

Byline

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Company Reputation Won't Stop FTC Ad Investigations

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The chairwoman of the Federal Trade Commission, Edith Ramirez, has announced the FTC is significantly increasing scrutiny and enforcement of mainstream advertising by reputable companies. Chairwoman Ramirez recently said that the FTC is increasing enforcement against not only “outright fraud,” but also national advertising campaigns. As the chairwoman stated, “advertising must be truthful and nondeceptive,” and the FTC’s vigorous false advertising enforcement aims to keep advertisers honest.

As part of this aggressive push, the FTC has launched Operation Full Disclosure, a truth-in-advertising campaign that already includes FTC-issued warning letters to more than 60 companies regarding inadequate disclosures in their advertising. The goal stated by Chairwoman Ramirez suggests that even credible advertising claims may encounter FTC investigation, saying that the commission will push its campaign “until we are confident the industry understands the need for ‘clear and conspicuous’ disclosures, and what ‘clear and conspicuous’ means.” The FTC has also clearly said that not receiving a warning letter by no means implies that a company’s advertising claims will not be investigated.

What Does This Mean for Companies?

The FTC’s statements and actions are consistent with a broader trend of more frequent regulatory actions against mainstream companies running ads with claims that might not appear suspect on their face. The warning letters targeted a variety of advertising claims on the basis that they contained insufficient disclosures or qualifications, including ads that quoted a low price but omitted conditions necessary to obtain the product at that price. The warning letters also targeted ads that failed to disclose that a product’s advertised capability required buying another, complementary product. Moreover, the warning letters targeted not only ads that lacked specific explanatory information, but also those the agency considered ambiguous. Companies should revisit their advertising — and particularly their ad substantiation processes — and make sure that they are up to the FTC’s standards.

Specific Concerns Beyond the Increase in Scope

The FTC has become much more likely to seek financial remedies and disgorgement. Some of the FTC’s recent false advertising prosecutions resulted in multimillion dollar settlements, as was the case earlier this year with TriVita Inc. and Ellison Media Company, or similarly lucrative court victories. The FTC’s successful false advertising prosecution against Wellness Support Network in February, for example, concluded with the U.S. District Court for the Northern District of California granting the commission’s summary judgment motion and awarding it Wellness Support Network’s total sales revenue from 2004 to 2012, totaling over \$2 million. Companies need to be aware that they could be subjected to significant financial risk.

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Retailers in particular need to be aware that they may be held responsible for the claims – and the substantiation – of the products they carry. The FTC may try to require that retailers independently verify the science or other support behind any claims they run, even if those claims come straight from the manufacturers. It may not be enough for a retailer to point to scientific testing by the manufacturer, unless the retailer has independently assessed the validity of the manufacturer's testing. The FTC's standards for advertising substantiation also depend on the type of claim being made. Claim substantiation will have to closely follow the FTC's view of sufficient evidence for particular product or service claims. Moreover, it is not enough for a retailer's ads to be accurate if they do not sufficiently qualify claims with exceptions or limitations. For example, the warning letters went to advertisers using claims of "risk-free" or "worry-free" trial periods without sufficiently disclosing the need to make an initial payment for the product or to pay for its return shipping.

Certain kinds of claims are receiving particularly intense scrutiny and being subjected to particularly stringent substantiation requirements. They include:

- Health and wellness claims: The FTC touts it has filed more than 120 advertising claims related to health supplements in the past decade alone, and it cites a trend in unsubstantiated health claims related to eating certain foods.
- Weight-loss claims: ICON Health & Fitness Inc., recently agreed to pay the FTC \$3 million in civil penalties to settle false advertising charges regarding the company's weight-loss claims related to its abdominal exercise technology.

Weight-loss claims are also a prime example of the FTC's substantiation requirements. Since the FTC announced its January 2014 settlement with GeneLink, a company that advertised dietary supplements to treat certain diseases, it now defines "competent and reliable evidence" for weight-loss claims to require two randomized, well-controlled human clinical trials. This one-size-fits-all substantiation rule notably attracted disagreement from Commissioners Maureen Ohlhausen and Joshua Wright; they released statements questioning this requirement's across-the-board applicability. Nevertheless, Chairwoman Ramirez recently emphasized that this is the standard the FTC will use and that companies should be prepared to meet it.

Additionally, the FTC's warning letters particularly targeted weight-loss claims. The FTC focused on claims based on "outlier results" rather than what the typical consumer could experience, as well as ads that included "materially altered demonstrations" of the product or service without sufficient disclosure.

- Up-to claims: Five settlements with the FTC in 2012 rephrased the industry-standard test for the veracity of up-to claims: that "an appreciable number of consumers" will experience the ad's claimed results. The settlements required the companies instead to show that "all or almost all consumers are likely to see the maximum savings claimed[.]" While the FTC may not hold all up-to claims to this standard, caution is warranted. This phrasing is a significant departure from the prior standard, and advertisers should be conscious of this higher hurdle.

The FTC continues to be increasingly aggressive in its policing of advertising. Businesses of all types need to be vigilant as they prepare marketing plans, create advertising campaigns and monitor substantiation practices so they are not caught in the FTC's crosshairs.