



Ring in the new year by avoiding marketing practices that could result in class

actions, regulatory enforcement actions, and competitor claims. Here are five advertising and marketing law takeaways for brands and legal teams to consider for 2021.

1. **Remember cause marketing rules for charitable promotions.** With both COVID-19 and social justice movements, brands are looking for ways to give to charitable causes. However, advertising that a consumer purchase will result in a donation to a charity or charitable cause (e.g., "for each purchase, we will donate \$1 (or x item)") triggers state "commercial co-venture" requirements, including certain disclosures, contractual requirements between the brand and charity, and, in select jurisdictions, registration and bonding. Also, collecting money at checkout, or engaging in similar fundraising efforts for charity may trigger "paid solicitor" or "professional fundraisers" laws (e.g., if a fee or other compensation is taken).
2. **Avoid unsupported health claims.** The Federal Trade Commission (FTC) closely monitors health claims and this year has repeatedly issued warning letters and enforcements to brands making allegedly unsupported COVID-19 prevention or cure claims. Brands should avoid express or implied claims that a product or service has an ability to cure, treat, or prevent COVID-19 without competent and reliable scientific evidence and compliance with applicable Food and Drug Administration (FDA) requirements.
3. **Do not engage in price gouging.** State laws and executive orders apply during emergencies when businesses raise the price of essential, commodity, or disaster-related products and services. While some jurisdictions prohibit price increases at or above specific thresholds, others simply prohibit charging "unconscionable prices." COVID-19 has resulted in significant legal activity, including (1) regulator actions against specific violators; (2) letters from AGs to e-commerce platforms seeking help policing against price gouging; (3) Department of Justice task force investigations of hundreds of companies and individuals selling PPE at high prices; and (4) private companies filing lawsuits to protect their essential products (e.g., under federal trademark, unfair competition, false advertising, and state price gouging laws).

4. **Clearly communicate subscription billing and automatic renewal terms.** States continue to enact laws regulating subscription billing (e.g., New York recently enacted an autorenewal law similar to California's). Further, class actions and government enforcement actions continue to target recurring subscription services that display no (or inadequate) disclosures, with settlements often reaching millions. Brands with offerings that automatically renew should consider auditing their automatic renewal processes for compliance, including to ensure that (1) the checkout process clearly communicates the recurring billing terms (including the fees to be charged and an easy cancellation method) and obtains unambiguous assent to the terms; and (2) the appropriate acknowledgments and notices are provided to the customer.
5. **Integrate transparency into consumer endorsement and review practices.** Companies should keep in mind the nuanced compliance requirements related to incentivizing, curating, and sharing of consumer reviews. For example, FTC and National Advertising Division representatives at a recent 2020 marketing law conference identified review gating (discouraging consumers from leaving negative reviews in the same location as positive reviews), undisclosed review reorganizing (e.g., making positive reviews appear first), and unjustifiable deletion of negative reviews as potentially deceptive practices. Further, for truth-in-advertising reasons, free gifts, samples, and other benefits sent to consumers may need to be accompanied by instructions for how to disclose such incentives in associated reviews and online postings. The FTC has also announced that it is reviewing its endorsement-related guidance and may issue updated guides and/or FAQs in 2021. Brands should ensure their marketing teams understand their endorsement and disclosure obligations and stay tuned for more developments.

Brands should consult with knowledgeable marketing and consumer protection law counsel to ensure that they are managing legal and practical risks for their 2021 products, services, and advertising campaigns.

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