

Legal and Regulatory Issues in Marketing Claims

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Federal oversight of environmental attributes and claims associated with energy and other products is on the rise

- **Multi-Jurisdictional Regulatory Regime**
 - Federal Trade Commission
 - Federal Energy Regulatory Commission
 - Commodity Futures Trading Commission
 - Securities Exchange Commission

The Federal Trade Commission has authority to take action against “unfair or deceptive acts or practices in or affecting commerce”

(15 U.S.C. 45(a)(1)).

The FTC also publishes Guides for the Use of Environmental Marketing Claims (16 C.F.R. Part 260)

- Deceptive Practices
 - Likely to mislead reasonable consumers
 - Material to their decision to buy or use the product

- **Unfair Practices**
 - Causes substantial consumer injury
 - Not reasonably avoidable by consumers
 - Not outweighed by the benefits to consumers or competition

- The FTC takes a two-step approach when assessing marketing claims
 - What express and implied claims does my advertising convey to reasonable consumers?
 - Do I have “competent and reliable evidence” to support each claim?

- If you are found to have engaged in deceptive practices, the FTC can order you to:
 - Cease and desist
 - Pay refunds
 - Disgorge ill-gotten gains
 - Correct the offending content (e.g., revised ads, labels, etc.)

- A few words on the Green Guides
 - They are under review to expand the type of environmental claims they address, including concerns about RECs and offsets
 - They apply to all forms of marketing claims, including those made to consumers and to other businesses
 - So they provide another potential basis for corporate liability

- A few words on FERC
 - Some in Congress are considering giving FERC authority to oversee fraud and manipulation related to trading GHG allowances, RECs and other environmental attributes
 - FERC allegedly prefers having the CFTC regulate such trading

- At a minimum, representatives of FERC enforcement have said that FERC's existing anti-manipulation rule could apply to credits and allowances. That rule says:
 - It shall be unlawful for any entity, directly or indirectly, in connection with the purchase or sale of electric energy or the purchase or sale of transmission services subject to FERC's jurisdiction:
 - To use or employ any device, scheme, or artifice to defraud;
 - To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or
 - To engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity.

- A few words on the CFTC
 - The CFTC has a current proposal to find that the Carbon Financial Instrument (CFI) listed for trading on the Chicago Climate Exchange performs a significant price discovery function
 - This is a first step in asserting authority
 - The CFTC is telling Congress that it should regulate credits and allowance trading
 - This would include physical and financial markets

- If Congress gives the CFTC jurisdiction over physical allowances and credits, as well as futures and options, buyers and sellers could be subject to CFTC fraud and anti-manipulation rules

- A few words on the SEC
 - Use care to ensure that representations about green products and programs included in registration statements or periodic reports do not mislead investors

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