SKUNK AT THE PICNIC: THE LEGAL CONSTRAINTS ON PRIVATE ENVIRONMENTAL GOVERNANCE

Summit on Private Environmental Governance: Facing the Challenges of Voluntary Standards, Supply Chains and Green Marketing

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CUSTOMERS ARE THE NEW REGULATORS

Source: Toward Sustainability; the Roles and Limits of Certification (RESOLVE 2012)

Rise in Ecolabels 1964-2012

Source: Toward Sustainability; the Roles and Limits of Certification (RESOLVE 2012)

The Consumer Goods Forum and The Sustainability Consortium Announce Global Partnership

A joint program to accelerate the development and implementation of a global approach to measure and communicate product life cycles.
THE CHALLENGE

BRITANNIA BETWEEN SCYLLA & CHARYBDIS.

or... The Vessel of the Constitution, situated near the Rock of Democracy, and the Whirlpool of Arbitrary Power.
LEGAL RISK CONTINUUM

Government Standards

American National Standards (ANSI-Designated)

Other Consensus Standards

Trade Association/Business Initiatives

Stakeholder Initiatives

Logos:
- USDA Organic
- NAHB National Green Building Program™
- Sustainable Forestry Initiative
- WWF Global Forest & Trade Network
- Level™
- EPEAT™
- U.S. Green Building Council LEED® USGBC
- The Consumer Goods Forum
RISKS IN BUSINESS APPROACHES

Source: Consumers Union 2009

Industry Convention
Voluntary Standards
Premium Labels
Premium (Value-added) Label Trigger

Marketplace Capture/Adoption

Value-added Criteria
RISKS IN STAKEHOLDER APPROACHES

- Aspirational standards
- Variable application
- Unmet expectations
- Pressure
EXAMPLE: “GREENLINING”
# SIX MOST COMMON MYTHS

**Anticompetitive standards are ok if:**

- They’re for a good cause / they’re ancillary restraints
  
  **But see:**
  
  Board of Regents v. Nat’l College Athletic Ass’n (1984); FTC v. Superior Court Trial Lawyers Ass’n (1990)

- They’re voluntary
  

- They’re adopted by non-profits
  

- They’re adopted by government
  
  Allied Tube & Conduit Corp. v. Indian Head, Inc. (1988); FTC v Phoebe Putney Health Systems, Inc. (2012)

- They only cause a little harm (“it’s just one point”)
  

- They avoid too many labels confusing consumers / they’re leadership standards / they stop a race to the bottom
  
SUPPLIER BILL OF RIGHTS

1. **Don’t regulate without due process**: ensure suppliers have a meaningful seat at the table when setting supply chain standards or requirements.

2. **Promote competition**: limit requirements to those necessary to accomplish legitimate ends and use the least restrictive means; be biased towards encouraging competing products and standards.

3. **Be fair**: treat suppliers equally and provide objective specifications; beware the biases of interested parties who want your forum to endorse their products or their preferred brands; ensure auditors are independent.

4. **Be truthful**: set standards that are specific and practical enough to be consistently applied and audited; test each one against FTC standards for substantiation of claims: express, implied, comparative.

5. **Be efficient**: leverage the controls in place: regulations, other standards and programs, consultants; don’t make us check the checkers.

6. **Don’t indulge gossip**: if a supplier is the target of complaints, provide a forum for the supplier to address them fairly and objectively, against a clear standard of review.
THANK YOU