



# PRODUCT REGULATORY NEWS

## Product Regulatory Team

**Nicole Finitzo**

**Lake Forest**  
847.295.4308

[nfinitzo@schiffhardin.com](mailto:nfinitzo@schiffhardin.com)

**Randolph M. Perkins**

**Lake Forest**  
847.295.4323

[rperkins@schiffhardin.com](mailto:rperkins@schiffhardin.com)

**Daniel J. Deeb**

**Chicago**

312.258.5532

[ddeeb@schiffhardin.com](mailto:ddeeb@schiffhardin.com)

**Mary Ann Mullin**

**Lake Forest**  
847.295.4318

[mmullin@schiffhardin.com](mailto:mmullin@schiffhardin.com)

**Nathan A. Engel**

**Lake Forest**  
847.295.4313

[nengel@schiffhardin.com](mailto:nengel@schiffhardin.com)

**Kathryn McCollough Long**

**Lake Forest**  
847.295.4324

[klong@schiffhardin.com](mailto:klong@schiffhardin.com)

**Charlene Q. Kalebic**

**Lake Forest**  
847.295.43353

[ckalebic@schiffhardin.com](mailto:ckalebic@schiffhardin.com)

**Henry Lee Mann**

**New York**

212.745.9544

[hmann@schiffhardin.com](mailto:hmann@schiffhardin.com)

Government regulation and enforcement of consumer and industrial products, both domestically and internationally, is a constantly evolving arena. Staying current on the latest guidelines can be challenging for corporations, but compliance is essential. Schiff Hardin's Product Regulatory Team has extensive expertise in counseling clients on the requirements affecting all stages of a product's life cycle. We are pleased to have this opportunity to share our knowledge and insight into some of the latest developments affecting product regulation and hope you will find the contents of this newsletter informative and helpful.

## States and Local Governments Take the Lead in Setting Product Content Restrictions

by Kathryn McCollough Long

Product content restrictions abound in the United States. For example, regulations limit the volatile organic compound (VOC) concentration of paints, adhesives, and a wide variety of "consumer products"—ranging from floor wax to underarm deodorant. Among the panoply of other restrictions, regulations limit the mercury content of batteries, the lead content of plumbing fixtures, and the bisphenol-A (BPA) content of baby bottles, formula cans and cash register receipt paper. Most of these strictures share one thing in common: they typically have been promulgated by state governments rather than at the federal level. States and local governments are clearly taking the lead in setting product content limits and are also the frontrunners in implementing a host of other regulations (a.k.a. "product stewardship" requirements) designed to protect the environment from lead, mercury and other substances that have been incorporated into products.<sup>1</sup> While it is true that U.S. EPA has set some product content restrictions (e.g., VOC content limits for consumer products), those content limits typically only apply to the manufacture and import (as opposed to the sale) of products and are generally not as restrictive as the limits set by states and local governments. State and local regulatory authorities, such as the California Air Resources Board (CARB) and the South Coast Air Quality Management District (SCAQMD), which has jurisdiction over the Los Angeles metropolitan area, have generally adopted much more restrictive standards and have recently tended to be more active

<sup>1</sup> One notable exception to this rule is that U.S. EPA occupies the field in the regulation of pesticide products, with state regulations generally piggybacking on the federal standards.

The fact that it is the states—and not the federal government—that adopt and enforce most product regulations makes compliance considerably more difficult.

than U.S. EPA in bringing enforcement actions against entities that violate product regulations. Moreover, state and local regulations are not without teeth. For instance, regulators can and have sought penalties of up to \$30 million for violations of SCAQMD Rule 1113, which sets limits on the VOC content of paint and coating products. Thus, state and local restrictions are of tremendous significance to the regulated community.

The fact that it is the states—and not the federal government—that adopt and enforce most product regulations makes compliance considerably more difficult. This is especially the case for product manufacturers, distributors and large retailers. Lacking a single, uniform regulatory scheme, must a manufacturer make fifty different versions of the same product in order to accommodate each state's unique restrictions? From a commercial perspective, shouldn't retailers with locations in multiple states (or those which make internet-based sales to customers located in multiple states) be able to offer the same products to customers across the country? A number of states have attempted to alleviate this problem by adopting model rules set by national or regional organizations, such as the Ozone Transport Commission. However, so-called uniform model rules have not proved to be a panacea. Unfortunately, states rarely adopt model rules verbatim. Often, a state will add or omit an exemption, change the definition of a key term, or otherwise alter the text of a model rule—whether in response to comments received from an interested party or as the result of an apparent drafting error.

A practical solution to the “too many cooks in the kitchen” problem consists of two main steps. When taking this approach, a seller should first identify the jurisdiction with the most stringent requirements and apply those requirements to its operations nationally. Alternatively, companies can attempt to identify a “common denominator,” design and sell products that comply with those standards where applicable, and block sales of products in more restrictive jurisdictions. However, the tasks of identifying the most restrictive jurisdiction or a common set of factors, in each case on an ongoing basis, are not simple. For example, while CARB and SCAQMD are both known for setting very aggressive and stringent requirements in California, those bodies only have authority over products that emit contaminants to the air. Other jurisdictions, like Connecticut and its ban on the sale of BPA-containing receipt paper, are on the cutting edge in setting other types of product content restrictions. Thus, the identification process may need to be applied on a product by product basis. The second step is to remain vigilant for regulatory changes—both in the requirements imposed by the jurisdiction initially serving as the benchmark and in other jurisdictions, which may subsequently vault into the position of setting the most restrictive standard. Manufacturers and retailers are left with the difficult job of trying to predict when and where the next new product regulation will pop up. Consequently, given the current regulatory climate and the complex maze of restrictions, it is essential for many manufacturers, distributors and retailers to invest in sophisticated compliance programs.

---

## Federal Agencies Must Meet Sustainability Goals in 95 Percent of Procurement Contract Actions

by Nathan A. Engel

---

On May 31, 2011, the Department of Defense, the General Services Administration and NASA published significant interim regulations (located in the Federal Acquisition Regulations, Title 48 of the Code of Federal Regulations). These new rules codify the environmental and sustainability goals and requirements applicable to government procurement actions set out in an October 5, 2009 Executive Order (E.O. 13514) and a January 24, 2007 Executive Order (E.O. 13423). These regulations are intended to bolster various programs, policies and procedures to support the federal government's goals of protecting the environment and fostering markets for sustainable technologies, products and services. For the reasons noted later in this article, these regulations will affect the procurement practices of not only federal agencies but also in many cases those of private companies that do business, directly or indirectly, with the U.S. government.

Among other things, the May 31 regulations require that federal agencies advance the cause of sustainable acquisition by ensuring that 95 percent of new contract actions qualify as sustainable. A contract action is defined in the regulations to mean "any oral or written action that results in the purchase, rent, or lease of supplies or equipment, services, or construction ...." The requirements cover not only products to be delivered to the government, but also products acquired by the contractor for use in performing services at a federally-controlled facility. These requirements are not subject to a low value dollar threshold, but contracts for weapons systems or to be performed outside the United States are not subject to the requirement. Contract actions meet this requirement if they are one or more of the following:

- Energy Efficient (i.e., for the types of products eligible for Energy Star designation or Federal Energy Management Program (FEMP) designation)
- Water Efficient
- Bio-based
- Environmentally Preferable (e.g., Electronic Product Environmental Assessment Tool (EPEAT) registered or non-toxic or consisting of less toxic alternatives)
- Non-ozone depleting
- Made with recovered materials.

Specific requirements and procurement preferences have been established within the Federal Acquisition Regulations (FAR) for each of the sustainability goals listed above. Each of these requirements is briefly outlined below.

The energy efficiency standards apply to purchases of energy-consuming

...these regulations will affect the procurement practices of not only federal agencies but also in many cases those of private companies that do business, directly or indirectly, with the U.S. government.

products listed in the Energy Star program or FEMP. Among other things, products that consume power in a standby mode are eligible if they are listed on FEMP's Low Standby Power Devices Product listing. Information about the Energy Star program is available at [www.energystar.gov/products](http://www.energystar.gov/products) and information about FEMP may be accessed at [www1.eere.energy.gov/femp/procurement/eep\\_requirements.html](http://www1.eere.energy.gov/femp/procurement/eep_requirements.html).

For purposes of meeting the water efficiency standards, federal agencies are directed to reduce potable water consumption intensity by using low-flow fixtures and efficient cooling towers.

Bio-based products are commercial or industrial products other than food that are composed in whole, or in significant part, of biological products, renewable agricultural materials (including plant, animal, and marine materials) or forestry materials. When acquiring a bio-based product, federal agencies are directed to ensure that the product is composed of the highest practicable percentage of bio-based material or meets the U.S. Department of Agriculture (USDA) minimum bio-based content standards. Certain products are also eligible for acquisition preference if they are certified by the USDA as meeting the bio-based standards.

The environmentally preferable requirements mandate that 95 percent of the electronic products purchased by the government meet the EPEAT standard. Purchases of personal computer products, which is a term referring to desktop computers, notebook computers, computer monitors and peripheral equipment such as the keyboard, mouse and power cords, must meet the IEEE 1680 standard. The IEEE 1680 standard was issued by the Institute of Electrical and Electronics Engineers on April 28, 2006.

Federal agencies are directed to substitute safe alternatives to ozone-depleting substances to the maximum extent practicable.

Going forward, federal agencies purchasing products that contain recovered materials are directed to ensure that the products are composed of the highest percent of recovered materials practicable or that they meet the minimum content standards in accordance with the Environmental Protection Agency's Recovered Materials Advisory Notices. The new rules will need to be taken into account by many private companies that directly contract with the U.S. government or which do business with government contractors. This is the case because in order for 95 percent of their contracts to meet the sustainability requirements, Federal agencies can be expected to often impose these requirements on contractors either by the insertion of an FAR contracting clause in a contract (whether by setting forth the requirement in full or, as is commonly done but not always recognized by private companies, incorporating an FAR clause by reference into a contract). Prime contractors and higher tier contractors in turn often "flow down" these types of requirements to subcontractors and other companies in the stream of commerce by including or incorporating the requirements by reference into purchase orders or other agreements with suppliers and service providers. Accordingly, the

Going forward, federal agencies purchasing products that contain recovered materials are directed to ensure that the products are composed of the highest percent of recovered materials practicable or that they meet the minimum content standards in accordance with the Environmental Protection Agency's Recovered Materials Advisory Notices.

promulgation of these new rules makes it important for private companies to be cognizant of the requirements and to take steps to determine whether any of these requirements is applicable to a specific contract or subcontract, thus making it even more important for purchase orders and other contracts relating directly or indirectly to government procurements to be carefully reviewed.

## How (and How Not) to Sell “Green” Products

by Mary Ann Mullin

In 2010 and 2011, there has been an explosion in enforcement against manufacturers for allegedly making false claims that their products are “green.” Aggressive action has been taken by the Federal Trade Commission (“FTC”), the Environmental Protection Agency (“EPA”), and the Department of Energy (“DOE”). Now the Food and Drug Administration (“FDA”) has signaled it will get into the act. State enforcement and class action lawsuits have also targeted misleading green claims. This article highlights noteworthy recent enforcement activity and offers practical advice for staying out of the line of fire.

### Federal Trade Commission

The FTC has been pressing the hardest. Although the FTC has had guidelines in place since 1992 for evaluating when a claim that a product is green (e.g., “eco-friendly,” “biodegradable,” “environmentally friendly,” “energy efficient,” etc.) is false or misleading, it is only in the last couple of years that the agency has flexed its enforcement muscle against companies making these claims. The FTC has taken the position that the claims are false unless there is convincing scientific support to back up the claims. Recent actions have included a proceeding against a manufacturer and retailer of paper plates who claimed that the plates were biodegradable. Despite evidence that the paper plates could under certain circumstances biodegrade over time, the FTC argued that the claim was false because the majority of household waste is disposed in landfills, incinerators or recycled, none of which allow for biodegradation to occur. The FTC also levied hefty fines against clothing manufacturers who claimed their clothing was made of bamboo fibers, when the primary ingredient was rayon. FTC settlements are typically characterized by six figure fines and onerous consent decrees requiring annual detailed compliance reporting for a decade or more.

FTC enforcement, as well as fines, tends to be more aggressive if the target company has made a representation that the company is green or uses environmentally friendly manufacturing processes. When the FTC went after manufacturers and retailers of clothing and textile products, it piled on extra violations and penalties for the companies that claimed their manufacturing processes were “environmentally friendly.” FTC took the position that because the companies’ manufacturing facilities released hazardous air pollutants, the



The FTC has taken the position that the claims are false unless there is convincing scientific support to back up the claims.

companies' manufacturing process could not be touted as environmentally friendly even though the facilities may be environmentally friendly in other ways.

### **Environmental Protection Agency**

The EPA has targeted companies that claim their products are anti-microbial, anti-fungal or inhibit germs. In the last couple of years, the EPA has initiated enforcement actions against a wide range of manufacturers, including manufacturers of computer products, clothing, light switches, faucets, cleaning products and headphones. Recently, the EPA has begun targeting retailers who sell these products. The EPA takes the position that there must be adequate support for these claims and the products must be registered as a pesticide with the EPA. Manufacturers settling with the EPA have paid fines of over \$500,000 and agreed to remove claims from labels and promotional materials and to notify all retailers and distributors to remove anti-microbial claims on labels.

### **Department of Energy**

On the basis of an initiative announced in 2009, the DOE has begun aggressive enforcement of energy efficiency standards for appliances and plumbing fixtures, including standards for the conservation of both electricity and water. The DOE has targeted manufacturers who fail to submit the required certifications that their products meet minimum standards. In addition to paying fines, some manufacturers settling with the DOE are also required to notify affected customers that the product exceeds standards and conduct on-site repairs of non-compliant products.

### **Food and Drug Administration**

Hand sanitizers and similar products that purport to have anti-microbial properties and are intended to be used on humans are considered to be drugs and are regulated by the FDA under the Federal Food, Drug and Cosmetics Act (the "FDCA"). The FDCA prohibits the introduction of any drug into interstate commerce if the drug has not been approved by the FDA.

On April 18, 2011, the FDA issued warning letters to four companies that manufacture over-the-counter hand sanitizers or distribute over-the-counter hand sanitizers under their own private label. The affected products all carry antimicrobial claims on their product labels, including claims that the products prevent MRSA (methicillin-resistant *Staphylococcus aureus*) infections, but have not been reviewed or approved by the FDA. In some cases, the FDA also determined that the products were misbranded.

### **Consumers Challenge "Green" Claims**

On June 16, 2011, the Center for Environmental Health, a non-profit corporation, brought a lawsuit in California state court against 25 manufacturers

Hand sanitizers and similar products that purport to have anti-microbial properties and are intended to be used on humans are considered to be drugs and are regulated by the FDA under the Federal Food, Drug and Cosmetics Act (the "FDCA").

of “organic” products. According to the plaintiff, the defendants’ products violate the California Organic Products Act of 2003 (“COPA”) because, although labeled as “organic” or with statements like “contains organic ingredients,” the products do not meet the minimum 70% organic content threshold required by COPA. The complaint seeks an injunction against the defendants as well as attorneys’ fees and costs.

In May of 2010 a class action lawsuit was brought against a company for including a “Greenlist” label on its products which, according to the plaintiff, suggests that the product has been certified by a third-party and is environmentally friendly when in fact the manufacturer created the Greenlist label itself. The plaintiff’s claims survived a motion to dismiss earlier this year and the parties are currently proceeding with discovery. Interestingly, the California Supreme Court ruled in January of 2011 that consumers who have purchased products as a result of false advertising or misleading labels have a right to bring lawsuits against manufacturers and sellers of those products under California’s unfair competition and false advertising laws.

### State Action

States also have become more aggressive in enforcing false green claims. For example, in September 2010 the Washington Attorney General’s Office reached an \$85,000 settlement with Great Lakes Window, an Ohio-based manufacturer of replacement windows that also does business under the name “Penguin Windows.” The Attorney General alleged that Great Lakes falsely pledged that its windows would result in a 40% savings on purchasers’ energy bills in violation of the Washington Consumer Protection Act. According to the complaint, Great Lakes had no reasonable basis to substantiate its 40% energy savings pledge and consumers typically experienced far less energy savings after installing the new windows.

In April 2011, the Attorney General of Massachusetts announced that a settlement had been reached with a Michigan distributor of compact fluorescent light bulbs to resolve claims that the distributor failed to have the required plan to educate consumers about mercury content in their products and recycling of those products. It appears that this distributor came to the attention of the Massachusetts authorities through advertisements in which the distributor conveyed messages that it was a “steward” of the environment and other vague claims that it was an environmentally friendly company. The Massachusetts Attorney General indicated special concern about the vague environmental stewardship claims made by the distributor, stating that “[w]e will continue to pursue companies that project themselves as being stewards of the environment to attract customers, when in fact they are failing to comply with the Commonwealth’s important environmental protection programs.”

### Practical Tips

Companies can effectively handle this increased scrutiny by doing their homework before making claims that a product is green.

... the California Supreme Court ruled in January of 2011 that consumers who have purchased products as a result of false advertising or misleading labels have a right to bring lawsuits against manufacturers and sellers of those products under California’s unfair competition and false advertising laws.

Companies can effectively handle this increased scrutiny by doing their homework before making claims that a product is green.

1. The first step is to collect data about the product. For example: What is the actual efficiency of the product? What is the product content? This may require hiring an outside environmental consulting firm to independently test the product.
2. Once the data is available, the company needs to evaluate the data to determine what claims are supportable. Companies should involve legal counsel early in this process to ensure that deliberations remain privileged.
3. When a company makes a decision as to what claims to make, it should document the data that substantiates the claim. It is also wise to consider whether third party certification is desirable.
4. Finally, companies should determine if registration with a state or federal agency is required before the claim is made.

---

### **General License Authorizes Transactions with Certain Subsidiaries of Libyan National Oil Corporation**

**by Nathan A. Engel**

---

On September 9, 2011, the Office of Foreign Assets Control (“OFAC”) of the U.S. Treasury Department, the federal agency tasked with maintaining and enforcing U.S. sanctions and embargos, eased restrictions on transactions with certain Libyan companies. OFAC issued a general license pursuant to the Libyan Sanctions Regulations, 31 CFR Part 570, and Executive Order 13566 of February 25, 2011, “Blocking Property and Prohibiting Certain Transactions Related to Libya.” A copy of this general license may be accessed at [http://www.treasury.gov/resource-center/sanctions/Programs/Documents/libya2\\_gl7.pdf](http://www.treasury.gov/resource-center/sanctions/Programs/Documents/libya2_gl7.pdf). The September 9, 2011 general license authorizes U.S. persons to engage in transactions involving entities owned or controlled by the Libyan National Oil Corporation, with the exception of Zueitina Oil Company, provided that such transactions do not involve the Libyan National Oil Corporation itself or any other persons whose property and interests in property remain blocked under Executive Order 13566 and the Libya Sanctions Regulations. Executive Order 13566, issued by President Obama on February 25, 2011, prohibited transactions with the Government of Libya, its agencies, instrumentalities, and controlled entities, and the Central Bank of Libya, as well as certain other listed individuals and entities. Subsequent to February 25, OFAC issued a series of notices designating additional individuals and entities as subject to the prohibitions contained in Executive Order 13566 and the Libyan Sanctions Regulations, including the Libyan National Oil Corporation and various subsidiaries and affiliates of the Libyan National Oil Corporation.