ASSOCIATION OF CORPORATE COUNSEL

TITLE: **A New Type of Environmental Threat: Could Marketing Your Company as “Green” Put It at Risk?**

DATE: **November 20, 2008**

PRESENTED BY: **ACC Litigation and Environmental Health & Safety Committees**

SPONSORED BY: **Ernst & Young**

FACULTY: **Brian Gilbert**, Executive Director, Ernst & Young’s Fraud Investigation & Dispute Services
Jack Holleran, Principal, Ernst & Young

MODERATOR: **Monica Palko**, Associate Corporate Counsel – Litigation, Bearing Point, Inc.

*****

Operator: Just a reminder, today's conference is being recorded.

Welcome to this ACC webcast. Monica, please go ahead.

Monica Palko: Hello, and good afternoon or good morning, depending upon your time zone, and welcome to today's webcast, "A New Type Of Environmental Threat, Could Marketing Your Company As Green Put It At Risk?" The webcast is sponsored by Ernst & Young in conjunction with the ACC's Litigation Committee, and we're very pleased that the Environmental Health & Safety Committee is cosponsoring.

I'm Monica Palko. I will be your moderator today. I'm Associate Corporate Counsel for Litigation at BearingPoint, and the Webcast Chair of the Litigation Committee.

Before we get started, I'd like to highlight a few things. The materials for today's webcast are displayed at the left-hand side of your screen. That includes full speaker bios and an evaluation form.

We very much welcome your input, and we encourage you to complete the evaluation. Also, if by chance you have a question that we're unable to address during the webcast, you can pose it through the evaluation form to receive a response later.

We want for today's webcast to be as interactive as possible and, with that in mind, the speakers will identify themselves, at least the first few times they speak. If you have a question, and we certainly encourage questions, you can type it into the chat box that appears on the bottom left-hand side of your screen, and then click send. Please remember to click send.

Only today's presenters will be able to view your question, not everybody on the call, and the questions are completely anonymous. Even the presenters cannot see any name or any e-mail address. You can obviously choose to identify yourself and your question if you like, but otherwise we won't know. It helps if you keep your questions short. It can be a little bit tough to read through at a lengthy scenario on the webcast.

We'll also be asking some polling questions during the webcast, and I don't know if you're familiar with these, but these are an opportunity during the webcast in real-time for everybody to let us know a, b, c, or d, to come in on a poll, and we'll all be able to see the percentage response in real-time. Again, it will be completely anonymous. We won't have e-mail addresses or names.

So without further adieu I would like to introduce today's speakers, and I do encourage you to go to the left-hand side of your screen and read their full bios. So I'll just hit some highlights now.

Jack Holleran, Jack is a principal with Ernst & Young's Fraud Investigation and Dispute Services Practice, and he's based in Washington, D.C. He leads the Firm's Corporate Compliance Advisory Services Practice in the Americas. Jack advises chief compliance officers on compliance risk assessments and compliance program design, implementation, and enhancement.

Before joining Ernst & Young, Jack was the Chief Compliance Officer at Phillip Morris, where he led the effort to design and implement the Company's ethics and compliance program.

Brian Gilbert is an Executive Director at Ernst & Young, where he leads his Environment and Sustainability Practice, which is within the Fraud Investigation and Dispute Services Group. Brian has more than 25 years in experience in assessing, designing, managing, and improving environmental compliance systems. While he was in industry he managed corporate environmental compliance, as well as audit functions. He has an engineering degree and is a certified professional environmental auditor.

So, Brian, why don't you take it from here?

Brian Gilbert: Well, thank you, Monica. And, Jack, why don't you take it?

Jack Holleran: Great. Thank you, everyone, for joining today's webcast. We're delighted to have an opportunity to share some perspective with you on this very important issue.

I wanted to start by providing some context around the issues that we're going to be discussing. Environmental marketing is not traditionally limited to just green ads or glossies. In fact, these sorts of greenwashing issues, which Brian will describe in some more detail in a moment, manifest themselves in lots of different places. And so there's sort of a broad lens that we're casting upon this.

Clearly, these green claims are presented in traditional print and media advertising, but in addition you find both general and specific product claims related to consumer products, building design, for example. External reporting, whether you're talking about corporate sustainability reports or corporate responsibility reports, as well as financial reporting.

And then, finally, corporate communications including more traditional ones, such as press releases and recruiting brochures, but also such things as blogs and product placements, and sponsorships. So green marketing claims present themselves in a number of different places. Next slide, please.

That, of course, raises the question is there too much green? As these green claims have become more prevalent, they are starting to get more scrutiny from more stakeholders, including regulators, which we'll talk about shortly, as well as attorneys general and private litigants, as well as other company stakeholders.

Clearly, through all these different media more businesses are making claims, that either their products or their company or their facilities are green. But there has been, I would say it's fair to say that the nature and the extent of green claims that companies are making have outstripped the regulatory guidance, particularly from the Federal Trade Commission.

Now, many of the claims that are made may be considered just to be corporate speech and in some cases marketing puffery, if you will, which is the term of art for those of you who may be FTC practitioners. For those are not, puffery is considered to be exaggerations that consumers simply don't take seriously.

But there are cases in which consumers have begun to rely upon some of these marketing claims, which may or may not then be substantiated and this, in fact, has led to a rise in consumer backlash, sort of a loss of trust in companies and increases in both enforcement from a regulatory perspective and litigation.

And I guess the way that we are thinking about this, and we'll be talking about it for purposes of the webcast, is that all of these green claims and the evolutions and products and in buildings and in so forth really create a significant opportunity for companies to build their brands, both to build brand equity and to build brand loyalty with consumers.

But with that significant opportunity also comes significant consequences if you don't get it right. There may be enforcement consequences, litigation consequences, and perhaps most significantly reputational consequences.

Brian?

Brian Gilbert: Well, thanks, Jack. This is, again, Brian Gilbert, and good morning and good afternoon to some of you.

And building on what Jack was just saying, not now but sometime after the presentation, please after the presentation go to the Internet and go to one of the search engines and just type in your company name and the word green, and count how many hits you get. At a minimum, you'll probably get a couple dozen. If you're with a major corporation it could be literally in the thousands.

And so because the term green has been somewhat overused, it came into being from the environmentalists, the regulators have started taking notice, and the term greenwashing has entered the lexicon.

And so greenwashing is basically a term that's starting to be used more and more often, and it's not a good term. If someone says you're greenwashing, it's not a compliment, where being green is, greenwashing is not.

And basically it's seen as a negative term that basically indicates that you're misleading your stakeholders, either with unsubstantiated or irrelevant claims. And it's interesting to note the background of the term was kind of linked at one time to whitewashing, but apparently the first use of it was apparently noted in the hotel industry. And many of us have stayed in hotels and noticed those little signs that say, "please reuse your towel."

Well, allegedly, an author was looking into that and said that in many cases there's really no environmental activity going on, it's purely a cost saving. And so he wrote an article and coined the phrase greenwashing.

And the key point is that while it was originally used just by environmental activists, it's now moved more mainstream and is being used by the regulators, as well. And so green is good, greenwashing is bad. What about allegations of greenwashing?

Well, there's been a couple of high profile incidents just in the last year or so, and it's rather unfortunate, because I attended another session on copyright law and that prohibited me from actually using the images in this presentation, but the links are there to some of the cases and later on, again not now please, it wouldn't be too difficult to find the actual image of the ad.

And what's interesting about them is that if you were to look at the ads you would not probably see anything wrong with them. The shell ad, which goes under the banner don't throw anything away, basically shows the profile, a silhouette of a oil refinery with flowers coming from the smokestack.

And the message underneath was that Shell Oil was taking the carbon off gas and also some of the sulfur from the off gas, and they were using it either to put into concrete or into growing flowers. And so, hence, the ad with the flowers coming out of the smokestack.

An activist group took them before some regulatory bodies, this was overseas, and basically said that even though, yes, that was true, they were doing that, it wasn't enough. And so, unfortunately for Shell in that case they were required to pull the ad.

Similar with Lexus, this one was high performance, low emission, zero guilt. Basically, it shows a picture of one of their hybrid cars, and in the case of this ad in the United Kingdom they required it to be pulled because they didn't like the expression zero guilt because they said driving a hybrid car shouldn't alleviate you of all guilt.

So kind of interesting perspective that's starting to occur, and so then the question comes up is this just a couple of isolated incidences that are occurring overseas in Europe and Australia and countries that are a little more active.

Well, an environmental marketing company did a survey, I believe it was late last year or early – late last year. And basically they surveyed over a thousand products in the big box stores, and those products had a variety of claims associated with them.

And basically what they found out was that the bulk of the environmental claims that were being made on those products were either misleading, contained irrelevant information, or were demonstrably false.

And so for case in point, a couple of examples would be products that would list the energy star label when the EPA does not offer energy star for all products, products that were labeled as 100% recycled paper, and the product was actually made out of plastic. So a variety of incidents like that where they indicated that potentially the environmental claim associated with the product was misleading.

Now, since this was an independent company and we're not party to their survey methodology, you could indicate that maybe was a little over aggressive survey methodology to find fault.

But if you look at the results and then you factor in, let's say, it was 50% aggressive or 75% aggressive, well, you still have a relatively large number of product claims that are conceivably false. And so then you fast forward to a recent article in the National Law Journal, which is basically saying there will be more green false advertising claims abroad.

So you look at kind of what's occurring internationally. We'll get into the regs and some enforcement here in the U.S. in a few minutes. It's starting to move towards the U.S., and the reason it's gotten everyone's attention is because as companies overuse the term green and people start relying on that, the probability of litigation and claims increases.

So, with that, Monica, I'll turn it over to you for the first phone question.

Monica Palko: Great. This is a bit of a cutting edge issue, and we're interested in how familiar everyone who has joined is with the subject matter, and that helps us know how to emphasize and focus the rest of the presentation.

So if you can just click on the boxes that appear on your screen, we'll go ahead and get agile understanding of how familiar everyone is with greenwashing? Well, I can't help but note no one is clicking very familiar.

Brian Gilbert: Well, I guess that's a good thing considering the way the question is.

Monica Palko: All right. It looks like most people are coming in as somewhat familiar and periodically monitoring for requirements and trends. But, ah, here we go – but it's very similar to those who would actually say that they're unfamiliar and just now learning about greenwashing and these types of claims.

Brian Gilbert: OK. Well, hopefully, we'll be able to go through today and bring up some additional information to help you all out, and then we'll close it with some activities, possible considerations, to consider in your own organizations, as well.

And, again, going back to greenwashing, for those that are still a little bit unfamiliar with the term, basically greenwashing is a term used to describe companies that make green claims, environmental substantiations that are not supported or considered irrelevant.

And so, for example, you take a company that says they're the most environmentally friendly company on earth, but then they have high EPA fines, noncompliance with environmental regulations, investors, stakeholders would perceive that as greenwashing, that basically you're saying you're green but your actions are not in synch with your external message.

So basically not a good term. Being green is good, but trying to say you're green when your actions don't meet your message, not good. So we'll go ahead here, move to the next one.

When we talk to companies the one – there's no company that we talk to that wants to be out of compliance, obviously. And so where it typically breaks down is the fact that there's not a thorough understanding of the compliance framework that regulates the activity.

And so in the case of most companies, when we talk to them, if you talk to them about clean water, clean air, and even major environmental regulations, they have a fairly good handle on those. Those have been out for awhile, they're fairly well defined.

When we talk about marketing, we typically run into, if you talk to the environmental people, well, their comment will be, well, there's really nothing in the EPA guidelines or EPA regulations that regulate this.

And so a lot of companies have kind of come to the conclusion, well, since there are not a lot of regulations on it, then they're at will under corporate speech to kind of say what they think is appropriate for their company.

Well, based on the number of green claims that companies are making, the FTC took notice, and basically what the FTC said was, and this goes back a number of years ago, it was they said that may be true that the EPA doesn't have significant environmental regulations, however, you just can't make this stuff up. There are Federal Trade Commission requirements that govern the communication that you have.

And in some cases they've been considered pretty broad. We'll talk a lot about environmental print media, but this also applies to organizations that will issue corporate sustainability reports, product claims. You know Jack mentioned building claims. There's some litigation in that area right now on green building claims.

So we, for the simplicity of this presentation, a lot of times we'll kind of refer to product, but I want everyone to remember that it's broader than just a specific product.

So basically what the FTC said was, "Yes, the EPA doesn't have a lot of specific regulations, some but not a lot, however, we can regulate this under Section 5 of the FTC Act, specifically in the sections that talk about unfair and deceptive practices." Those were the key words that the FTC focused in on.

And so then the FTC is – most acts are codified in regulations. The FTC came out in 16 CFR 260 and they issued guidelines. Now, since they're technically guidelines it means that they are voluntary. However, the FTC has indicated that they will use those as the basis for corrective action.

And similar to the print ads I wanted to show you on the other thing, I was going to show images of the guides, because they are available on the FTC's Web site. There's a big green book, and there's a couple other documents they have but I wasn't allowed to provide that in this presentation. So, again, afterwards, I would encourage you all to go to the FTC Web site and download a copy of the book, and we'll talk more about that a little bit later on.

And so what do these guides contain? Well, they're somewhat interesting because they take a look at product claims, and let's use some simple ones, like biodegradable and recyclable, and they give those claims kind of, they look at them from the meaning that a consumer would give to them, not technical, not necessarily the technical or scientific definition of the term.

And so the guidelines are basically geared to make sure that false claims aren't made. Within the guide, they split it into two major categories. One is kind of the specific claims that I talked about, and they have a list, a key list of words, and for each of those they provide the criteria that you would need to follow in order to be able to make the claim.

And in this case let's say, for example, biodegradable. They realize, however, that corporations are making other claims that necessarily wouldn't fit in that key word list, they're broader environmental claim.

And so what they said is for those broader general claims that's fine to go ahead and make those claims, but you're required to have substantiation for the claim that you're making.

And so we're a financial accounting firm, and obviously we get involved from an environmental perspective on a lot of environmental, review of the environmental liabilities on financial statements. And so it would be like us going into a company and saying, "Do you have any environmental remediation or do you have any environmental liability"? And if they were to rep to us, "No, we do not," well, then the next question we would ask is, "Well, how can you substantiate that claim"?

So using that analogy I mean on a financial setting, the FTC is kind of considering the same thing, it's basically you know it's fine to be able to make the claim, make sure you can substantiate it, and it's not necessarily as technical or detailed as to how people would interpret it, and so you have to be cognizant of potential misunderstandings.

Again, we kind of talked about the word substantiation, because that is key. It should be based on scientific evidence. What you should consider when you hear the term substantiation, and we'll get into it a little bit later when we talk about enforcement in litigation, is that if your company was to undergo enforcement action or undergo a claim, potentially even from another company, how would you substantiate your assertion that you were making with respect to your environmental activity?

So very important that you're able to substantiate and then also very important that document because it's one thing to have substantiated, but if it's not well documented and you can't find that documentation if you're challenged then you potentially have a problem. So the thing that you need to focus on then when you substantiate is do you have the appropriate criteria for that substantiation and the appropriate measures?

One of the things that the FTC has looked at is specificity, and when a claim is being made what is actually the claim referring to. Is it the product, is it packaging, or is it a component within the product. And so if you're going to make a claim they've said you need to be very specific as to what that claim is.

And what are becoming more ubiquitous right now are kind of environmental fields of approval, environmental certifications. As this area is emerging, companies are coming out and offering clients an opportunity to be certified to say that you meet our criteria, and, therefore, your product or your assertion is environmentally friendly.

And what the FTC said is that's fine, but since some of these are so kind of ambiguous and they're not widely known that you should basically accompany that with the information that explains the criteria for that certification.

One of the things that's occurring right now with respect to the FTC is, again, as we talked about earlier, as more and more companies incorporate green into advertising, into product literature, into you name it, it's getting in there, they decided that they needed to accelerate their review of this area.

And so originally they were scheduled not to even begin hearings and looking into this until 2009. However, they decided to start early and, in fact, they've already completed three hearings starting in '08.

One of the ones that they started taking a look at first was carbon offsets, renewable energy certificates. And the reason for that is obviously is that carbon greenhouse gas is becoming big in the United States. As companies make claims for that it's important that that data be appropriate.

One of the things that's of interest, our practice does a lot of work with greenhouse gas overseas because European countries are regulated by Kyoto and there's a lot more carbon trading going on overseas than in the U.S. right now.

And we've talked to some of the carbon brokers, and what they've said is that right now that the reason that if you look at Reggie, the Regional Greenhouse Gas Initiative, that just started the first auction of carbon credits in the United States.

One of the things that we're being told by some companies is the reason that the U.S. carbon trades at a discount compared to overseas is because of the lack of reliability on the claims and the insurance and certification of that.

Jack Holleran: Hey, Brian?

Brian Gilbert: Yes.

Jack Holleran: This is Jack. I just wanted to ask a quick question about the FTC guide updates. The reading that I did in getting ready for the webcast suggested strongly that there had been a significant wave of FTC enforcement after the guides were initially published back in the 1990s, but that there had been sort of a period of dormancy of FTC enforcement in this area over the past few years.

Do you think it's a fair observation that in light of the FTC accelerating the updating and the refreshing of the guides that that not only reflects a recognition that the marketing claims in this arena may have outstripped the old guidance, that is it wasn't sort of keeping pace, but that the FTC also may be preparing for additional enforcement?

Brian Gilbert: Yes, I mean basically the rumor on the street right now with the FTC is that next year they will update the guides, they will reissue them, and then what they'll be looking for is a high profile, a couple of high profile cases to kind of make their mark.

To Jack's point, we'll have a slide on it a little bit later, if you look at it, in the early '90s when this came out there was a period where the FTC took heavy enforcement action. Over the last about year 2000 it's kind of died down. Voluntary enforcement has picked up. And now in terms of a pendulum it's looking to swing back the other way.

So we definitely see that FTC action will most likely pick up next year, but as we go through this you'll see that there are other drivers, as well. And then to kind of go through some of these, because I know the regulatory framework can be a little dry for some of you.

One of the areas that the FTC also said to take a look at was (Lanamac). Typically that only applies to trademark infringement, but they've actually noted one or two cases where they've applied it to litigation between companies with respect to green claims, because the (Lanamac) also applies to false advertising claims.

We talked a little bit about the EPA early on, and there's not a lot that the EPA, but one point to recognize is that the FTC, when they put these guides together they didn't do them in complete isolation.

In fact, I believe it was the former assistant general counsel for the EPA that actually took the lead while she was at the FTC in helping to draft a lot of these guides, so they do have technical input.

One of the regs, though, that typically comes up that we see some companies not as current on, as I said earlier on the environmental side, clean water, clean air, is the FIFRA Act, and within FIFRA there are very specific claims regulating how you market a product.

And FIFRA, while most people think it's the regulation that applies to kind of rat poison and stuff, it also applies to more and more commercial products, as antimicrobials become common, and hand sanitizer, et cetera, FIFRA regulates that. So there's very specific requirements in terms of using words like natural, naturally, harmless, and there's only a few of them on the slide. There's actually a lot more.

We get into then some of the other compliance framework, and one of the things you shouldn't forget about is state regs and also international. For example, the State of California has very specific regs. If you look at Section – well, there's Section (175580) of their business and professions code. It basically says that any company making certain environmental claims needs to maintain documentation that supports those assertions.

So when you're setting up your compliance framework, it's important to consider a lot of the regulatory. And then, as we talked about earlier, there are also, especially if you're a multinational company that there are international requirements, as well.

To Jack's point earlier that it's kind of like a pendulum, the regulatory oversight probably in the last eight years, you wouldn't get the FTC to admit it now, but in this area has kind of died down.

However, what's happened is the consumer – I'm sorry, the Council of Better Business Bureaus through their National Advertising Review Council has started taking a look at ads. And it's kind of interesting, I mean their whole goal is basically they want to minimize the government involvement. And so they want to minimize the government taking enforcement action, and they'll self police marketing among its members. Oops, went back, sorry about that.

Jack Holleran: Brian, we've had a couple of questions to come in.

Brian Gilbert: OK.

Jack Holleran: Monica, I don't know if you wanted to walk us through those?

Monica Palko: Sure, I'm happy to. I didn't know if you wanted to wait for the end or take them intermittently, so I'm delighted to do that.

A question is coming in, we're talking a lot about the end products, and what about non-consumer products? Are raw materials, manufacturing equipment sellers, are those being regulated, as well, in terms of their assertions about what's green or what's not?

Brian Gilbert: Yes. I mean as I said earlier, and Jack had kind of teed up in the earlier slide, we're talking about products just because it's, for the sake of 45 minutes, 50 minutes, it's kind of easy to talk about, but actually there was actually a California Supreme Court case that went into assertions being made in external communication in reporting.

And basically a company was reporting that their – this is an older case, but that their factories were sustainable, environmentally friendly. They were making claims like that in print reporting, not associated with any specific product. And they were actually challenged under the corporate speech, commercial speech doctrine.

So it depends on the claim that's being made, but, yes, it applies to anything that someone could potentially rely on.

Jack Holleran: But I would – this is Jack. I would add, I mean for those who supply raw materials to others but don't make claims, it's the manufacturer of the product, or the good, or the packaging that makes the claims.

Now, if you're a packaging manufacturer and you make claims about the packaging that then the ultimate manufacturer of the product who uses your packaging repeats those claims, then there may be some liability that may attach back there.

But I think it's important, we've been talking a lot about the legal and regulatory framework, and we're going to finish that quickly because there are some issues we need to make sure that we hit.

But I would say to think about it not just from the context of the guides and what the sort of regulatory landscape looks like, but it clearly if you're a manufacturer of equipment and you publish corporate sustainability or corporate responsibility report that talks about your environmental practices, then while regulation, a regulatory enforcement may not be a significant risk to you, you do have stakeholders who are going to be, who may be concerned about your operations, about your business, who may use claims that you make in your corporate responsibility reports, either to file some private litigation for civil action, to refer a matter into regulators or to become sort of a nongovernmental organization who goes after you on a reputation, and challenges your reputation for having a disconnect between your actual operations and your actual practices, and what you're claiming in your corporate responsibility report.

So it's not just the guides, while the guides are clearly important and that's really the focus there is on consumer products, I suppose they could be extended outward to suppliers of raw materials and to manufacturers of equipment, but there are also reputational consequences and potential litigation consequences to consider, as well.

Brian Gilbert: Yes, if the manufacturer of the equipment is making an environmental claim on it, then it applies.

Jack Holleran: Right.

Brian Gilbert: Then the opportunity for litigation exists when one party relies on it, and so initially this was considered commercial, I mean corporate speech, and companies argued under free speech doctrine that they could say what they wanted. And basically what started happening was there's been some cases where they said, "Well, no, it has to be substantiated especially if people are relying on it."

One of the last ones really on the framework, and basically all we were trying to tee-up is that there's a lot of things – people say there's nothing out there, but regulating this because the EPA doesn't have anything, and while the EPA has minor stuff there are other things that are out there.

One of the ones that we see is that more and more companies are signing up for voluntary associations, and that kind of links you in through promissory estoppels. If you say you're a member of this organization and you're going to comply with the tenets of it, well, then there's specific things that you have to comply with.

We've been in some companies where the voluntary commitments they've made to these associations are more onerous than some of the regulations in certain areas. So one of the ones that's come out recently is the International Council of Mining and Metals, for example, basically said, Jack was talking about external reporting, well they said if you're going to – we want you to issue an external report on what you're doing for the environment sustainability, but you'd better get it assured, as well. You just can't print it off as a green marketing piece.

So, therefore, it's kind of important to take into consideration the whole framework. And that kind of leads us to the next series of polling questions, Monica?

Monica Palko: Great. The next question is now that we've gone through this regulatory environment, is there more or less about the regulation that you would have expected?

Interesting, I guess it's coming in as about what everyone anticipated. And some others seem to be surprised that perhaps there's a lack of specific marketing, or not as much marketing guidance as we would have thought but a host of regulatory matters that do apply to the marketing.

Brian Gilbert: OK.

Monica Palko: Most people it seems about what they expected, though.

Brian Gilbert: OK.

Monica Palko: The next question is helpful. We found tremendous crossover appeal here, as we noted before. Not only is the Litigation Committee involved, but the Environmental Health and Safety Committee. And then in addition we found that marketing and communications departments were very interested. And it's partly because we all need to be working together.

But this question is who at your company is actually responsible for tracking the requirements that pertain to your environmental marketing, if you know?

And it looks like it's about equal between they're not formally tracked or the legal department would have that responsibility. Ah, not formally tracked is winning out. I think that if we do this presentation again a year from now we may see a shift between those that aren't formally tracked and those that have gone ahead and implemented some formal system at their company.

Brian Gilbert: OK. Well, we saw about 12% had their marketing department in it, but one interesting quote that Ernst & Young sponsored something called (Clean Tech), and you can look at our Web site and there's some survey information in different industries, pertaining to clean technology.

But one of the quotes that I thought was interesting that applied was from a VP at a public relations firm, and he basically said if you want to be taken seriously don't let your marketing department own green. And it kind of goes back to building trust and reputation. So thought it was kind of interesting.

One of our – we do work with – we source some work that the federal government had done, and they actually have a clip tape that they show their employees of all the interviews that have occurred over the years with corporate executives about the environment. And it's rather interesting, you had a lot of federal employees kind of rolling in the aisle, based on some of the assertions that were being made.

Looking at enforcement, we kind of touched on this already. In the '90s when this came out, the FTC took a lot, not as active in the last few years. However, we anticipate or the speculation is that the green guys will come out next year and that there'll be a couple high profile cases to kind of announce that the FTC is back.

The voluntary side, though, has been somewhat interesting, and a lot of this is there are the self-policing where the NAD, the National Advertising Division of the Better Business Council, will take a look at claims that companies have made. But then it also claims that other companies have challenged another company's assertions.

So, for example, Panasonic was challenged by Sony Electronics about the green claim it was making with its LCD TVs. Clorox was challenged on some of their household cleaning products by SC Johnson.

So in those cases what will happen is the NAD will come in as a voluntary agency and they'll take a look at the situation, and they'll make a decision as to whether or not the marketing claim needs to be adjusted. And so that information, if you're interested in seeing some of the claims, is also available on – the details and the specifics also available on the FTC Web site.

One of the other areas that we're seeing a lot more of is activist, and we started off with saying there was about 1,700 green claims and only one of them was right. Well, a lot of this has turned to – if you go to the Internet to a couple of sites like this, you'll see that activist organizations are getting very vocal in looking at company products and then scoring them in terms of the green claim.

I believe the middle one, the greenwash index, they actually show clips of companies' ads and then they let people comment on it and rate it. So somewhat interesting.

So in terms of enforcement, right now we would see it as more voluntary self policing. As the activists get more and the FTC is starting to ramp-up to speed in this, we see the pendulum probably starting to switch to more of a regulatory focus next year.

So, with that, I'll turn it back to you, Jack, and some of the litigation cases.

Jack Holleran: Monica, why don't we hit the other – a couple of questions that have come in before we turn to litigation?

Monica Palko: Excellent. One that's come in is whether we're aware of any specific regulations that apply to green buildings or to construction?

Brian Gilbert: Yes, there's the U.S. Green Building Council has the lead certification standards, and if you meet certain criteria then you are able to go for different status on the building so you can go for like bronze claim, silver, platinum status. And depending on the locale that you're in, you can potentially qualify for a tax credit.

So, for example, right now, in fact, actually Ernst & Young assisted one of the largest green building in the U.S., the casinos out in Vegas qualify for, if they meet certain criteria, can qualify for the lead certification, and then they get a tax incentive.

What we've seen is that some of the buildings that have been built, we've seen the first kind of crop of litigation starting to pop-up where a company, someone built a building and it actually didn't meet the lead criteria.

Jack Holleran: I would also just point, those who are listening in, I know that there's a lawyer out there, named (Chris Cheatham), who – with whom we have no affiliation, so this is not a plug, but in doing some research for today, there's a Web site. It's www.greenbuildinglawupdate.com, and there's a section on there that lists the codes and regulations that are out there, both at the federal level, the state level, and the city level. So that's an information resource that may be available to you, if that's a particular issue that's of concern to you.

Monica Palko: Great. And one more quick question, do you all have any insight as to when the revised green guides are expect to issue?

Brian Gilbert: In terms of a date, no. I mean we've heard kind of that it will occur next year. However, change in administration, we wouldn't expect that to drop off. In fact, we see some of the environmental priorities moving up. So we would anticipate last year – in terms of the quarter, I don't know that at this time.

Jack Holleran: Great. Well, let's turn quickly to some of the noteworthy cases in this area, and then move on and wrap-up with some practical considerations and some ideas that we have on what companies can do in order to make sure that these risks are appropriately identified and managed.

And really what we wanted to do was to demonstrate that there is a – there's a series of cases out there that represent sort of the wide spectrum of ways that these kinds of issues can manifest themselves.

And I'm not going to get into the facts that time doesn't permit us to get into the facts and the holdings and the procedural twists and turns of each of the cases, but just so that you have a general sense of the kinds of issues that are involved in each of the cases.

The Kivilinna case, for example, relates primarily to greenhouse gases, but there was an allegation by the plaintiff in that case of a false scientific debate. And Brian spoke earlier about the importance of having both substantiation for any green marketing claims that you may make, as well as the importance both from a federal level but also from a state level in documenting the substantiation.

That is what is the data upon which you rely in order to make the claim, so that you don't end up exposed to a claim that there was, in fact, no scientific debate or there was a false scientific debate that had been perpetrated, if you will, in order to justify the making of the claim. So all the requirements that we talked about around substantiation, documentation, or certainly in play with respect to that issue.

The second case, the Lexmark case, related primarily to copyright infringement related to a Lexmark chip that allowed its printer only to recognize Lexmark print cartridges. And there was an issue that arose in the context of that litigation that related to the truth or the falsity of the Lexmark advertising to consumers that all or most of their printer ink cartridges that were returned to Lexmark would be either remanufactured or recycled.

So the point is that if you're going to hold yourself out there as inviting consumers to return products in order to minimize the environmental footprint, just pay attention to the fact that there may be folks out there who are watching to make sure that there's consistency between your words and your actions.

The (Ramont Pure) case involved allegations against Nestle with respect to its Poland Spring water, that the water had not ever, in fact, been extracted from the actual Poland Spring in Maine, nor did it derive from, as is described I think on the labeling or was at the time, "some of the most pristine and protected sources, deep in the woods of Maine," which is the way it had been advertised. Now, that case was settled without acknowledgement.

But, and Brian had mentioned earlier a case that I think Sony had brought against Panasonic. So litigation is a way that companies can keep each other in check, and competitors can keep each other in check, as well. And so just be aware that your competitors are going to be watching closely.

I think that also underscores that marketing claims like this, particularly given consumer interest in the environment and in sustainability, that being able to make fairly and honestly to make green marketing claims, can be a source of competitive advantage. But I think this, I mentioned earlier on the significant opportunity that exists to build brand and to build equity and loyalty, but also the consequences if you don't get it right.

And so clearly your competitors are going to be looking, and if there's a concern that there may not be consistency between your words and your actions, your competitors are one of the stakeholders out there who may call you on that.

The Nikki case, (Caske) against Nikki, most of us will recall some of the difficult considerations or issues that Nikki had with respect to working conditions and human rights in its supply chain, and Nikki really sort of was at the center of a heated debate that went on for quite some time with respect to those issues.

And so to address, I think those concerns in that debate, Nikki launched a campaign that included newspaper advertisements, other public sort of forums, like letters to editors, correspondence with key stakeholders, including college and university presidents, with the goal in essence to try to demonstrate that it had taken steps to improve conditions for workers who were overseas. Now, sort of reassure customers that it was a company that was committed to doing the right thing, and deserved trust and loyalty.

Now, (Mark Caske), who was a critic of Nikki, objected to the campaign, and sued Nikki under (Califor's) Unfair Competition Law. And so that's the issue, there's a – I told you I wouldn't get into the procedural twists and turns, and I won't. But that was – that's sort of an interesting procedural case. It made it all the way up to the Supreme Court of the United States and involved the question of whether the campaign Nikki had engaged in was in effect truthful and, or was – whether there were issues with it that Caske had taken issue with.

And, lastly, we had gotten a question about green building codes and that sort of thing. The last case, the Southern Builders' case actually touches on and was one of the first green building lawsuits out there. So you'll be able to read more about that.

Let's go on to the next slide.

Monica Palko: And we have another polling question, so what would you say is the greatest risk to your program to maintain compliance with the marketing requirements?

Interesting, it seems as if controlling statements from various groups within the company who may not funnel their comments through the marketing and communications department may be the biggest risk that people are seeing here.

Jack Holleran: OK. Let's move on. The way that we think about this is that advertising and marketing of your products is a business process. But given everything that we've covered, obviously, green marketing is a compliance risk area. It's one that is the subject, it's important to regulators, it's important to other stakeholders, and that tends to be how emerging compliance requirements can actually become sort of front and center in the way you operate your business.

Putting out a corporate sustainability or a corporate responsibility report is also a business process. There are ways that those things work within your companies today. So really what we wanted to close with is how you can integrate compliance risk management into the business process to really address a lot of the data that we just got in that last polling question, so that there's some centralized accountability for marketing, for doing the kinds of reviews that we have been talking about either internally or externally for documentation and record keeping.

So we wanted to close with a couple of practical considerations, and the first really starts with either taking an assessment or an inventory, assessing currently how environmental marketing requirements are tracked within your company and who has responsibility for them.

Presumably, the marketing department is one of the key stakeholders there. If you're in an organization now where people outside of marketing have the ability to publish advertising then you probably have some process disconnects.

So we're going to assume for the purposes of this discussion that marketing has a lead role in any marketing or advertising campaign, but obviously if you broaden the focus, though, to include corporate sustainability reports or external communications that may operate a blog, if you will, you can see that there are lots of different communication media where environmental issues may come up.

And so I think having some assessment of where those different places are within your organization right now, at least has – gives you the information you need to have a clearer sense of where those risks are going to come up.

Secondly, taking an inventory of the claims that you make and the reports and the certifications and so on is important because that'll also help to identify where you have issues, and that can in turn enable you to figure out how efficiently to assess the risks and to manage the risks.

Now, the documentation that substantiates the claims that are being made obviously needs to be maintained as part of the process, so there needs to be somebody in the marketing department or somebody along the way who has, as part of their responsibility, not only the gathering of the data to substantiate the claims, but also the keeping of the records so that if there ever is a challenge by the FTC or another regulator.

In California, for example, any citizen can ask to see under California's law, any citizen can ask to see the documentation for a green claim, so there may be private citizens who knock on the door one day wanting to see your claims. You need to have that sort of, that documentation at the ready for purposes of being able to substantiate what you did and what you said.

Thirdly, take a look at your existing processes and your procedures and the controls that you have in place, and then assess whether they would identify and eliminate gaps that you identified in the first couple of steps, and then make improvements.

I mean one way to do this and really to test your readiness and to test your capability is either to put a team together internally to design a mock audit or a mock assessment, or it's obviously something that we help companies with but we're not here to pitch our services.

But having somebody to come in and act as though, and sort of test your readiness, act as thought it were an actual FTC inspector who comes in and wants to see your documentation for a certain claim. Put yourself through that process in order to test how ready you are.

And the same way that you would, that we all have fire drills that get conducted in our buildings from time to time, or some of you may work in places where you do a special situation readiness exercise to see how you handle that. That I think gives you pretty good insight into how things are working.

And then, lastly, develop or improve the monitoring program that you have in place and really assess the extent to which your compliance program operates in such a way to make sure that these compliance risks are identified in your marketing process or in your corporate responsibility reporting process, and that those risks are appropriately identified and managed.

Go to the next slide, please. So thinking about this from the perspective of how you manage your compliance risk, this is just a picture that says hopefully close to a thousand words, identify where the risks are by conducting a compliance risk assessment. Where in your business do these green marketing risks arise.

Secondly, conduct an assessment of the compliance program, controls that you have in place. That is whose got accountability for managing these risks? What are they doing? Is it working, and then how do you know that? And that's really the way that we talk with chief compliance officers.

The five key questions you need to have an answer to are what are our most significant risks, who owns them, what are they doing, is it working, and how do we know? And so really applying those five questions to green marketing claims is what this is designed to illustrate.

So understand the risks, evaluate your program's effectiveness in managing those risks, and then look for ways continuously to improve and monitor. Be mindful, though, that the business is going to continue to change underneath you and around you. And there are you know the marketing folks, anybody who watches Mad Men knows this, the marketing folks are always going to be looking for new and different ideas, and ways to differentiate products and buildings and so on.

So make sure from a process perspective that your compliance program is designed to keep pace and to be integrated into that process.

I think we have one more polling question, Monica?

Monica Palko: Yes. Our final polling question, this is where we all come clean, so to speak – how would you rate the program in place at your company to make sure that environmental marketing requirements are being met?

Well, it looks like most of us think we could do better.

Great. And I actually think we can move into the Q&A. We probably have time for one last question.

Here's one – when advertisements are challenged does it lead to an end to the program or just pulling the ad? Companies promote the program in order to make money and so the question is do environmental marketing claims and challenges sometimes lead to the end of these programs?

Jack Holleran: I'm not sure I understand the question, Monica. Lead to the end of the – sort of the product offering, itself, or the advertising program?

Monica Palko: That is the question. For example, a company is trying to make money by saying, "Hey, we're green in an X, Y, Z way." And so they advertise that to everybody. If they have to pull the ad do they quit planting trees and flowers and the like, or do they usually just change the ad?

Jack Holleran: Brian?

Brian Gilbert: A couple of things. I guess from a liability standpoint you're probably you know you could get a roomful of lawyers which we have, and argue about this. But if you've made a claim, you've withdrawn the claim, however you probably have historic rights to go after it.

On companies, like one of the ones that we didn't go through, with the (Saw Bal), where they made a claim that if you buy a saw they would plant 17 trees and that would offset the emissions, well, when they looked at it they said that the claim was actually not accurate because that would only offset one year. So they pulled the ad, and then (Saw Bal) had to enter into a program where they then compensated by having to go in and pay fines and then plant additional trees for the cars that they had sold.

So a couple of different ways you can look at it is usually the threshold is whether or not someone has relied on it or not, and if they can prove causation and all.

Monica Palko: OK. So in that case they stopped the program. In the future they didn't keep planting even 17 trees for just the first year that the cars were – when they were purchased?

Brian Gilbert: Well, actually what they did was they said they – yes, they said they would plant trees to offset, but they only did it for one year. And in reality the only way you could offset it, if you did it for every year that the typical life of a car was on the road.

So basically the ad was pulled, and then the – in this case it was the Australian regulatory body came in and said then to compensate for that you have to go plant the trees, the additional trees. If that makes sense?

Monica Palko: Right, right. Well, I think we're about out of time, but I would like to refer everyone to what is slide 35. And Ernst & Young has some excellent resources, if you would like to continue to – the research in this area.

And also I want to remind everybody about the evaluation sheet, if we didn't get to your question or if you would like to pose it to Ernst & Young directly, please put it in the evaluation sheet, and we encourage you to complete the evaluation regardless of whether you have a question.

Also, if you'd like to review the webcast, it will be posted in a few hours, and then it will be available for about a year. And so that remains as a resource here for about the next year.

So this concludes today's webcast, and you can now disconnect.

END