

Top Advertising Law Enforcement Trends for the New Year



This holiday season, brands are ready for bustling sales, special offers and

joyful consumers. However, with regulators on the lookout for deceptive practices and plaintiffs' attorneys ready to file class actions, the holidays are a prime time to discuss advertising law enforcement trends that could ruin a perfectly festive time and new year.

In this list, we summarize enforcement trends and priorities identified at the annual conference of the National Advertising Division (NAD), which took place in October 2017. NAD operates as a part of the Advertising Self-Regulatory Council, an arm of the Better Business Bureau, and conference speakers included FTC attorneys, a state attorney general, NAD attorneys and industry professionals. These speakers both looked back at advertising enforcement activity from 2017 and opined on priorities for 2018. We share six takeaways for your brand or legal team to follow.

1. Disclose material connections with influencers and endorsers—and ensure they disclose too! In September 2017, the FTC updated its [Endorsement Guides FAQs](#) to further address relationships with endorsers and influencers, including by providing more guidance on both acceptable language and the location of disclosures. The agency emphasized that influencers and endorsers must disclose their relationship with the company in *all* advertising no matter the media or platform, and companies using influencers and endorsers are expected to develop policies and procedures consistent with the FTC's emphasis on disclosure and effective compliance monitoring. Importantly, the FTC also reiterated that the disclosure responsibilities apply both to brands *and* their influencers, issuing over 90 warning letters to brands and influencers in April 2017 questioning whether they were truthfully and adequately disclosing their relationship. Expect enforcement activity in this area to continue.

2. Ensure that terms and conditions comply with ROSCA and state automatic renewal laws. If you offer free trials that convert to a subscription, a monthly subscription service or other services that might start as temporary but then automatically renew, you must comply with the Restore Online Shopper's Confidence Act (ROSCA) and related state laws that establish requirements for how, when and what consumers must be told about internet transactions, subscription plans and free trials that convert to paying plans.

In particular, California's automatic renewal law has been a favorite of plaintiffs' attorneys and was recently updated to expressly require businesses to disclose the price that the consumer will be charged after the free trial ends, among other changes. At a high level, clear and conspicuous disclosure and express consent to the terms are key.

3. Make sure your product is really Made in the USA. The FTC will be watching for false Made in the USA claims. According to the FTC, products advertised or labeled as Made in the USA without qualification must be "all or virtually all" made in the United States. The FTC takes the position that "all or virtually all" means that all significant materials and processing that go into the product must be of U.S. origin and "the product should contain no—or negligible—foreign content." Retailers should review whether they have support for unqualified and qualified Made in the USA claims under federal law and state laws. California, for example, has very specific Made in the USA compliance requirements.

4. Support your health claims. Any claim that a product is good for you, healthier than your competitors or will positively have an impact on your health is potentially subject to greater scrutiny by regulators, consumers and plaintiffs' attorneys. Such health and safety claims must be substantiated with competent and reliable scientific evidence according to the FTC. The FTC also emphasized protecting vulnerable consumers, including older Americans, so carefully vet and qualify any health claims before executing marketing.

5. Don't overstate your "green" claims. The FTC is keeping a close watch on claims that a product is "green," "organic" or "natural," and takes the position that broad "eco-friendly" claims are not able to be substantiated. As such, advertisements must be careful not to expressly or impliedly communicate more than the company can actually substantiate (e.g., stating that a product is "emission free," when, in fact, some emissions inevitably occur). Moreover, companies should ensure that any "green seals" or certifications are legitimate, and consumers are not misled into believing a third party provided certification when it was actually bestowed by the company itself.

6. Take a second look at your advertising if your product targets "vulnerable populations." Do you market and sell products especially appealing to the elderly, such as those that improve memory or ease joint pain or arthritis? Are your products or services aimed at helping those in rural areas, particularly those who are affected by the opioid crisis? The FTC and state attorneys general are concerned about companies targeting these vulnerable populations. They have brought claims, for example, against dietary supplement retailers that made improper claims regarding their ability to ease joint pain or their ability to reduce symptoms associated with opioid withdrawal.

Keeping these priorities in mind should help you prevent surprise enforcements from tarnishing the holiday spirit and create a solid foundation for 2018 advertising practices. Please contact experienced counsel with your questions or for more information.

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