

It's Not Easy Being Green: The Ins and Outs of Environmental Touts

By Jeff Civins¹ and Mary Mendoza²

In today's green-focused economy, companies have incentive to tout their products' green credentials to customers in multimedia advertisements, online marketing, and product labels. Such touting, however, is not without risk; it may give rise to liability under, among other things, the Federal Trade Commission Act ("FTC Act").

Section 5 of the FTC Act generally prohibits unfair and deceptive trade practices. Violations of that act may result in civil and criminal penalties, injunctive relief, and restitution. The FTC has developed a series of rules and guides, commonly known as the "Green Guides," to help marketers avoid making misleading environmental claims.

In January 2008, the FTC announced a series of three public workshops to evaluate whether the Green Guides needed revisions to address specific green claims such as "biodegradable," "carbon neutral," "compostable," "recyclable," "recycled content," and "ozone safe." Based on the comments it received, the FTC proposed revisions to the Green Guides in October of 2010 that address claims currently covered by the Green Guides, as well as new claims that were not previously addressed.

Regarding claims presently covered by the Green Guides, the proposal cautions marketers not to make environmental claims that the FTC believes are likely to be misperceived and that are nearly impossible to substantiate. The proposed Green Guides also warn against unqualified certifications or seals of approval that do not specify the bases for those certifications or approvals. The proposed Green Guides advise marketers of how consumers are likely to understand certain claims like "degradable," "recyclable," and "free of" a particular substance. Regarding new claims, the Green Guides provide recommendations concerning what is meant by "made with renewable materials" or "renewable energy," as well as "carbon offsets."

Because the Green Guides are administrative interpretations of the law, they do not have the force and effect of law, and they are not independently enforceable. If a marketer makes claims that are inconsistent with the Green Guides, however, the FTC can take action under the FTC Act. Conversely, if a marketer makes claims consistent with the Green Guides, they are afforded a safe harbor from enforcement by the FTC under the FTC Act.

In its notice of the workshops, the FTC gave some helpful guidance to marketers, explaining that they "must have a reasonable basis for their claims at the time they make them." "Reasonable basis" is determined from the perspective of the consumer. The FTC noted that competent, reliable, scientific evidence and documentation must support the claims. As a result, marketers should try to be accurate and specific in their green claims and identify the assumptions and methodologies on which they are based.

¹ Jeff Civins is a partner in the Austin, TX office of the law firm of Haynes and Boone, LLP. His practice emphasizes compliance matters, transactions and litigation. He may be reached at jeff.civins@haynesboone.com or 512.867.8477.

² Mary Mendoza is the administrative partner in the Austin, TX office of the law firm of Haynes and Boone, LLP. Her practice emphasizes environmental and administrative law. She may be reached at mary.mendoza@haynesboone.com or 512.867.8418.