



Green Marketing Update -- The Revised Green Guides and Other Recent Developments

December 4, 2012

Speakers:

Leah Rochwarg
Eric Boyd

Jay Connolly
Ilana Morady



Agenda

- Risks of “green washing”
- Green buildings, green construction, and other drivers of green marketing claims
- Role of the FTC’s Green Guides
- Recent changes to the FTC’s Green Guides
- Recent litigation developments
- What you can do to reduce risks associated with your green marketing claims



Green Washing

- Deceptive use of green marketing to promote the perception that a company's policies, products, packages or services are better for the environment
- Could be truthful, but misleading
 - For example, claims that something is “now 50% less”, when going from 3 to 2% overall



Green Washing: Risks and Liabilities

- Potential Litigation
 - ▶ Consumers
 - ▶ Competitors
 - ▶ State unfair competition/false advertising
 - ▶ FTC unfair/deceptive practices
- Product Issues
 - ▶ Retailer Limits
 - ▶ Diminished consumer confidence in product, brand, manufacturer, or seller



An Overview of Green Building Rating Systems in the U.S.

- LEED
- Green Globes
- International Green Construction Code (IGCC)
- Energy Star
- Living Building Challenge
- Build it Green
- NAHB National Green Building Program
- Many others in the US, Canada, and Internationally



McGraw Hill - Green Outlook 2013

- McGraw-Hill Construction's 2013 Dodge Construction Green Outlook report said green building is expected to represent 44 percent of all commercial and institutional construction in 2012 — growing to 55 percent by 2016.
- The outlook for green home and renovation activity should be about 20 percent in 2012 and 38 percent by 2016, according to the report.
- The value of green building has seen growth from \$10 billion in 2005 to \$78 billion in 2011.



McGraw Hill - Green Outlook 2013

- In 2012, the total market — non-residential and residential — is expected to be worth \$85 billion, and by 2013, overall new green building is projected to rise to between \$98 billion and \$106 billion.
- By 2016, the number is expected to reach \$204 billion to \$248 billion.
- <http://analyticsstore.construction.com/index.php/green-outlook-2013.html>



Benefits of Green Building

- ✓ Lower operating costs and increase asset value
- ✓ Reduce waste sent to landfills
- ✓ Conserve energy and water
- ✓ Be healthier and safer for occupants
- ✓ Reduce harmful greenhouse gas emissions
- ✓ Qualify for tax rebates, zoning allowances and other incentives in hundreds of cities



An Overview of LEED Green Building Rating System

- **LEED Green Building Rating Systems**

- Rating systems are groups of requirements for projects that want to achieve LEED certification. Each group is geared towards the unique needs of a project or building type.

- **Projects earn points to satisfy green building requirements**

- Within each of the LEED credit categories, projects must satisfy prerequisites and earn points. The number of points the project earns determines its level of LEED certification.



Main Credit Categories

- **Sustainable sites credits** encourage strategies that minimize the impact on ecosystems and water resources.
- **Water efficiency credits** promote smarter use of water, inside and out, to reduce potable water consumption.
- **Energy & atmosphere credits** promote better building energy performance through innovative strategies.
- **Materials & resources credits** encourage using sustainable building materials and reducing waste.
- **Indoor environmental quality credits** promote better indoor air quality and access to daylight and views.



How it works

- For commercial buildings and neighborhoods, to earn LEED certification, a project must satisfy all LEED prerequisites and earn a minimum 40 points on a 110-point LEED rating system scale. Homes must earn a minimum of 45 points on a 136-point scale.



LEED 2009

- Launched in April 2009, LEED 2009 is the current version of the LEED green building program. LEED 2009 is built on the fundamental structure of the previous rating systems while ensuring new technology and urgent priorities are addressed.
- To improve the commercial and institutional LEED rating systems in the LEED 2009 update, the USGBC focused on three areas: harmonization, credit weightings and regionalization.



Focus on Credit weightings

- USGBC revised credit weightings to award more points to strategies that will have greater a positive impact on what matters: energy efficiency and carbon dioxide emission reduction.
- USGBC evaluated each credit against a list of 13 environmental impact categories, including climate change, indoor environmental quality, resource depletion and water intake.
- USGBC prioritized the impact categories and assigned credits a value based on how they contribute to mitigating each impact.
- USGBC assigns the most value to credits that have the highest potential for making the biggest change.



The next version of LEED

- LEED is continuously evolving and improving. According to the USGBC, they're not just going for net zero; they're going for net positive.
- Getting to an entire market transformation means we need to keep moving in the right direction.
- The next update to the rating systems (LEED v4) will open up LEED to a wider range of building types and manufacturing industries, delivering the benefits of green building up and down the supply chain.
- It will advance environmental footprint issues, like climate change, and encourage optimization of energy and water use.



Important LEED v4 dates

- Public comment period open: October 2, 2012 through Dec. 10, 2012
- Ballot period open: June 1, 2013



Anticipated changes LEED v4

- **New market sectors:** data centers, warehouses and distribution centers, hospitality facilities (i.e. hotels), existing schools and existing retail, and LEED for Homes Mid-Rise.
- **Increased technical rigor:** revisions to credit weights, new credit categories focusing on integrated design, life cycle analysis of materials, and an increased emphasis on measurement and performance.
- **Streamlined services:** An improved LEED user experience that makes the LEED Online platform more intuitive and introduces tools to make the LEED documentation process more efficient.



Some refer to it as “Green Magic”

- According to the USGBC website, a 2008 CoStar Group study found that green buildings outperform their non-green peers in key areas such as occupancy, sale price and rental rates. Sometimes, by wide margins.
- LEED buildings command rent premiums of \$11.33 per square foot higher than conventional buildings and boast 4.1 percent higher occupancy, according to the study. Rental rates in Energy Star buildings represent a \$2.40 per square foot premium over comparable non-Energy Star buildings and have 3.6 percent higher occupancy.
- "Call it green magic," writes Adam Aston in Business Week. "According a pair of studies that offer the first broad-scope examination of the economics of green buildings, green buildings really do it all: lower operating costs, boost rental rates, increase sales values and even improve occupancy rates."



Sources for Guidance for Specifying and Selecting Materials

- Sources for guidance on selecting and specifying materials for a green project
 - Athena Institute www.athenasmi.ca
 - Building Green www.buildinggreen.com
 - One Design firm's materials specification checklist does not identify specific products. Rather, it identifies qualities such products should possess



Partial Checklist for Specifying Materials

- reused, recycled, and/or recyclable, reducing impacts resulting from extraction of new resources;
- post-consumer recycled content material and/or post-industrial recycled content (recovered) material;
- nonhazardous to recycle, compost, or dispose of;
- renewable and sustainably harvested (no old growth timber), preferably with minimal associated environmental burdens (reducing the use and depletion of finite raw and long-cycle renewable materials);



Partial Checklist for Specifying Materials

- rapidly renewable building materials;
- specify natural, non-toxic, low volatile organic compound-emitting non-solvent based finishes, paints, stains and adhesives;
- non-toxic/non-polluting in manufacture, use, and disposal.

source: Corbett, T. *Green Buildings and Risk*.

www.aepronet.org/ge/no43.html



FTC Green Guides

- Section 5 of the FTC Act prohibits “unfair or deceptive acts or practices.”
- The FTC’s Green Guides, 16 C.F.R. Part 260, address application of Section 5 of the FTC Act to environmental advertising and marketing practices.
- The Green Guides consist of General Principles, Specific Guidance, and Examples.
- The Green Guides are administrative interpretations of law and are not independently enforceable.
- Examples provide “safe haven” from FTC enforcement.
- No preemption of federal, state or local laws.



FTC Green Guides

- 1992 - FTC first issued Green Guides
- 1998 - First Green Guide Revision
- 2012 - FTC issued revised Green Guides in wake of “virtual tsunami” of environmental marketing claims



FTC Green Guides – General Principles

- Claims must be:
 - ▶ True
 - ▶ Qualified
 - ▶ Specific/not overly broad
 - ▶ Substantiated
 - ▶ Clear whether they apply to the product, package or company
- Qualifications should be clear, prominent and understandable.
- Applies to:
 - ▶ Labeling, promotional materials, websites, etc.
 - ▶ Direct and implied claims
 - ▶ Words, symbols, emblems, logos, depictions, brand names, etc.



FTC Green Guides – Specific Topics

Clarified topics

- General environmental benefits
- Ozone-safe
- Degradable
- Compostable
- Recyclable
- Recycled content
- Non-toxic / free-of
- Source reduction
- Refillable
- Certifications and seals of approval

New topics

- Renewable material
- Renewable energy
- Carbon-offset claims



Environmental Claims: Qualitative

- **Green/eco-friendly**

- ▶ Consumers often think it means product has specific environmental attributes such as “made from recycled materials” or “compostable”
- ▶ Without qualification/substantiation, avoid general environmental claims
- ▶ Even if qualified, need to analyze the “trade-offs” resulting from the attribute

- **Sustainable**

- ▶ Consumers are often unable to define
- ▶ Many think it means “longer lasting” or “good quality” rather than implying environmental benefits
- ▶ No meaningful guidance in Green Guides



Environmental Claims: Certifications

- Concerns:

- ▶ Likely to convey general environmental benefit
- ▶ Material connection to certifying organization
- ▶ FTC's Endorsement Guides
- ▶ Still need to be specific
- ▶ Still need substantiation
- ▶ OK to qualify with reference to web page

- Examples:

- ▶ “GreenLogo” – No
- ▶ “American Institute of Degradable Materials” – No
- ▶ “Forest Products Industry Association” – Yes
- ▶ “EarthSmart Certified for reduced chemical emissions during product use” – Yes



Environmental Claims: How things are made

- Recycled content
 - ▶ “Materials that have been recovered or otherwise diverted from the solid waste stream, either during the manufacturing process or after consumer use”
 - ▶ Clear about what components of a product are “used, reconditioned or re-manufactured”
 - ▶ Deceptive if normally collected and recycled anyway (like scrap)
- Renewable materials (Bamboo, etc.)
 - ▶ No definition or test
 - ▶ Implies other attributes, such as “recyclable”
 - ▶ Claim should be qualified: what is the material, how was it sourced, and why is it renewable?
 - ▶ Rapidly renewable?



Environmental Claims: What things contain

- Non-toxic
 - ▶ For both humans and environment
 - ▶ Substantiation with scientific evidence
- Free-of
 - ▶ If product contains a “de minimus” amount of a substance that would be “inconsequential to consumers”
 - ▶ “Inconsequential” depends on the material, e.g. mercury v. formaldehyde
 - ▶ Can’t say it is “free-of” something, like chlorine, when the product was never associated with the substance
 - ▶ Can’t say it is “free-of” something, like chlorine, when it contains something that poses a similar risk



Environmental Claims: What you can do with it

- Compostable

- ▶ Materials in a product or package will “break down into, or otherwise become a part of, usable compost (e.g. soil-conditioning material, mulch) in a safe and timely manner in an appropriate composting program or facility, or in a home compost pile or device”
- ▶ If not at home, need to qualify if facilities are not available to substantial majority of customers

- Degradable

- ▶ “The entire product or package will completely break down and return to nature within a reasonably short period of time after customary disposal”
- ▶ ASTM Standards
- ▶ One year rule usually means trash going to landfill needs qualification



Environmental Claims: What you can do with it

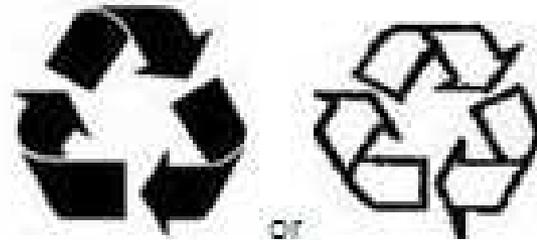
- Recyclable

- ▶ Product can be “collected, separated, or otherwise recovered from the solid waste stream for reuse, or in the manufacture or assembly of another package or product, through an established recycling program”
- ▶ If recycling facilities are available to at least 60 % of consumers/communities, then no qualification necessary (“Substantial Majority Test”)
- ▶ If recycling facilities are not available to a substantial majority, can say “This product may not be recyclable in your area.”
- ▶ If recycling facilities are available to only a few communities, can say “This product is recyclable only in the few communities that have appropriate recycling programs.”
- ▶ Can’t say: “Recyclable where facilities exist” without qualification
- ▶ Can’t say “Please recycle”



Chasing arrows contained inside a circle

Means that the paper it is printed on was made partly or entirely from recycled paper.



Chasing arrows NOT contained inside a circle These two symbols simply encourage people to recycle paper when they discard it. This does not mean that the paper the symbol is printed on is recycled paper.

Source: [http://www.coworkforce.com/green/symbols.asp#green seal](http://www.coworkforce.com/green/symbols.asp#green%20seal)



Recycling No.	Uses
 PETE	Recycled to produce polyester fibres, thermoformed sheet, strapping, soft drink bottles.
 HDPE	Recycled to become various bottles, grocery bags, recycling bins, agricultural pipe, base cups, car stops, playground equipment, and plastic lumber.
 PVC	Recycled to become pipe, fencing, and non-food bottles.
 LDPE	Recycled to become plastic bags, various containers, dispensing bottles, wash bottles, tubing, and various molded laboratory equipment.
 PP	Recycled into auto parts and industrial fibers.
 PS	Recycled into a wide range of products including office accessories, cafeteria trays, toys, video cassettes and cases, insulation board and expanded polystyrene products (e.g. Styrofoam).
 OTHER	



Examples

NOT OKAY

- Resin Identification Code conspicuously displayed when recycling facilities not available to substantial majority of consumers.
- Saying “includes some recyclable material” when recyclable portion not specified and separation facilities do not exist.

OKAY

- Resin Identification Code on bottom of container or in other inconspicuous location.
- “25 % of the material in this package is recyclable in the few communities that can recycle multi-layer products.”



Environmental Claims: Energy

- Renewable energy

- ▶ No consensus – but no fossil fuels unless renewable energy certificates (RECs) are used
- ▶ Specify source of renewable energy
- ▶ Can't use RECs more than once

- Carbon offset claims

- ▶ Consumer perception studies show consumers unable to describe what carbon offset is
- ▶ Need competent and reliable scientific evidence and appropriate accounting methods
- ▶ Should not advertise offset if already required by law (landfills)
- ▶ Need to disclose if offset purchase for reductions that won't occur for at least two years
- ▶ Can't use same offset twice



Lean Marketing

- Exaggerated or misleading advertising about the health benefits of food products.
- Consumer class actions and FTC enforcement:
 - Natural
 - All natural
 - Wholesome
 - Etc.



So what do these terms really mean?

- Organic
 - ▶ Environmental claim or health claim? Consumer research shows confusion
 - ▶ USDA regulates for agricultural products, e.g. food and textiles, under the National Organic Program (NOP)
- Strict standards
 - ▶ Claim must be certified
 - ▶ Seals - 100% organic / organic / made with organic ingredients
 - ▶ Fruits/vegetables - no bioengineered ingredients, no sewage sludge or synthetic fertilizer
 - ▶ Meat/poultry/eggs – requirements for animal health and nutrition, e.g. organic feed, no antibiotics



So what do these terms really mean?

- Natural

- ▶ Environmental claim or health claim?
- ▶ No regulatory definition; consumer perception evidence is lacking
- ▶ Certification not required
- ▶ Food
 - No objection from government if no added color, artificial flavors, or synthetic substances that would not normally be expected in the food
- ▶ Textiles
 - Fiber exists as such in the natural state, rather than derived from a manufactured material



Recent Green Marketing Cases And Related Litigation

- Biodegradable Claims

- ▶ *Rosenman, et al. v. Green Genius, LLC, et al.* (Cal. Super. Ct., San Francisco County) Nationwide and California consumer fraud class action alleging **use of the term “biodegradable” on the label of its plastic bags** violated California Public Resources Code, section 42357.
- ▶ *The People of the State of California v. Quidsi Inc.*, (Cal. Super. Ct. Napa County) (10/16/2012) Unfair competition action by DA’s office alleging **Plastic dog waste bags improperly labeled with terms “biodegradable,” “degradable,” or “decomposable,”** along with other terms that would indicate that the bags would break down, fragment, or biodegrade in a landfill or other environment.



Recent Green Marketing Cases And Related Litigation

- “Organic” Claims

- ▶ *In Re Aurora Dairy Corp. Milk Marketing and Sales Practices Litigation*, No. 4:08-MD-01907 ERW). Nationwide class actions against Aurora Dairy Corp. and numerous retailers, alleging violations of numerous state consumer protection statutes based on the production by Aurora—and sale by retailers—of private label milk and milk products alleged to be improperly labeled as “USDA Organic.” The Eighth Circuit Court of Appeals affirmed the district court’s dismissal of any and all claims attacking the organic certification of the products and their organic labeling based on federal preemption.

- ▶ *Morris v. Vogue International Inc.* (Cal. Super. Ct. Orange County) Alleges defendant’s the “Organix” line of shampoos improperly imply the products are organic, when they are not.



Recent Green Marketing Cases And Related Litigation

- All Natural, “No Artificial Ingredients” and Related Claims
 - ▶ Products with “All Natural” or “No Artificial Ingredients” claim, but which contain:
 - High-Fructose Corn Syrup (*Snapple*)
 - Artificial sweeteners (*Dryers Grand Ice Cream*)
 - Artificial coloring (*Chobani Yogurt*)
 - Other Artificial Ingredients (*Blue Diamond Almonds; Neutrogena Corporation’s facial cleansers; Hain Celestial Group beauty products*)
 - Genetically Modified Organisms (“GMOs”) (*Wesson oil; Kix cereal; Tostitos; Sun Chips; Kashi Go Lean Crunch; Nature Valley Granola Bars; Campbell Soup; Open Nature Products; Pepperidge Farm’s Goldfish*)
 - “0 trans fats” (*Hain Celestial drink products*)



Recent Green Marketing Cases And Related Litigation

- Health Claims

- ▶ Immunity (*Rice Krispies* “helps support your child’s immunity”; *Nestle Boost* claim implied by an illustration of kids being protected by product)
- ▶ Brain Development Claims (*Frosted Mini-Wheats* “clinically proven to improve kids attentiveness.”)
- ▶ Lower Cholesterol (*General Mills’ Cheerios*)
- ▶ Fiber (*Fiber One*; *Quest Nutrition*)
- ▶ Probiotics (*Dannon Activia Yogurt* “clinically proven” to help your digestive system and help prevent colds and flu)
- ▶ Weight loss



Recent Green Marketing Cases And Related Litigation

- “Wholesome” and Related Claims
 - ▶ Non-Actionable Puffery?
- Nutrient Content Claims
 - ▶ “0 trans fats” (which can be said if less than *1/2 gram per serving* – preemption)
 - ▶ Antioxidant Claims (*Sunsweet Growers Inc.’s dried fruit and fruit juice products and Hershey’s Dark Chocolate Products*)
- Misleading Comparative Claims
 - ▶ *Campbell’s Soup* “25 percent less sodium” failed to compare like products



Recent Green Marketing Cases And Related Litigation

- Potential Use of Green Guides as Predicate Violations For Unfair Competition Laws
 - ▶ Analogous to FDA Guidance documents/Warning Letters being cited in complaints?
- Risk Of Administrative Actions Leading To Follow-On Consumer Fraud Class Actions
 - ▶ Similar to FDA Warning Letters
- Most Popular Venues
 - ▶ California
 - ▶ NJ
 - ▶ NY
 - ▶ Florida
 - ▶ Illinois



Thank you!

- Eric E. Boyd - eboyd@seyfarth.com
- Leah Rochwarg - lrochwarg@seyfarth.com
- Jay Connolly - jconnolly@seyfarth.com
- Ilana Morady - imorady@seyfarth.com

Seyfarth Shaw LLP
131 S. Dearborn Street
Suite 2400
Chicago, Illinois 60603

Visit our website at

<http://www.seyfarth.com/Green-Marketing-Compliance-Team>