



'Tis the season for retailers to set best practices to avoid class actions, regulatory

enforcement actions, and competitor claims. Ring in the new year with these top five U.S. advertising and marketing law takeaways.

1. **Review advertising and disclosures for subscriptions that automatically renew.** The Federal Trade Commission (FTC), [state legislatures](#), attorneys general, and class action plaintiffs are targeting recurring subscription programs. For example, the FTC recently issued an [Enforcement Policy Statement](#) that provides a roadmap for how the FTC may enforce against unfair and deceptive recurring subscription practices, and has warned against using "dark patterns" that mislead consumers to sign up for recurring subscriptions or make cancellation difficult. Also, Colorado and Delaware enacted their first automatic renewal laws in 2021, while California and Illinois amended their existing automatic renewal laws with stricter requirements. With increased regulatory and legislative attention on this issue, brands that offer subscriptions that automatically renew should update their advertising, checkout, and notice processes with the following key compliance tips in mind: (1) clearly and conspicuously disclose material terms, including the amount that consumers will be charged, the frequency of any recurring charges, the deadlines by which consumers must act to prevent charges, and how to cancel the subscription; (2) obtain consumers' express consent to the automatic renewal terms; and (3) provide simple and easy cancellation methods.
2. **Review and refresh policies, trainings, and compliance programs for influencers, endorsements, and consumer reviews.** In October 2021, the FTC sent a [Notice of Penalty Offenses](#) to more than 700 brands warning that unfair and deceptive acts and practices related to endorsements could trigger penalties of up to \$43,792 per violation. The Notice reminds brands to avoid unfair or deceptive acts such as: (1) misrepresenting that an endorsement reflects the experience or opinions of users; (2) misrepresenting an endorser as an actual, current, or recent user of a product; (3) using testimonials to make unsubstantiated or deceptive performance claims; (4) failing to disclose a material connection between an endorser and product seller; and (5) misrepresenting that the experience of an endorser represents the typical or ordinary

experience of users of the product. Brands should revisit the FTC's guidance on endorsements and testimonials and refresh endorsement compliance practices.

3. **Avoid inaccurate and unsubstantiated U.S. origin claims.** In July 2021, the FTC [codified](#) its long-standing Made in USA guidelines into a formal rule which allows the FTC to seek monetary penalties of up to \$43,792 for each violation. The new rule [prohibits](#) advertisers from making unqualified U.S. origin claims unless: (1) final assembly or processing of the product occurs in the United States; (2) all significant processing for the product occurs in the United States; and (3) all or virtually all of the product's ingredients or components are made and sourced in the United States. The new rule also applies to implied U.S. origin claims made in a broad range of marketing formats. Implied claims include representations that a product or service is "made," "manufactured," "built," "produced," "created," or "crafted" in the "United States," "America," or any other terms or imagery that convey U.S. origin. Qualified claims will continue to be enforced under the FTC's general truth-in-advertising-related authority. Brands should review related FTC guidance and ensure that express and implied U.S. origin marketing and labeling claims are accurate.
4. **Carefully consider sustainability claims.** Consumers and regulators are increasingly targeting false and misleading sustainability claims. As brands look ahead to promoting green features and products in the new year, it is a good time to reference the FTC's guidelines regarding environmental advertising claims (the [Green Guides](#)). The Green Guides warn marketers against making broad and unqualified environmental claims because, according to the FTC, brands likely cannot substantiate the wide range of meanings that these claims convey. Rather than making broad claims such as "eco-friendly" or "green," brands should consider narrow sustainability claims and focus on the specific environmental benefits or attributes offered, provided that there is sufficient evidence to support such claims.
5. **Take extra care with health claims.** The FTC continues to prioritize enforcement against health claims across a number of industries. This past year the FTC sent a stream of warning letters to brands making unsupported COVID-19-related health claims and also sent warnings to cannabidiol (CBD) marketers allegedly conveying unsupported claims about CBD products. In addition, the FTC settled with multiple sellers of health products in 2021 for significant penalties. Outside of the regulatory space, health industry competitors filed Lanham Act lawsuits and National Advertising Division (NAD) complaints against each other. Simply put, brands should carefully review substantiation for health claims, which are likely to remain highly regulated and enforced in 2022.

Check with experienced marketing and consumer protection law counsel to help manage legal and practical risks when advertising products and services in 2022. And follow [Consumer Protection Review](#) and The [AMP Moment](#) podcast to stay current on ad law developments and trends throughout the new year.

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