



Advertising

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Background

The Federal Trade Commission (FTC) works to ensure that the nation's markets are efficient and free of practices which might harm consumers. To ensure the smooth operation of our free market system, the FTC enforces federal [CONSUMER PROTECTION](#) laws that prevent [FRAUD](#), deception, and unfair business practices. The Federal Trade Commission Act allows the FTC to act in the interest of all consumers to prevent deceptive and unfair acts or practices. In interpreting the Act, the Commission has determined that, with respect to advertising, a representation, omission, or practice is deceptive if it is likely to mislead consumers and affect consumers' behavior or decisions about the product or service. In addition, an act or practice is unfair if the injury it causes, or is likely to cause, is substantial, not outweighed by other benefits, and not reasonably avoidable.

The FTC Act's prohibition on unfair or deceptive acts or practices broadly covers advertising claims, marketing and promotional activities, and sales practices in general. The Act is not limited to any particular medium. Accordingly, the Commission's role in protecting consumers from unfair or deceptive acts or practices encompasses advertising, marketing, and sales online, as well as the same activities in print, television, telephone and radio. For certain industries or subject areas, the Commission issues rules and guides. Rules prohibit specific acts or practices that the Commission has found to be unfair or deceptive. Guides help businesses in their efforts to comply with the law by providing examples or direction on how to avoid unfair or deceptive acts or practices. Many rules and guides address claims about products or services or advertising in general and is not limited to any particular medium used to disseminate those claims or advertising. Therefore, the plain language of many rules and guides applies to claims made on the Internet. Solicitations made in print, on the telephone, radio, TV, or online naturally fall within the Rule's scope.

Bureau of Consumer Protection

The FTC's Bureau of Consumer Protection protects consumers against unfair, deceptive, or [FRAUDULENT](#) practices. The Bureau enforces a variety of consumer protection laws enacted by Congress, as well as trade regulation rules issued by the Commission. Its actions include individual company and industry-wide investigations, administrative and federal court [LITIGATION](#), rule-making proceedings, and consumer and business education. In addition, the Bureau contributes to the Commission's on-going efforts to inform Congress and other government entities of the impact that proposed actions could have on consumers. The Bureau of Consumer Protection is divided into six divisions and programs, each with its own areas of expertise. One of the divisions is the Division of Advertising Practices.

Encyclopedia of Everyday Law: Advertising

Within the Bureau of Consumer Protection is the Division of Advertising Practices and the Division of Enforcement. These entities are the nation's enforcers of federal truth-in-advertising laws. The FTC Act prohibits unfair or deceptive advertising in any medium. That is, advertising must tell the truth and not mislead consumers. A claim can be misleading if relevant information is left out or if the claim implies something that is not true. In addition, claims must be substantiated especially when they concern health, safety, or performance. The type of [EVIDENCE](#) may depend on the product, the claims, and what experts believe necessary. Sellers are responsible for claims they make about their products and services. Third parties such as advertising agencies or website designers and catalog marketers also may be liable for making or disseminating deceptive representations if they participate in the preparation or distribution of the advertising or know about the deceptive claims.

The Division of Advertising Practices focuses its enforcement activities on claims for foods, drugs, dietary supplements, and other products promising health benefits; health fraud on the Internet; weight-loss advertising and marketing directed to children; performance claims for computers, ISPs and other high-tech products and services; tobacco and alcohol advertising; protecting children's privacy online; claims about product performance made in national or regional newspapers and magazines; in radio and TV commercials, including infomercials; through direct mail to consumers; or on the Internet.

Advertising Agency Obligations

Advertising agencies (and more recently, website designers) are responsible for reviewing the information used to [SUBSTANTIATE](#) ad claims. These agencies may not simply rely on an advertiser's assurance that the claims are substantiated. In determining whether an ad agency should be held liable, the FTC looks at the extent of the agency's participation in the preparation of the challenged ad and whether the agency knew or should have known that the ad included false or deceptive claims.

Publisher Obligations

Like advertising agencies, catalog and magazine publishers can be held responsible for material distributed. Publications may be required to provide documentation to back up assertions made in the advertisement. Repeating what the manufacturer claims about the product is not necessarily sufficient. The Division of Enforcement conducts a wide variety of law enforcement activities to protect consumers, including deceptive marketing practices. This division monitors compliance with Commission cease and desist orders and federal court injunctive orders, investigates violations of consumer protection laws, and enforces a number of trade laws, rules, and guides.

Franchises and Businesses

The Franchise and Business Opportunity Rule requires franchise and business opportunity sellers to give consumers a detailed disclosure document at least 10 days before the consumer pays any money or legally commits to a purchase. The document must include:

- The names, addresses, and telephone numbers of other purchasers
- A fully-audited [FINANCIAL STATEMENT](#) of the seller
- The background and experience of the business's key executives
- The cost of starting and maintaining the business
- The responsibilities of the seller and purchaser once the purchase is made

In addition, companies that make earnings representations must give consumers the written basis for their claims, including the number and percentage of owners who have done at least as well as claimed.

Multi-level marketing (MLM), sometimes known as network or matrix marketing, is a way of selling goods and services through distributors. These plans typically promise that people who sign up as distributors will get commissions two ways: On their own sales and on the sales their recruits have made.

Pyramid schemes are a form of multi-level marketing which involves paying commissions to distributors only for recruiting new distributors. Pyramid schemes are illegal in most states because the plans inevitably collapse when no new distributors can be recruited. When a plan collapses, most people except those at the top of the pyramid lose money. Lawful MLMs should pay commissions for the retail sales of goods or services, not for recruiting new distributors. MLMs that involve the sale of business opportunities or franchises, as defined by the Franchise Rule, must comply with the Rule's requirements about disclosing the number and percentage of existing franchisees who have achieved the claimed results, as well as cautionary language.

Telemarketing Sales

The FTC's Telemarketing Sales Rule requires certain disclosures and prohibits misrepresentations. The Rule covers most types of telemarketing calls to consumers, including calls to pitch goods, services, sweepstakes, and prize promotion and investment opportunities. It also applies to calls consumers make in response to postcards or other materials received in the mail. Calling times are restricted to the hours between 8 a.m. and 9 p.m. Telemarketers must disclose that it is a sales call, and for which company. It is illegal for telemarketers to misrepresent any information, including facts about goods or services, earnings potential, profitability, risk or liquidity of an investment, or the nature of a prize in a prize- promotion scheme. Telemarketers must disclose the total cost of the products or services offered and all restrictions on getting or using them, or that a sale is final or non-refundable. Although most types of telemarketing calls are covered by the Rule, the Rule does not cover calls placed by consumers in response to general media advertising (except calls responding to ads for investment opportunities, credit repair services, recovery room services, or advance- fee loans). It also does not cover calls placed by consumers in response to direct mail advertising that discloses all the material information required by the Rule (except calls responding to ads for investment opportunities, prize promotions, credit repair services, recovery room services, or advance-fee loans). The Mail or Telephone Order Merchandise Rule requires companies to ship purchases when promised (or within 30 days if no time is specified) or to give consumers the option to cancel their orders for a re- fund.

Environmental Marketing Practices

Guidelines for using environmental marketing claims have been established by the Federal Trade Commission. The guides themselves are not enforceable regulations, nor do they have the force and effect of law. These guides specifically address the application of Section 5 of the Federal Trade Commission Act that makes deceptive acts and practices in or affecting commerce unlawful to environmental advertising and marketing practices. Guides for the Use of Environmental Marketing Claims provide the basis for voluntary compliance with such laws by members of industry and are available from the EPA and the FTC. The guides apply to advertising, labeling, and other forms of marketing to consumers and do not preempt state or local laws or regulations. Generally, environmental claims must specify application to the product, the package, or a component of either. Environmental claims should not overstate the environmental attributes or benefit. Every express and material implied claim conveyed to consumers about an objective quality should be substantiated and other broad environmental claims should be avoided or qualified.

A product which purports to offer an environmental benefit must be backed with factual information. Green Guides govern claims that consumer products are environmentally safe, recycled, recyclable, ozone-friendly, or biodegradable. These guides apply to environmental claims included in labeling, advertising, promotional materials, and all other forms of marketing. The guides apply to any claim about the environmental attributes of a product, package, or service in connection with the sale, offering for sale, or marketing of such product,

package, or service for personal, family, or household use, or for commercial, institutional, or industrial use.

According to the guidelines, a product or package should not be marketed as recyclable unless it can be collected, separated, or otherwise recovered from the solid waste stream for reuse or in the manufacture or assembly of another package or product through an established recycling program. Products or packages that are made of both recyclable and non-recyclable components must have any recyclable claim adequately qualified to avoid consumer deception about which portions or components of the product or package are recyclable. Claims of recyclability should be qualified to the extent necessary to avoid consumer deception about any limited availability of recycling programs and collection sites. If an incidental component significantly limits the ability to recycle a product or package, a claim of recyclability would be deceptive. A product or package that is made from recyclable material, but, because of its shape, size, or some other attribute, is not accepted in recycling programs for such material, should not be marketed as recyclable.

Likewise, claims that a product or package is degradable, biodegradable, or photodegradable should be substantiated by competent and reliable scientific evidence that the entire product or package will completely break down and return to nature, i.e., decompose into elements found in nature within a reasonably short time after customary disposal. Claims of degradability, biodegradability, or photodegradability should be qualified to the extent necessary to avoid consumer deception about the product or package's ability to degrade in the environment where it is customarily disposed and the rate and extent of degradation.

A recycled content claim may be made only for materials that have been recovered or otherwise diverted from the solid waste stream, either during the manufacturing process (pre-consumer) or after consumer use (post-consumer). To the extent the source of recycled content includes pre-consumer material, the manufacturer or advertiser must have substantiation for concluding that the pre-consumer material would otherwise have entered the solid waste stream. In asserting a recycled content claim, distinctions may be made between pre-consumer and post-consumer materials. Where such distinctions are asserted, any express or implied claim about the specific pre-consumer or post-consumer content of a product or package must be substantiated. For products or packages that are only partially made of recycled material, a recycled claim should be adequately qualified to avoid consumer deception about the amount, by weight, of recycled content in the finished product or package. Additionally, for products that contain used, reconditioned, or remanufactured components, a recycled claim should be adequately qualified to avoid consumer deception about the nature of such components. No such qualification would be necessary in cases where it would be clear to consumers from the context that a product's recycled content consists of used, reconditioned, or remanufactured components.

Labeling Rules

The Textile, Wool, Fur, and Care Labeling Rules require proper origin and fiber content labeling of textile, wool and fur products, and care label instructions attached to clothing and fabrics.

For a product to bear the label "Made in USA," the product must be "all or virtually all" made in the United States. The term "United States," as referred to in the Enforcement Policy Statement, includes the 50 states, the District of Columbia, and the U.S. territories and possessions. "All or virtually all" means that all significant parts and processing that go into the product must be of U.S. origin. That is, the product should contain no, or negligible, foreign content. The product's final assembly or processing must take place in the United States. The Commission then considers other factors, including how much of the product's total manufacturing costs can be assigned to U.S. parts and processing and how far removed any foreign content is from the finished product. In some instances, only a small portion of the total manufacturing costs is attributable to foreign processing, but that processing represents a significant amount of the product's overall processing. Claims that a particular manufacturing or other process was performed in the United States or that a particular part was manufactured in the United States must be truthful, substantiated, and clearly refer to the

specific process or part, not to the general manufacture of the product, to avoid implying more U.S. content than exists.

A product that includes foreign components may be called "Assembled in USA" without qualification when its principal assembly takes place in the United States and the assembly is substantial. For the assembly claim to be valid, the product's last substantial transformation should have occurred in the United States.

Comparative Advertising

It is completely legal for a company to compare its product or service to another company's in an ad provided the comparison is truthful and accurate. However, it is illegal to mislead through an implied comparison. A statement in an ad that a product is more reliable than another because it does something that the other product may also do, can manipulatively imply a falsehood.

FTC Litigation

Typically, FTC investigations are non-public to protect both the investigation and the companies involved. If the FTC believes that a person or company has violated the law, the agency may attempt to obtain voluntary compliance by entering into a consent order with the company. A company that signs a consent order need not admit that it violated the law, but it must agree to stop the disputed practices outlined in an accompanying complaint. If a consent agreement cannot be reached, the FTC may issue an administrative complaint or seek injunctive relief in the federal courts. The FTC's administrative complaints initiate a formal proceeding that is much like a federal court trial but before an administrative law judge; evidence is submitted, [TESTIMONY](#) is heard, and witnesses are examined and cross-examined. If a law violation is found, a [CEASE AND DESIST ORDER](#) may be issued. Initial decisions by administrative law judges may be appealed to the full Commission. Final decisions issued by the Commission may be appealed to the U.S. Court of Appeals and, ultimately, to the U.S. Supreme Court.

In some circumstances, the FTC can go directly to court to obtain an injunction, civil penalties, or consumer [REDRESS](#). The injunction preserves the market's competitive status quo. The FTC seeks federal court injunctions in consumer protection matters typically in cases of ongoing consumer fraud.

Additional Resources

Advertising: Principles And Practice. Wells, William, Prentice Hall, 1999.

Copywriting for the Electronic Media: A Practical Guide. Meeske, Milan, Wadsworth Publishing Company, 1999.

Trust Us, We're Experts: How Industry Manipulates Science and Gambles with Your Future. Rampton, Sheldon and John Stauber, Putnam, 2000.

Organizations

The Council of Better Business Bureaus
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Encyclopedia of Everyday Law: Advertising

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Fax: (703) 525-8277

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