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Green-house Counsel

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COMPLIANCE AND LITIGATION RISKS OF GREEN CLAIMS

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Many businesses have worked to capitalize on “green marketing” trends. The real estate industry has joined this wave by, among other things, offering “green” leases or mortgages, or touting a certification awarded to a property under the U.S. Green Building Council’s Leadership in Energy and Environmental Design (“LEED”) Green Building Rating System. Two recent developments, however, have placed increased scrutiny on these green marketing efforts and raised the possibility of compliance and/or litigation risks for unsupported environmental claims, which in turn will likely require in-house counsel to become more involved in their clients’ green marketing plans.

First, in early October, the Federal Trade Commission (“FTC”) proposed revisions to their “Green Guides” in direct response to the increased proliferation of environmental marketing claims. While the Green Guides are promulgated at 16 C.F.R. Part 260, they are not enforceable regulations. Instead, they are considered to be administrative interpretations of the §5 of the FTC Act, which generally prohibits “unfair methods of competition” and “unfair or deceptive acts or practices,” as applied to environmental marketing claims. While the Green Guides do not have the force and effect of law, the FTC can—and has—taken enforcement actions under §5 of the FTC Act against companies that have made environmental claims inconsistent with the Green Guides.

The proposed revisions to the Green Guides encompass both changes to existing guidelines, plus some new guidelines applicable to environmental marketing claims that have become more popular recently. Should you wish to comment on the proposed guidelines, the submission deadline is December 20, 2010. Highlights of the proposed revisions that may be of particular relevance to in-house counsel in the real estate industry include:

- General Environmental Benefit Claims: Unqualified general environmental benefit claims, such as “green” or “eco-friendly” are prohibited. These types of terms carry a number of implied environmental benefits that are difficult to substantiate. Accordingly, companies that offer “green” mortgages or leases may need to qualify such claims with clear and prominent language that ties the claim to specific environmental benefits.
- Environmental Seals of Approval or Certifications: This section notes that uses of environmental seals of approvals or certifications, such as LEED or Green Globes, are covered by the FTC’s “Endorsement Guides” and that these seals of approval do not obviate the need to be able to substantiate any environmental claims. Companies employing these endorsements should qualify these endorsements for specific environmental attributes and disclose any relationships with the certifying party.

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RISKS OF GREEN CLAIMS (cont'd)

In addition to FTC scrutiny, questions about the veracity of third party environmental certifications, in particular the U.S. Green Building Council's LEED certification system, may soon be addressed in federal court. Last week, Henry Gifford, a self-described building energy efficiency expert, filed a [federal class action lawsuit in the Southern District of New York](#), against the U.S. Green Building Council alleging that its marketing efforts touting its LEED Green Building Rating System are inaccurate and actionable under federal and state statutes, as well as common law. The complaint alleges violations of the Sherman Antitrust Act, the Lanham Act, the Racketeer Influenced Corrupt Organizations Act, and sections of the New York State General Business Law, plus a claim of unjust enrichment.

Whether the Gifford complaint survives motion practice is an open question. Similarly, it is unclear what, if any, effect the FTC Green Guides revisions may have on the use of green marketing in the real estate context. At a minimum, however, both actions illustrate the increased amount of scrutiny that green marketing claims have been receiving recently and how companies, including real estate companies, that attempt to market their products or services based on environmental attributes should do so with in-house counsel involvement so as to better understand and avoid the potential compliance and litigation risks associated with such claims.