwierzba@seyfarth.com

**ATLANTA**

One Peachtree Pointe  
1545 Peachtree Street, N.E., Suite 700  
Atlanta, GA 30309-2401  
404-885-1500  
404-892-7056 fax

**BOSTON**

World Trade Center East  
Two Seaport Lane, Suite 300  
Boston, MA 02210-2028  
617-946-4800  
617-946-4801 fax

**CHICAGO**

131 South Dearborn Street, Suite 2400  
Chicago, IL 60603-5577  
312-460-5000  
312-460-7000 fax

**HOUSTON**

700 Louisiana Street, Suite 3700  
Houston, TX 77002-2797  
713-225-2300  
713-225-2340 fax

**LOS ANGELES**

Century City  
One Century Plaza  
2029 Century Park East, Suite 3500  
Los Angeles, CA 90067-3021  
310-277-7200  
310-201-5219 fax

Downtown

333 South Hope Street, Suite 3900  
Los Angeles, CA 90071-1406  
213-270-9600  
213-270-9601 fax

**NEW YORK**

620 Eighth Avenue  
New York, NY 10018-1405  
212-218-5500  
212-218-5526 fax

**SACRAMENTO**

400 Capitol Mall, Suite 2350  
Sacramento, CA 95814-4428  
916-448-0159  
916-558-4839 fax

**SAN FRANCISCO**

560 Mission Street, Suite 3100  
San Francisco, CA 94105-2930  
415-397-2823  
415-397-8549 fax

**WASHINGTON, D.C.**

975 F Street, N.W.  
Washington, D.C. 20004-1454  
202-463-2400  
202-828-5393 fax

**BRUSSELS**

Boulevard du Souverain 280  
1160 Brussels, Belgium  
(32) (2) 647 60 25  
(32) (2) 640 70 71 fax



**Breadth. Depth. Results.**

[www.seyfarth.com](http://www.seyfarth.com)

Attorney Advertising. This Construction Law Report is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer. (The foregoing legend has been affixed pursuant to U.S. Treasury Regulations governing tax practice.)