
"Antibacterial" Product Claims Trigger EPA Enforcement Against Retailers and Manufacturers

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Companies should take practical steps to prevent inadvertent violations.

On May 6, the U.S. Environmental Protection Agency ("EPA") announced the settlement of its latest batch of enforcement actions against national retailers selling (or reselling) consumer products with "antimicrobial protection" claims that are alleged to violate the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"). The most recent enforcement actions and settlements involve VF Outdoor, Inc. and its North Face brand (\$207,000 for "antimicrobial" shoes) and Component Hardware Group, Inc. (\$98,300 for "antimicrobial" Saniguard brand faucets, spigots, handles and similar hardware sold to medical institutions). These actions follow a string of similar enforcement cases and settlements against other large retailers and consumer product manufacturers in recent months, including Home Depot (\$230,000 for "antimicrobial" whirlpools and toilets), Target Stores (\$50,000 for "antimicrobial" mattress pads) and the parent of IO GEAR (\$208,000 for "antimicrobial" keyboards). EPA often begins its search for potential violations by conducting simple key word Internet searches. The Agency alleged improper Internet advertising claims in connection with several of these cases. Product manufacturers have the initial opportunity and responsibility to assure their products are not improperly labeled, but, as

some of these listed cases show, retailers are also at risk. Liability is strict, even for those merely reselling or distributing other companies' pre-packaged products. Penalties may be as much as \$6,500 per sale or shipment, and arguably could include all quantities of a mislabeled product held for sale at the time a violation is discovered. As a result, potential penalties may accumulate rapidly if problematic claims are identified.

This enforcement trend follows the increasing number of "antimicrobial" versions of standard consumer goods entering the market. Typically, these products have been made or treated with a chemical substance (i.e., a pesticide) approved and registered by EPA under FIFRA to inhibit growth of bacteria, molds and fungus. In these circumstances, it is generally permitted to claim that the *product* is protected from such microbes. But marketing claims – whether on packaging, product inserts, or web pages – directly or impliedly suggesting that the antimicrobial properties of the treated article will protect *people* (as opposed to the *product*) from bacteria or mold may cause EPA to deem the treated article to be a "pesticide" and subject to FIFRA registration requirements. EPA characterizes these violations as serious, claiming consumers may rely on unsubstantiated antibacterial product claims and stop taking normal steps to protect themselves. The Agency continues to believe that a great number of products are being marketed with improper antimicrobial claims, and EPA leadership has identified enforcement in this area as a policy priority.

Consumer product manufacturers, distributors and retailers should arrange periodically to audit their product lists and inventories, and associated marketing materials, to confirm that any antimicrobial, antibacterial or similar express or implied claims (including in product names) associated with the goods they sell are consistent with applicable legal guidelines. With appropriate advice, such evaluations can be incorporated into a company's

routine product line selection and/or design due diligence, with the objective of identifying and avoiding possible problems before any sales are made. Marketing personnel should be trained to spot the concern and consult with company counsel, in order to avoid potentially problematic claims on company websites, packaging and other sales materials. A comprehensive compliance program incorporating these types of steps may substantially reduce the risk of inadvertent violation. And if an improper product claim nevertheless slips through, the existence of such a program may mitigate any enforcement response. Resellers in particular should ensure that their purchase agreements provide an adequate remedy if, for example, their suppliers' label claims trigger an enforcement action. While enforcement penalties may be quite significant, commercial losses associated with embargoed goods and correcting improper packing may be much greater.

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