

Client Alert

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Advertising Tips for the New Year: A Few Lessons from the FTC's Recent Enforcement Efforts

Most marketers and retailers know that the consumer protection laws require that their advertising claims be substantiated, truthful and not misleading. But the new year is a good time to take stock of advertising campaigns, practices and procedures to make sure they pass muster under the Federal Trade Commission's (FTC's) latest guidance. The FTC's recent enforcement actions provide a starting point.

Environmental “Green” Marketing: The FTC has taken notice that environmental (or green) claims are a significant marketing trend and is on high alert to make sure such claims are substantiated and not misleading. Indeed, after issuing revised *Guides for the Use of Environmental Marketing Claims* (the “Green Guides”) in 2012, the FTC brought more than 10 cases in 2013 involving false environmental claims. They included charges that companies made unsubstantiated claims that their products were free of volatile organic compounds (VOCs), biodegradable, made of environmentally friendly textiles or were otherwise “green.” A few takeaways from these cases:

- Make sure you have scientific support for all green claims.
- Don’t make broad, unqualified claims that a product is “environmentally friendly” or “eco-friendly.”
- Make sure any touted benefits are attainable. For example, don’t say something is recyclable if it would not be accepted for recycling at any existing facility.
- Consumers may view certifications and seals of approval as endorsements so make sure you follow the FTC’s Endorsement Guides (described below).

Endorsement Guidelines: Expert and consumer endorsements and testimonials can be lawful, but marketers must be careful to follow all the rules of the road described in the FTC’s *Guides Concerning the Use of Endorsements and Testimonials in Advertising* (the “Endorsement Guides”). Some things to remember:

- Advertisers are liable for any false claims made by endorsers and any claims made by an endorser must be substantiated by the advertiser.
- If an endorser touts results that are not proven to be what consumers will achieve, the ad must clearly and conspicuously disclose what consumers can generally expect in the advertised circumstances. “Results not typical” or “Individual results may vary” is not enough — the disclosure must state what is typical.
- If the endorser and the marketer have a material connection (e.g., the endorser received money, trips or free products) that would not be apparent to a consumer, the connection must be disclosed. Payments to celebrities are usually expected so typically no disclosures is required; but free products given to bloggers do trigger disclosure obligations.

- Endorsers should not talk about their experience with a product if they haven't tried it.
- "Experts" should be experts in the advertised products and should have exercised that expertise in evaluating the products.

Mobile Marketing Disclosures: Last week, Apple Inc. agreed to settle an FTC complaint that the company had billed consumers for millions of dollars of charges incurred in kids' mobile apps without parental consent. The settlement requires that Apple (1) provide full refunds to consumers, paying a minimum of \$32.5 million, and (2) change its billing practices to ensure that it obtains express, informed consent from consumers for any charges.

This enforcement action comes after the FTC's update last year of its *dotcom Disclosure Guides* to more specifically address the use of smartphones and the rise of social media marketing. These developments demonstrate that mobile marketing can be expected to remain an area of FTC interest.

Some tips:

- The FTC's Act's prohibition on unfair and deceptive practices and related FTC guidelines apply online and to mobile.
- Website advertising should be optimized to ensure necessary disclosures are clear, conspicuous and accessible on any device where the advertising is accessed. For example, monthly fees or other service charges should be displayed close to pricing information regardless of the platform or service where an ad is viewed.
- Companies should ensure that they obtain express, informed consent prior to incurring fees and for future costs, consumers should be given the option to withdraw consent at any time.
- Hyperlinks should be accessible on all devices and labeled as specifically as possible. Hyperlinks should not be used for disclosures relating to health, safety and cost.
- Even on space-constrained ads, such as some social media platforms, advertisers must provide necessary disclosures (sponsored content, typical results, etc.).

Made in the USA: In October 2013 the FTC announced charges that a marketer of outdoor accessories falsely claimed on its website and in promotional materials that certain of its products were "Made in the USA" or "Truly Made in the USA" when in fact the products contained substantial foreign content.

This case serves as a reminder that, while not newly updated, the FTC's 1997 *Made in the USA Standard* remains important. Under that standard, US country of origin claims are permitted only if all or virtually all the product is US-made. The FTC considers a variety of factors when evaluating express or implied US country of origin claims, but in general all significant parts and processing must be of US origin, and the product should contain no — or negligible — foreign content.

New Rule: In addition to the FTC's general enforcement authority under the consumer protection laws, the FTC has jurisdiction under a variety of regulations and rules.

One of these, the Energy Labeling Rule (previously known as the Appliance Labeling Rule), imposes new requirements for online retailers. Specifically, as of January 15 all online retailers selling products bearing EnergyGuide or Light Facts labels must post online label images for those products. The Energy Labeling Rule already had required EnergyGuide labels to appear on many consumer products and energy information to appear in catalogs and online.

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The FTC's consumer protection mandate is broad and, as suggested by these highlights, FTC guidance touches upon a wide range of practices and industries. And remember, depending on the circumstances, the FTC may hold liable retailers, catalog marketers and others for their role in making or disseminating claims that violate the consumer protection laws. In addition, in its consumer protection challenges, the FTC increasingly has obtained monetary equitable relief such as consumer redress or disgorgement of profits. These developments demonstrate that companies at all levels of the retail chain should consider the truthfulness of advertising claims and have in place advertising policies that ensure appropriate legal review.

Hunton & Williams LLP has significant experience representing companies on consumer protection matters before the FTC, state attorneys general and the National Advertising Division and in Lanham Act lawsuits. Several of our attorneys joined Hunton & Williams from the FTC, including our practice group head and former FTC deputy director of the Bureau of Competition, Bruce Hoffman; the former acting assistant director of advertising practices, Melvin H. Orlans; partner Amanda Wait; and counsel Kristy Van Horn.

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