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NOTE

IMPROVING GREEN BUILDING: COMPARING LEED CERTIFICATION TO THE FDA AND ITS PRIVATE, THIRD-PARTY RATINGS APPROACH

PATRICK KAIN*

Recognizing global warming and other environmental concerns as potentially hazardous to life on earth, many environmentalists have targeted the building industry as a specific area with enormous room for improvement in sustainability. This effort has led to the development of new, green building practices in the building industry in the United States. The green building movement has been met with such positive feedback that it has essentially become the standard in the building industry today. The building industry is one of the most significant and lucrative businesses in the world, and any substantial changes to the system have vast business implications.

While the green building movement has certainly had many positive impacts on the environment, the swift enactment of measures to incorporate green building practices—largely based on private, third-party organizations—has received significant criticism. Many critics have expressed dissatisfaction with the government’s reliance on these third-party organizations in legislative actions. Specifically, critics argue that the third-party organizations are unconstitutional because they are not valid government authorities and lack meaningful government review. Additionally, the potential conflicts of interest that arise in the current process have led to increased skepticism surrounding the green building movement as a whole.

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"LEED will not be a novelty in the future. In today's market if you are building without LEED, you are building in obsolescence."¹ Beginning with the earliest recognition of climate change concerns, there has been an increasingly predominant effort in the United States to "go green." As President Barack Obama stated in his 2014 State of the Union address, "[t]he shift to a cleaner energy economy won't happen overnight, and it will require tough choices along the way. But the debate is settled. Climate change is a fact."²

Through the "go green" initiative, early environmentalists identified the

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building industry as an area with significant room for improvement in sustainability and came up with the idea of green building. Generally, green building is defined as “the practice of creating structures and processes that are environmentally responsible and resource-efficient throughout a building’s life-cycle . . .” More specifically, green building is “the practice of increasing the efficiency of buildings and their use of energy, water, and minerals, and reducing building impacts on human health and the environment through improved siting, design, construction, operation, maintenance, and removal.” In sum, green building is a dynamic, rapidly growing and evolving field, which is driven by a convergence of increasing public awareness about global climate change, cost and availability of energy sources, and the impact of the built environment on human health and performance.

The building industry has a massive impact on the natural environment, human health, and the economy. In fact, research estimates that architects use up to ninety percent of all materials ever extracted from the environment in the construction of buildings and infrastructure worldwide. Environmentalists, therefore, identify green building practices as an essential component of reducing energy consumption in the United States.

This Comment will argue that the development and integration of green building practices, as they exist today, has been done rashly and without consideration of legal implications. As the “go green” movement has continued to gain momentum, federal, state, and local governments have concurrently implemented policies to encourage, and in some cases require, green building. However, the governments endorsing these policies have generally failed to evaluate the constitutional and other legal implications


of such policies, leading to the deferral of decision-making and standard-setting responsibilities to independent third parties.

II. "GOING GREEN" IN THE BUILDING INDUSTRY MEANS OBTAINING LEED CERTIFICATION

The current system for recognizing green building is based almost entirely on the Leadership in Energy and Environmental Design ("LEED") certification program, which the private nonprofit U.S. Green Building Council ("USGBC") developed. While LEED has received credit for developing a standard for determining if a building is "green," it has also been the subject of much criticism. This Section will discuss the intricacies of the USGBC and the LEED certification ratings system and compare it with the U.S. Food & Drug Administration ("FDA") and the United States Pharmacopeia ("USP") ratings system, one of the oldest and most well respected third-party ratings systems used in food and drug law.

A. The USGBC and the Rise of the LEED Ratings System

Three building industry professionals established the USGBC as a nonprofit trade group in 1993 in response to growing concerns about environmental sustainability in the building industry. During its first year, the USGBC consulted industry experts including architects, real estate agents, building owners, lawyers, and environmentalists to develop a green building certification system and create a uniform system of green building standards. The resulting system—called Standard Version 1.0—was unveiled in 1999, and it immediately gained popularity and notoriety throughout the building industry. The USGBC advertises the LEED


9. See U.S. GREEN BLDG. COUNCIL, supra note 7 (stating the USGBC's mission is "to promote sustainability in the building and construction industry").

10. See Keller, supra note 4, at 1380–81 (explaining that the LEED creators sought to bring uniformity to the American green building movement by developing consensus-based national standards for use in constructing high-performance, sustainable buildings).

rating system as an innovative system that provides a method of standardization and oversight for environmental performance in the building industry.12

According to the USGBC’s website, “LEED is green building[,]” and the organization is largely correct in making this assertion.13 Today, the USGBC has over 13,000 members in all fifty states and in more than 150 countries and territories around the world.14 Since the establishment of LEED, not only has the ratings system grown to be the most widely-used green building rating system in the United States, but it has also become the “globally recognized symbol of excellence in green building.”15 Additionally, many states and localities have passed green building legislation based solely on LEED.16 LEED has essentially created its own new, extremely valuable and lucrative green building industry.17

i. How Does LEED Work?

LEED certification is an instrument utilized by builders to offer independent, third-party authentication that a building project implemented strategies to achieve high performance in key areas of environmental health and sustainability throughout design and construction.18 The LEED certification process allows owners and developers to earn points for a specific project by meeting technical requirements in nine different

(emanphaising the vast support accrued by LEED following its inception).


14. See What is LEED?, supra note 12 (referencing the dramatic rise in participation in the USGBC from both the public and private sectors at the global, regional, and local levels).

15. See About LEED, U.S. GREEN BLDG. COUNCIL, http://www.usgbc.org/articles/about-leed (last visited Mar. 26, 2016) (“With 13.8 billion square feet of building space participating in the suite of rating systems and 1.85 million feet certifying per day around the world, LEED is transforming the way built environments are designed, constructed, and operated.”).

16. See What is LEED?, supra note 12 (“More than 72,000 projects are participating in LEED across 150+ countries and territories, comprising over 13.8 billion square feet.”); see also Keller, supra note 4, at 1388–90 (listing the many states and localities with LEED-based policies).

17. Kriss, supra note 13 (“LEED has also spawned an entire green building industry, expected to be worth up to $248 billion in the U.S. by 2016.”).

18. See About LEED, supra note 15 (describing the basics of how LEED works).
categories designed to promote sustainability.  

Under the LEED ratings system, "[a] building project earns one or more points toward certification by meeting or exceeding the technical requirements for each topic area." The point allocation for technical requirements follows a broad system, but each system varies based on the specific type of project. There are four LEED certification levels that a project may achieve based on the number of points it earns. As mentioned, LEED certification is a globally recognized symbol and achieving certification can provide many benefits to building owners.

Moreover, building ratings systems, including LEED, are designed to be adaptable and inclusive of many different types of projects. As such, each category consists of common prerequisites and credits to accommodate each individual project. Over the past decade, LEED has enjoyed outstanding popularity, success, and growth. Since the inception of its first ratings system, the USGBC has developed LEED into many distinct

19. See What is LEED?, supra note 12 (describing the nine key categories: (1) integrative process; (2) location and transportation; (3) sustainable site development; (4) water efficiency; (5) energy and atmosphere; (6) materials and resources; (7) indoor environmental quality; and (8) innovation; and (9) regional priority).


21. See About LEED, supra note 15 ("LEED rating systems generally have 100 base points six Innovation in Design points and four Regional Priority points, for a total of 110 points . . ..").

22. Id. (outlining the four levels of certification: Certified (40–49 points); Silver (50–59 points); Gold (60–79 points); Platinum (80+ points)).

23. See King & King, supra note 22, at 408 (specifying that "benefits include: reduced or equivalent initial costs for sustainable design; reduced annual operating costs that reflect the incorporation of energy-efficient and renewable energy systems; water-saving design features; increased durability of the facility; and reduced maintenance costs").


25. See About LEED, supra note 15 (explaining that prerequisites are the "required elements, or green building strategies that must be included in any LEED certified project," whereas credits are the "optional elements, or strategies that projects can elect to pursue to gain points toward LEED certification").

ratings systems that accommodate specific sectors of the market.\textsuperscript{27} The USGBC, in an effort to seek continued progress and improvement, regularly conducts research to improve its rating systems by creating new versions for various sectors of the built environment utilizing new technology as they become available.\textsuperscript{28}

\textit{ii. Who Sets the USGBC’s Standards?}

While the USGBC emphasizes its diversity, a small sector of the USGBC called the LEED Steering Committee—comprised entirely of members of private industry—sets the specifics of the LEED ratings systems.\textsuperscript{29} According to the USGBC, the USGBC member-based volunteer committees, and the USGBC staff, put forth the LEED ratings system on a consensus basis.\textsuperscript{30} However, the LEED Steering Committee, which has final review and approval rights for all decisions, is not representative of this diversity with “its volunteer voting members all hail[ing] from private architecture, technology, and consulting firms.”\textsuperscript{31} Additionally, the USGBC’s Executive Committee members and Board of Directors have backgrounds in “building, manufacturing, consulting, finance, real estate, and related private industries.”\textsuperscript{32} In fact, the vast majority of USGBC members represent private industry with very few representing the public sector or government entities.\textsuperscript{33} The idea of adopting a structure of predominantly private individuals setting government-adopted LEED standards has received negative treatment in the past and creates many disincentives that may lead to market failures in the future.\textsuperscript{34}

\begin{footnotesize}
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\item[27.] See generally \textit{LEED v4 Ratings System Guidance}, U.S. GREEN BLDG. COUNCIL, http://www.usgbc.org/articles/rating-system-selection-guidance (identifying the many different rating systems that may currently be utilized to register a project with the USGBC).
\item[28.] See \textit{About LEED}, supra note 15.
\item[29.] See \textit{USGBC LEED Committees}, U.S. GREEN BLDG. COUNCIL, http://www.usgbc.org/committees/leed (last visited Feb. 9, 2016) (identifying all of the members of the various USGBC committees).
\item[30.] See \textit{About USGBC}, U.S. GREEN BLDG. COUNCIL, http://www.usgbc.org/articles/about-usgbc-0 (last visited Mar. 26, 2016) (“Membership includes building owners and end-users, real estate developers, facility managers, architects, designers, engineers, general contractors, subcontractors, product and building system manufacturers, government agencies, and nonprofits.”).
\item[31.] Keller, supra note 4, at 1381.
\item[32.] Id.
\item[33.] Id. (emphasizing the potential conflicts of interest that arise given this type of situation and the need for monitoring them).
To be eligible to receive LEED certification, a building owner must register the project with an affiliate organization called the Green Building Certification Institute ("GBCI"). The GBCI was established in 2008 to "administer project certifications and professional credentials and certificates within the framework of the [USGBC]'s [LEED] green building ratings systems." While the GBCI appears on its face to be an independent organization, it is closely tied to the USGBC and remains a trade association for the building industry with nearly all members having potential conflicts of interest.

Once a builder has applied for LEED certification, registered, and paid the requisite fee, the project undergoes a very subjective and extensive review process to determine what, if any, level of certification it has achieved. Notably, the USGBC does not publish or disclose any information regarding the points awarded to a project, and therefore, the process lacks transparency. The USGBC has enormous discretion in deciding whether to award a project with LEED certification.

iv. The Use of the USGBC in Legislation

LEED has been integrated into policy through a wide range of legislative actions at all levels of government in the United States in an effort to "go green." The "go green" movement created a wave of public policy action that led to more than 400 local jurisdictions, thirty-five state governments, and fourteen federal agencies or departments adopting LEED as a benchmark for monitoring green building practices. Additionally, the possibility of requiring LEED Certification in building codes, rather than simply using it as a benchmark, is gaining momentum.

adapting these standards as law is growing, which will make them difficult if not impossible to change, unless federal law and regulation supersedes the 'green' standards...

35. GREEN BLDG. CERTIFICATION INST., www.gbc.org (last visited Feb. 21, 2016) (identifying the GBCI as "the only certification and credentialing body within the green business and sustainability industry to exclusively administer project certifications and professional credentials and certificates of LEED").


37. See E.H.H.I. REPORT, supra note 34.


39. See E.H.H.I. REPORT, supra note 34.

40. See Keller, supra note 4, at 1385.


42. Id. (graphing the progress toward sustainable building codes).
Over the past decade, different levels of government have made attempts to incorporate green building practices; energy, water, and material efficiency; and in some cases require LEED certification.\textsuperscript{43} Responding to confusion associated with these attempts, Congress created the Department of Energy ("DOE") in 1977 to address energy use and conservation strategies.\textsuperscript{44} Congress then passed a number of federal legislative green building policies outlining strict sustainable performance standards including a key provision requiring all federally-owned buildings to meet certain green building LEED certification standards.\textsuperscript{45} Additionally, "in 2006, the [Environmental Protection Agency ("EPA")] and twenty other federal agencies—including the Departments of the Interior, Defense, Justice, State, and Transportation—signed the voluntary Federal Leadership in High Performance and Sustainable Buildings Memorandum of Understanding ("MOU").\textsuperscript{46} The MOU contains "guiding principles" for green building standards, which mimic the USGBC and the LEED third-party ratings system criteria.\textsuperscript{47}

In 2007, President George W. Bush signed Executive Order 13423—Strengthening Federal Environmental, Energy, and Transportation, Management—which included federal standards for sustainable design and buildings and specifically required that new construction and major renovations of all federal agency buildings comply with the MOU.\textsuperscript{48} Clearly, the current federal green building policy is largely based on the USGBC and the criteria from the LEED ratings system, without much independent work conducted by the EPA, the DOE, or any other government agency.

\textsuperscript{43} See Richards, supra note 26, at 3.
\textsuperscript{47} Id. (noting that the four categories of sustainability referenced in the MOU are all categories of sustainability under LEED).
B. The FDA and the United States Pharmacopeia Ratings System

The utilization of private, third-party ratings systems is not a new concept in the United States; it has been especially significant in the pharmaceutical industry. A group of eleven physicians concerned with the quality and consistency of medicines sought to “create a compendium of the best therapeutic products, give them useful names, and provide recipes for their preparation[,]” and in 1820, they published the first Pharmacopeia of the United States.\(^{49}\) Medical practitioners were frustrated by the lack of uniformity in the medicines they prescribed and dispensed and the resulting inefficiencies in the pharmaceutical industry.\(^{50}\) The first edition of the United States Pharmacopoeia (“USP”) asserted that the main purpose of the Pharmacopoeia was to develop a system to efficiently and successfully cultivate uniform medicines for distribution.\(^{51}\)

The subsequent early pharmacopeias consisted of compilations of recipes that facilitate compounding.\(^{52}\) As manufacturing gained prevalence over compounding, USP changed from being primarily a compendium of recipes to becoming a compendium of public standards that support the testing of manufactured drugs to determine their legitimacy and effectiveness.\(^{53}\) The USP identifies itself as an independent and practitioner-based, third-party organization committed to promulgating scientific-based public standards that help improve the quality of drugs and other articles.\(^{54}\) When USP acquired another pharmacopoeia called the

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50. See About Us, U.S. PHARMACOPEIAL CONVENTION, http://www.usp.org/about-usp (last visited Feb. 21, 2016) (“At the time, the marketplace for drugs and medicinals was chaotic: there was little assurance of consistency or quality regarding the medicines that patients were taking.”).

51. See id.

52. U.S. Food and Drug Administration, Compounding and the FDA: Questions and Answers, http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/PharmacyCompounding/ucm339764.htm#what (last visited Feb. 21, 2016) (defining “compounding [as] a practice in which a licensed pharmacist . . . combines, mixes, or alters ingredients of a drug to create a medication tailored to the needs on an individual patient”).

53. See What is a Pharmacopeia?, supra note 49.

54. See Legal Recognition of USP Standards, U.S. PHARMACOPEIAL CONVENTION, http://www.usp.org/about-usp/legal-recognition (last visited Feb. 21, 2016) (“While not a government entity, USP works closely with government agencies, ministries, and regulatory authorities around the world to help provide standards of identity, strength,
National Formulary, it established the United States Pharmacopeial Convention ("USPC") in 1975, and it remains the premiere and most respected authority for the benchmarking and compounding of medicines in the United States.\footnote{Peter Barton Hutt et al., Food and Drug Law 90 (Robert C. Clark et al., eds., 4th ed. 2014) (explaining that the USP and National Formulary ("USP-NF") "is a compendium of standards for drug strength, quality, purity, packaging, labeling, and storage, published by the USPC, a nongovernmental organization more than a century old").}

\textit{i. How Does the USP Work?}

The USPC sets standards for "identity, strength, and purity of drugs," through credible, science-based processes that USPC-selected medical experts established.\footnote{Ruth K. Miller et al., Article, FDA's Dietary Supplement CGMPs: Standards without Standardization, 63 Food Drug L.J. 929, 931 (2008) (explaining that the USP Council of Experts are the heart of the USP and that they are responsible for creating and revising the standards that appear in the compendia).} The evolving standards remain in a constant state of revision as modern scientific principles and new research and development advances occur in the field.\footnote{See id. (describing the compendia as always adapting and changing "to stay abreast of evolving science and best measurement practices").} The USP develops and publishes third-party standards for drugs. If a drug is found to be in compliance with the standards, the USP will allow it to feature the USP logo.\footnote{See USP in U.S. Law, U.S. Pharmacopeial Convention, http://www.usp.org/about-usp/legal-recognition/usp-us-law (last visited Feb. 21, 2016) [hereinafter "USP in U.S. Law"] (explaining that it remains the responsibility of the FDA and other government authorities to enforce the actual health standards and that it remains the responsibility of the FDA and other government authorities to enforce the actual health standards).}

\textit{ii. Who Sets the USPC's Standards?}

The most significant aspect of the USPC is the particular policies enacted by the third-party agency to ensure its standards are developed and administered fairly and reasonably. Accordingly, the USPC utilizes strict processes that facilitate dialogue with drug manufacturers during the development of public standards, but it also enacts policies and rules to protect the system from undue influence by outside interests.\footnote{See Miller, supra note 56, at 932.} Notably, the USPC endorses a strict conflict of interest policy that applies to all staff
and volunteers. The members of the Expert Committee—which is responsible for much of the standard setting within the USPC—must declare all relationships, activities, and any other related interests. Moreover, members must abstain from participating in any final discussion or vote on issues with any potential conflict of interest.

iii. The USPC in Legislation

The Federal Food and Drugs Act of 1906 integrated the USPC in federal law for the first time by recognizing the USP standards as the official quality standards in the United States. Today, there is an annual USP publication, and it “contains more than 4,500 monographs for prescription and over-the-counter products, dietary supplements, medical devices, and other healthcare products.” According to the USP, “[a]s they have been for nearly 200 years, USP standards continue to be established today by volunteer scientific experts, through an open and transparent process that includes public involvement. USP’s science-based standards are used and relied on worldwide.” Mirroring the USPC model discussed, the USGBC could modify the current LEED system to give it more legitimacy.

III. SHOULD LEED “BE” THE GREEN BUILDING AUTHORITY?

According to the USGBC’s website, “LEED is green building”; however, many scholars and experts in the field argue that, for a variety of reasons, LEED should not be the sole authority on green building standards in the United States and the world. This Comment asserts that the USGBC should not be a legal authority in legislative actions relating to green building standards because (1) it is not a valid government authority; and (2) there is a potential for conflicts of interest and informational gaps, which the organization has not addressed as well.

60. Id. (referencing the organization’s Conflict of Interest Policy, which states that “USP employees, officers, trustees, and volunteers have an obligation to ensure that they remain free of actual or perceived conflicts of interest in the performance of their duties”).

61. Id. (“USPC staff not only maintain a record of all stated conflicts but also work closely with committee chairs and members to identify and evaluate potential conflicts of interest and to ensure that committee members excuse themselves from deliberations and votes as required by the Rules of Procedures of the Council of Experts.”).

62. See What is a Pharmacopeia?, supra note 49.

63. Id.

64. Id.; see also USP in U.S. Law, supra note 58.


66. See Frank, supra note 8 (referencing the major problems associated with tax exemptions for huge developers manipulating the current system).
A. The USGBC is Not a Valid Government Authority under the U.S. Constitution

The government should not enact green building legislation based on LEED because the USGBC, a third-party, private organization, is not a valid government authority under the Constitution. The Constitution specifically references the limits of legislative power and with whom the power is vested. The nondelegation doctrine forbids the U.S. Congress to abdicate or to transfer to others the essential legislative functions with which it is thus vested. The Supreme Court has recognized the need to adapt legislation to complex conditions involving details that the national legislature cannot deal with directly. However, the Court has clearly asserted that delegating legislative authority to trade or industrial associations is never a valid exercise under the Constitution. Additionally, although the Court has recognized that the Constitution does not deny Congress the “resources of flexibility and practicality” in developing legislation that contain useful and widely applicable functions, the steadfast recognition of the necessity and validity of such legislation cannot obscure the limitations of the authority to delegate. Certain trade groups and industry associations may have a superior knowledge of applicable standards in a specific field or industry; however, the Supreme Court and other federal courts will not formally recognize the policies of these groups or associations as a valid legally binding authority.


68. See U.S. CONST. art. I, §§ 1, 8, cl. 18 (“All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” Congress is further authorized “[t]o make all Laws which shall be necessary and proper for carrying into Execution [its general powers.”]).

69. See A. L. A. Schechter Poultry Corp., 295 U.S. at 529–30 (highlighting the oversight from Congress necessary for democracy); see also Keller, supra note 4, at 1393–96 (discussing generally the nondelegation doctrine principle that Congress cannot delegate its legislative power to other agencies).

70. See Panama Refining Co. v. Ryan, 293 U.S. 388, 420–22 (1935) (recognizing that there are many complex situations in society and that it is difficult for Congress to always be knowledgeable about these situations to the degree necessary to draft legislation that will address all of the problems).

71. See A. L. A. Schechter Poultry Corp., 295 U.S. at 537 (stating that delegation is “unknown in our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress”).

72. See id. at 530 (noting that, while it may be useful to allow Congress to delegate certain matters for policy considerations, the costs of doing this would be dramatic and detrimental to democracy).

73. See Panama Refining Co., 293 U.S. at 420–22 (refusing to extend legislative authority to any third-party, private organizations without a clear oversight by Congress).
Courts at the state level generally find delegation to private actors to be even more troublesome than courts at the federal level.\textsuperscript{74} State courts regularly reference the nondelegation doctrine when considering the constitutionality of a transfer or delegation of legislative power to private or nongovernmental entities.\textsuperscript{75} Also, state courts have not adopted a set standard to deal with regulatory delegation to private actors, and they have encountered many difficulties in attempting to use their discretion to decide when it may be appropriate.\textsuperscript{76}

Thus, while the USGBC must not be recognized as a legally binding authority to make the laws under the Constitution, it may have legal significance and may be consulted as an authority with regard to the execution and carrying out of laws.\textsuperscript{77} The Court has recognized the distinction between the power vested in Congress to make the laws and the ability of Congress to appoint authorities to enforce the laws.\textsuperscript{78} Courts have consistently held that Congress may delegate to third-party entities the authority to research and monitor compliance of laws.\textsuperscript{79} In a landmark food and drug decision, Congress authorized the Secretary of the Treasury to establish uniform standards of purity, quality, and fitness for the consumption of teas imported into the United States based a board of

\textsuperscript{74} See Klopping v. Whittier, 8 Cal. 3d 39, 42 (1972); see also Keller, supra note 4, at 1394 (listing reasons including "(1) inability to hold private actors accountable; (2) potential for conflicts of interest between the public and the delegate; (3) the fact that the judiciary considers some powers to be purely governmental; (4) lack of transparency and legitimacy in the rulemaking process; and (5) concerns about efficacy of the standards promulgated").

\textsuperscript{75} See Keller, supra note 4 (continuing to discuss the many problems that arise from delegation to private actors including "concerns about notice and availability of information, lack of a public voice[,]" and future problems that arise with delegation generally).

\textsuperscript{76} See id. See generally Asmara Tekle Johnson, Privatizing Eminent Domain: The Delegation of a Very Public Power to Private, Non-profit and Charitable Corporations, 56 AM. U. L. REV. 455 (2007) (discussing many of the inherent problems with attempting to circumvent the nondelegation doctrine and delegating powers that are specifically vested in Congress to private entities).

\textsuperscript{77} See A. L. A. Schechter Poultry Corp., 295 U.S. at 530; see also Panama Refining Co., 293 U.S. at 420–22 (identifying the possible ways to reduce the burden on Congress).

\textsuperscript{78} See Panama Refining Co., 293 U.S. at 426 ("'[The] delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law.'").

\textsuperscript{79} See id. ("Authorizations given by Congress to selected instrumentalities for the purpose of ascertaining the existence of facts to which legislation is directed, have consistently been sustained.").
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The Court held that this was a valid delegation of authority because Congress had fixed the "primary standard" and subsequently committed the Secretary of the Treasury to merely monitor compliance and observance of the laws. Therefore, nothing precludes Congress from authorizing the USGBC to oversee green building policy and to act as a vehicle to enforce legislation so long as Congress remains the valid legal authority to develop and enact the legislation.

B. Properly Delegating Government Decision-Making Authority

While courts have recognized that the inclusion of a product in the USP as having a recognizable legal significance, the Court does not consider the USPC to be a valid legal authority. In general, food and drugs are subject to a rigorous regulatory regime largely due to the strong governmental interest in promoting a safe environment for consumers. Consequently, food and drugs are subject to FDA approval before parties can market and sell them. Notably, the 1906 Federal Food and Drugs Act contains a reference to the USP, where it specifically references inclusion of a substance in the USP as a consideration in determining whether the substance will meet the legal definition of a "drug." However, Congress and courts are careful to consider the nondelegation doctrine in all decisions related to the vesting of legislative authority in third parties.

Congress has been careful to abide by the nondelegation doctrine, and it

80. See Butfield v. Stranahan, 192 U.S. 470, 495 (1904) (representing one of the earliest cases of a delegation of standard setting authority to a private, third-party entity through the context of Food & Drug law).

81. See id. (explaining that Congress gave the Secretary "the mere executive duty to effectuate the legislative policy declared in the statute" and did not delegate the actual standard setting authority).

82. A. L. A. Schechter Poultry Corp., 295 U.S. at 530; see also Nat'l Nutritional Foods Ass'n v. FDA, 504 F.2d 761, 788-89 (2d Cir. 1974).

83. See generally Colleen O. Davis, Red Tape Tightrope: Regulating Financial Conflicts of Interest in FDA Advisory Committees, 91 WASH. U. L. REV. 1591 (2014) (referencing the strong policy reasons for subjecting the FDA to close supervision by the federal government).

84. See National Nutritional Foods Ass'n, 504 F.2d at 788-89 (noting that the federal government felt the policy interests were so strong that it created a separate governmental body to mandate and enforce the standard setting regulations).

85. See Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 321(g)(1)(A) (2016) (replacing the repealed Federal Food and Drugs Act of 1906 that both included under the definition of "drug" any article "recognized in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them").

86. See A. L. A. Schechter Poultry Corp., 295 U.S. at 530 (referencing the Supreme Court decision where the Court conducted a detailed investigation of the nondelegation doctrine that continues to be the leading authority on the issue today).
emphasized that the USPC represents an enforcement agency, not a government standard-setting authority. Through the 1938 Federal Food, Drug, and Cosmetic Act, Congress revised the Food and Drug Act, specifically, to place the burden on drug manufacturers to demonstrate the safety of their new products directly to the FDA rather than by merely abiding by the specifications outlined in the USP. Additionally, the FDA does not give much deference to the USP, and it generally relies on its own resources when evaluating substances and assessing the views of drug manufacturing companies. In fact, the FDA is required to conduct its own, independent investigation into the qualification of a substance to be legally recognized as a "drug" and does not rely solely on its inclusion in the USP and the assertions made by drug companies.

In the food and drug context, courts have usually thwarted the efforts of the FDA when it has attempted to classify products as "drugs" based solely on their inclusion in the USP. In United States v. Ova II, a federal district court—considering the regulatory status of a pregnancy test—concluded that the official USP compendia provision of the drug definition "cannot be taken literally" because a literal interpretation would not be in accordance with the FDA's stance towards third-party ratings. Similarly, in National Nutritional Foods Ass'n v. Mathews, the court held that the FDA may not

87. Ruth K. Miller et al., Article, FDA's Dietary Supplement CGMPs: Standards without Standardization, 63 FOOD DRUG L. J. 929, 936 (2008); see also Hutt, supra note 89 (discussing the FDA's treatment of section 321(g)(1)(A) as not being viewed expansively and, rather, being viewed in a very limited context).


89. See Hutt, supra note 89 ("Although [S]ection 321(g)(1)(A) appears on its face to give FDA the power to treat any item listed in these compendia as a drug, the agency generally has not viewed this provision so expansively.").

90. See Nat'l Nutritional Foods Ass'n v. FDA, 504 F.2d 761, 788–89 (2d Cir. 1974) (appointing the FDA as the government authority to approve a drug on the market for sale); see also Davis, supra note 83 (discussing the potential issues with delegating authority to any private agencies in regulating products in an extremely lucrative industry due to the likelihood of conflicts of interest).

91. See Nat'l Nutritional Foods Ass'n, 504 F.2d at 788–89 (rejecting the argument that vitamins and minerals are drugs because of their recognition in the official compendia); see also Nat'l Nutritional Foods Ass'n v. Mathews, 557 F.2d 329, 337–38 (2d Cir. 1977) (rejecting the argument with regard to high potency vitamins); United States v. An Article of Drug OVA II, 535 F.2d 1248 (3d Cir. 1976) (rejecting the argument with regard to pregnancy test kit); United States v. Articles of Animal Drug Etc., 528 F. Supp. 202, 204–06 (D. Neb. 1979) (accepting the argument with regard to animal euthanasia drug).

92. See United States v. An Article of Drug OVA II, 414 F. Supp. 660, 662 (D.N.J. 1975) aff'd sub nom. An Article of Drug OVA II, 535 F.2d at 1248 (emphasizing that a literal interpretation of the provision would "run afoul of the principle that a legislative body may not lawfully delegate its functions to a private citizen or organization").
regulate items as drugs based solely on their inclusion in the USP because the FDA does not recognize the USP as a valid government authority.93 Further, in National Nutritional Foods Ass'n v. FDA, the court found that including all items listed in the USP under the umbrella of "drugs," which the FDA regulates, would unnecessarily burden the agency.94 The court held that an administrator's decision under a regulatory statute, such as the Food, Drug, and Cosmetic Act, must be governed by an intelligible statutory principle and not based solely on the description of the substance in the USP.95

Similarly, the federal government must recognize that the USGBC is not a valid governmental authority on green building, and therefore, it must withhold authority to approve standards for green building practices.96 Congress must address the nondelegation issue in green building as it addressed the nondelegation issue with the Food, Drug, and Cosmetic Act, and it should place the burden on the USGBC to concretely demonstrate the validity of the LEED ratings system to the federal government.97 The government must not legally recognize buildings as "green" only for the purposes of classifying them as eligible for certain tax breaks and other government subsidies based solely on meeting the USGBC-enacted LEED certification standards.98

The government may establish the USGBC as an authority for monitoring and enforcing green building standards, but it must be subject to review by a valid legal authority.99 While the courts have held that

93. See Mathews, 557 F.2d at 337–38 ("To construe § 201(g)(1)(A) so as to grant the Commissioner the power to regulate as drugs every item mentioned in the USP and NF solely on the basis of such inclusion would give the FDA virtually unlimited discretion to regulate as drugs a vast range of items.").
94. See Nat'l Nutritional Foods Ass'n, 504 F.2d at 788–89 (highlighting that inclusion of all drugs "would prove too much[] for it would lead to the conclusion that all vitamin and mineral preparations even within the [U.S. RDA] limits are drugs – a position that would run counter to the regulations").
95. See Mathews, 557 F.2d at 329 ("Inclusion in the USP does not automatically establish that the classification of such an article as a drug is reasonable.").
96. See id. (identifying the nondelegation doctrine as a clear legal barrier that may not be overlooked preventing the third-party, independent USGBC from yielding authority to make legislative decisions).
98. See United States v. An Article of Drug OVA II, 535 F.2d 1248 (3d Cir. 1976); Nat'l Nutritional Foods Ass'n, 504 F.2d at 788–89; see also Mathews, 557 F.2d 325, 337–38 (emphasizing that there must be a valid governmental authority to enact binding legislation and that the USP does not possess this power).
99. See Article of Drug OVA II, 414 F. Supp. at 665 (noting that the "[l]imited delegation of legislative functions to governmental agencies within the boundaries of
inclusion of a product in the USP does have legal significance, the key distinction is that the USPC is not a valid legal authority for the federal government.100 The federal government, through the FDA, maintains final decision-making authority as to whether a drug manufacturing company has met the requisite standards to be classified as a “drug” under the Federal Food, Drug, and Cosmetic Act of 1938.101 Similarly, the USGBC must be subject to review by a valid legal authority when making legislative determinations regarding green building standards.102

C. The Problem of Potential Conflicts of Interest

One of the major concerns regarding the USGBC and the federal government’s adoption of LEED building standards is the potential for conflicts of interest. In the corporate context, it is presupposed that all director-executed corporate transactions are free of any conflicts of interest.103 Fiduciaries have a seemingly absolute duty to establish the entire fairness of any transaction that involves self-dealing.104 The concern with LEED is that its members—industry professionals responsible for generating the standards—are in a position to profit dramatically from compliance with regulations based on the LEED ratings system.105 While the government is responsible for enacting legislation that authorizes massive tax cuts for LEED certification, USGBC members and building owners stand to benefit considerably in the private industry from compliance measures.106

It should not be surprising that LEED’s standards cater to developers:
LEED "was created as a marketing tool" for businesses to use to portray themselves and their projects as "green." It is for this reason that critics of LEED deride it as "a highly lucrative regime of payouts and misinformation" and "a moral-protection racket." Based on the arguments of these critics, it seems that the pecuniary interest of USGBC's primary stakeholders conflict directly with the broader social goals that the green building legislation seeks to address.

The federal government should subject the USGBC to certain processes or policies to address many of the concerns surrounding the potential conflict of interest. In the food and drug context, the FDA is subject to several regulations imposed by the federal government that are specifically aimed at preventing financial conflicts of interest.

First, under the Federal Advisory Committee Act of 1972, any "advisory committee" established by a federal agency must comply with specific conditions geared toward efficiency, record keeping, and public disclosure. Second, the federally-imposed Sunshine Act, which amended the Freedom of Information Act, imposes specific requirements on advisory committees designed to increase transparency and limit potential conflicts of interest. The FDA meets this requirement by hosting a website where it posts meeting outlines prior to meetings and meeting minutes after the meetings. Third, the Ethics Reform Act of 1989 amended the basic criminal conflict of interest statute to subject advisory committee members

107. See id. (explaining that the USGBC has enabled many developers to win huge tax breaks and grants, charge higher rents, exceed local building restrictions, and receive expedited permitting by providing them with LEED Certification).


109. See Frank, supra note 8 (emphasizing that the actual goals of lowering energy costs are not met under the LEED system).

110. See Davis, supra note 84, at 1592 (explaining that the FDA employs very specific processes in an effort to alleviate the financial conflicts of interest in the extremely lucrative pharmaceutical industry).

111. Id. (referringencing the federal conflict of interest laws imposed directly on the FDA).

112. See generally The Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972) (stating that the committees are overseen by the U.S. General Services Administration pursuant to the law).


114. Id. § 552(b).

115. See generally id. § 552.

116. See Davis, supra note 84, at 1602 (emphasizing the efforts by the FDA to meet the federal requirements and the resulting positive effect on the industry as a whole).

to criminal liability for breach of the conflict of interest statute. The revised statute prohibits an executive branch employee from participating in a government matter if the member, or anyone in the member's family, has a conflicting financial interest. Finally, the Food and Drug Administration Amendments Act of 2007, which amended the Food, Drug, and Cosmetic Act, further addressed the issue of conflicts of interest in Title VII. In a similar fashion, the federal government should intervene and require the USGBC to integrate the aforementioned FDA procedures, which would alleviate many of the conflict of interest concerns with the USGBC and LEED.

IV. LEED-ING THE WORLD INTO THE FUTURE

While the USGBC has made massive strides towards sustainability in the building industry, there are substantial changes that it should make to its procedures and processes. How can the federal, state, and local governments most effectively utilize LEED and the USGBC to actually help protect the environment in the long term? The solution most likely relates to the federal government taking a more active role in the USGBC and its processes to avoid nondelegation authority and conflict of interest concerns.

A. Federal Government Review of the LEED Rating System

A major step the government could take toward validating the USGBC and LEED certification would be to conduct a thorough review of the LEED ratings system. According to USA Today, "[g]overnors, mayors, state legislators, and federal administrators have been forceful LEED advocates who [have] helped it flourish nationwide." It is very easy for a government official to simply promote sustainability and echo environmental concerns for the nation to hear; however, meaningful government review of green building standards could really make a significant impact. The federal government could potentially allocate a portion of its budget to study the impact of the building industry on the environment. Rather than taking time to conduct its own research, the

118. See Davis, supra note 84, at 1602 (expanding the scope of 18 U.S.C. § 208(a) to include "special government advisory committee members" under the umbrella of government employees subject to the statute).
120. Id. (explaining that under Title VII, the Secretary must disclose on the FDA website the "type, nature, and magnitude" of any questionable financial interest of advisory committee members).
121. See Frank, supra note 8.
government today has deferred to the USGBC on all methods of improving sustainability. Most government officials have simply embraced LEED without understanding many of its actual benefits, trade-offs, or costs.  

In the food and drug context, the federal government recognized the substantial health risks associated with the public sale and marketing of consumable products and created a regulatory agency to mitigate those risks. Similarly, the federal government should recognize the substantial environmental concerns in the building industry and allocate resources to, among other things, study green building, set and enforce universal standards for green construction, and develop programs to update existing buildings. If the federal government can recognize concerns with the building environment to the degree that it is willing to dole out billions of dollars in tax breaks nationwide, it should take the initiative to actually study the built environment itself.

While it is certainly a step in the right direction to support “go green” initiatives, the government must do more than stand by while private, third-party organizations set the standards for green building in the United States, in violation of the nondelegation doctrine. The federal government should treat green building standards similarly to how it treats food and drug standards. The impacts of regulating the building industry have the potential to be massive in promoting sustainability and saving the environment. If the federal government actually seeks to make changes that will have a drastic impact on the environment, as President Obama has claimed, it must take affirmative steps to address the problem.

**B. Improving the USGBC’s Transparency and Processes**

Improving the USGBC’s transparency of information and processes is another meaningful way to improve the current green building system. The USGBC could learn a lesson from observing the USP, a third-party organization that has been active for over 200 years, which collaborates with the FDA and has publicized all of its records, processes, and information. The USP has learned from experience what it must do to be a successful, influential third-party ratings organization. The USGBC could incorporate many of the features employed by the USP into its standards-setting and conflict of interests processes. Also, if the USGBC were able to provide statistical information to the public and meaningful

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122. See id.
123. See 2014 State of the Union Address, supra note 2.
evidence about why it should enact certain standards for green building, then reliance on its ratings system would be much more acceptable and understandable. The lack of transparency and lack of statistical data supporting the views of the USGBC is a major issue. To avoid this information gap, the federal government, one of the largest supporters and users of the LEED ratings system, should enact legislation to require the USGBC to incorporate these mentioned tactics.

CONCLUSION

The USGBC and LEED have enormous potential in the building industry to make a massive impact on the future of the world. Green building practices can alleviate many environmental concerns facing the world today. However, there are constitutional and other legal implications with the current status of USGBC and its LEED ratings system; as it stands, the USGBC’s current procedures improperly lead to the deferral of decision-making and standard-setting responsibilities to independent third parties. Time will tell whether the process of integrating standards—similar to the mentioned FDA rating system—will alleviate the legal issues that could potentially entangle the “go green” movement.