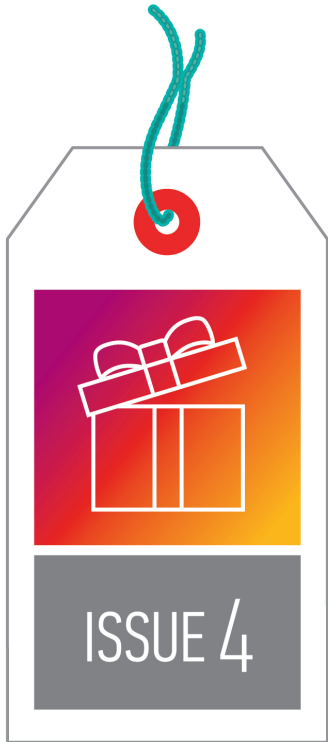


Stay and Bright With These Ad Law Tips



Another new year approaches, so it's time for retailers to revisit advertising and

marketing law compliance strategies to avoid class actions, regulatory enforcement actions, and competitor challenges. In this Update, we share our picks for the top five U.S. marketing law topics that deserve your attention in 2023.

1. **Avoid broad and unsupported sustainability claims.** Regulators and consumers continue to closely scrutinize "green" and "sustainability" claims. For example, consistent with the Federal Trade Commission's (FTC) [Guide for the Use of Environmental Marketing Claims](#) (the Green Guides), courts and the National Advertising Division (NAD) remain critical of broad, unqualified environmental claims—such as "sustainable," "eco-friendly," and "green"—because they can convey a wide range of meanings that could mislead consumers. Because of this, retailers should consider narrowing or qualifying claims to describe the specific environmental benefits at issue. In addition, recent NAD decisions have concluded that retailers must substantiate "aspirational" claims (e.g., "Our plan is to plant 2 million new trees by the end of 2021"). While NAD decisions are not precedential to courts (and at least one court has taken a more permissive position), retailers should ensure that aspirational green claims are supported by tangible steps and progress toward the stated goals. The FTC will accept public comments about the Green Guides until February 21, 2023. Retailers should be on the lookout for ongoing developments in this area.
2. **Review recurring subscription programs for compliance with state and federal laws.** The FTC continues to focus its enforcement on unfair and deceptive recurring subscription practices. Last year, the FTC issued an [Enforcement Policy](#) to provide guidance about how the FTC may enforce against such practices. This year, the FTC brought an action against [Vonage](#) for, among other claims, failure to provide a simple (easy to find and use) cancellation method for recurring subscriptions, which resulted in a \$100 million settlement. States also continue to add or amend their laws regulating recurring subscriptions. For example, new updates and laws took effect in 2022 in California, Colorado, Delaware, Florida, Idaho, Tennessee, and Virginia. Plaintiffs' lawyers also continue to bring lawsuits alleging violations of state recurring subscription laws. To avoid unwanted scrutiny by consumer class action plaintiffs or regulators,

retailers should (1) clearly and conspicuously disclose material recurring subscription terms, (2) obtain consumers' express consent to the full subscription terms, (3) provide simple and easy cancellation methods, (4) send a reminder notice before a free trial converts to a paid subscription and before a paid subscription automatically renews (as required by certain jurisdictions), and (5) stay current on changing laws and enforcement trends in this area.

3. **Do not hide fees or engage in other "dark patterns."** The FTC has increasingly focused on "dark patterns," including by issuing a detailed [dark patterns report](#) in September 2022. According to the FTC, "dark patterns" are website, app, or other digital design practices that trick or manipulate consumers into making choices they would not otherwise have made, such as design practices that (1) induce false beliefs (e.g., false countdown timers), (2) lead to unauthorized charges (e.g., unauthorized recurring subscriptions), (3) hide or delay disclosure of material information (e.g., hidden fees), and (4) obscure or subvert privacy choices. The FTC is also considering rulemaking to curb "junk fees," which it views as service fees that add little or no value or hidden fees that a brand only discloses late in the purchasing process (or not at all). Consumer class actions regarding hidden fees are not new, but we expect to see an increase in actions alleging unfair or deceptive hidden fees. To mitigate risk related to dark patterns and hidden fees, retailers should (1) avoid using misdirection or deception to create psychological pressure to complete the transaction; (2) make consumer choices easy to access and understand; (3) disclose unavoidable and mandatory fees upfront; (4) itemize different types of fees at checkout for clarity; and (5) otherwise work with marketing counsel early and often in the website, app, and digital experience design process.
4. **Update programs related to influencers, endorsements, and consumer reviews.** In May 2022, the FTC issued proposed revisions to the [Guides Concerning the Use of Endorsements and Testimonials in Advertising](#) (the Endorsement Guides). The FTC's proposed revisions to the Endorsement Guides expand or clarify guidance related to (1) who can be considered an endorser, (2) what qualifies as an endorsement, (3) who can be liable if the endorsement is deceptive, (4) consumer review practices (e.g., manipulation of published reviews), and (5) when and how to disclose paid and other material connections between brands and endorsers, among other topics. These proposed revisions, along with the [Notice of Penalty Offense](#) issued by the FTC in 2021, demonstrate the FTC's continued focus on endorsements, influencers, and review programs. Retailers should review and refresh their influencer programs, including related policies, trainings, contracts, and disclosure practices.
5. **Carefully consider new restrictions and guidelines on advertising to kids.** The FTC, state regulatory authorities, and state legislatures have shown increased concern when it comes to advertising to children. In October 2022, the FTC held a virtual event entitled "Protecting Kids From Stealth Advertising in Digital Media" and solicited feedback about how digital advertising affects children. The Children's Advertising Review Unit (CARU) also issued new Self-Regulatory Guidelines for Children's Advertising (effective January 1, 2022) that apply to advertising primarily directed to children under age 13. Finally, California enacted the [California Age-Appropriate Design Code Act](#) (CAADCA), which requires businesses providing online products, services, or features that are "likely to be accessed by children" under age 18 to implement extensive privacy and safety features, including by (1) employing age-appropriate design elements that make it easier for children to report privacy problems, and that notify children when they are being monitored or tracked; (2) avoiding dark patterns or other design choices that persuade children to provide more personal information than is reasonable or that otherwise could be materially detrimental to the physical health, mental health, or well-being of a child; (3) concisely and prominently providing privacy information, terms of service, policies, and community standards using language suited to the age of the children; (4) by default, setting a high level of privacy safeguards; and (5) conducting data protection impact assessments. The CAADCA will take effect in July 2024, be enforced by the California attorney general, and carries penalties of up to \$7,500 per affected child for intentional violations, and up to \$2,500 per affected child for negligent violations. Retailers should coordinate with counsel to evaluate their websites, apps, and advertising for compliance.

Takeaways

Companies should check with experienced marketing and consumer protection law counsel to help manage legal and practical risks when advertising products and services in 2023. 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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