

MID ATLANTIC REAL ESTATE JOURNAL

NEW JERSEY-PENNSYLVANIA-DELAWARE-MARYLAND-VIRGINIA

Friday, June 27, 2008

Volume 20, Issue 11

ENVIRONMENTAL/GREEN BUILDINGS

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Revision to the FTC's Green Guides could be on the horizon

In recent years, spawned by the public's intensifying interest and awareness in environmentally friendly products, manufacturers and builders have increasingly put forth claims that their products are "green" or eco-friendly. Given this recent proliferation in green claims, the Federal Trade Commission (FTC) is currently reviewing the Green Guides for the Use of Environmental Marketing Claims and is considering whether to amend the Guides to address green claims associated with buildings and building materials.

By way of background, the Green Guides, codified at 16 C.F.R. Part 260, were issued in 1992 and last reviewed in 1998. According to guidance issued by the FTC, the Green Guides were developed "to help marketers avoid making unfair or deceptive environmental claims." Under Section 5 of the Federal Trade Commission Act (FTC Act), deceptive acts



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and practices in marketing are unlawful. Accordingly, the Green Guides were developed to help marketers avoid running afoul of that prohibition. Consistent with the FTC Act, the Green Guides state that there must be a reasonable basis for any express or implied claims about the environmental attributes of a product. The Green Guides provide specific guidance as to how marketers should substantiate a claim that a product is generally environmentally beneficial, as well

as certain specific claims including claims that a product is degradable, compostable, recyclable, or refillable. Substantiating green claims "will often require competent and reliable scientific evidence" developed in an objective and generally accepted manner according to the Green Guides. Thus, along with outlining the general principles for substantiating a green claim, the Green Guides provide specific examples of FTC Act compliant claims intended to serve as a "safe harbor" for marketers. While the Green Guides specifically state that they are merely an "administrative interpretation" and "are not themselves enforceable regulations, nor do they have the force and effect of law," they have been given substantial weight in FTC enforcement actions. Further, the Green Guides have been codified into law by several states, including California.

The FTC was not scheduled to review the Green

Guides again until 2009, but decided to perform an early review given the recent surge in green claims. Part of the FTC's review includes a series of public workshops with the third such workshop scheduled for July 15, 2008, in Washington D.C. This latest public workshop will center in part on whether revisions are needed to address green claims relating to buildings and building materials. More specifically, many green building claims involve third party certification programs, like the Green Building Council's Leadership in Energy and Environmental Design program (LEED), which have grown substantially since the promulgation and 1998 review of the Green Guides. In fact, many of these green building claims include assertions of "sustainability" or "renewability" which are simply not addressed in the Green Guides. Accordingly, the FTC is now considering whether the

Green Guides adequately address green building claims and whether specific safe harbor provisions should be provided for appropriately made claims of sustainability and renewability. Any such revision would establish a framework that builders and other marketers of green buildings and green building materials, should follow to comply with the Green Guides and to avoid running afoul of the FTC Act.

In conclusion, the potential revision of the Green Guides could impact the marketing of green buildings and green building products. Accordingly, builders and marketers of these products should watch for any revision of the Green Guides and be prepared to comply with that revision.

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