

Advertising Law Compliance Checklist

A high level framework to identify advertising law problems

1. ANALYSIS OF BENEFIT CLAIMS AND SUBSTANTIATION/DISCLOSURES

Any time you make a claim about your product, you need to be able to back it up with proof. The type of proof, or “substantiation,” required is often dictated by the nature of the claim, and the more specific the claim is, the more nuanced the substantiation needs to be. A thorough review of your marketing claims and how they match up to your substantiation is important before launching a marketing campaign.

2. REVIEW OF THE USE OF TESTIMONIALS/REVIEWS

Testimonials and reviews can become unlawful endorsements when the testimonial or review does not disclose that the third party reviewer received something of benefit (e.g., money, commissions, equity in your company, or even free product) from the company. If an endorsement does not contain a disclosure of these material connections, or if the endorsement is false or misleading, then it violates the FTC Act. Developing policies about how reviews are obtained, and how key material connections are disclosed, is important to avoid FTC scrutiny.

3. REVIEW OF REFUND/GUARANTEE POLICIES

Refund and guarantee policies need to be clear and straightforward. Furthermore, consumers must have meaningful opportunities to avail themselves of these policies. Poorly drafted refund and guarantee policies can lead to class action

litigation or government investigations, and thus carefully drafting these policies can result in the avoidance of significant legal expenses in the future.

4. REVIEW OF ANY MADE IN USA CLAIMS

The FTC requires that products advertised as “Made in the U.S.A.” be “all or virtually all” made in the United States. If your product has mostly been manufactured or produced outside the United States, it is deceptive to advertise it as “Made in the U.S.A.” (or a similar phrase)--and therefore a violation of the FTC Act . However, it’s possible to make lawful qualified claims, like “Made in U.S.A. with imported ingredients,” or similar statements. Careful wording of Made in U.S.A claims is essential to avoiding lawsuits and government investigations.

5. REVIEW OF THE USE OF STOCK PHOTOS/FICTIONAL SPOKESPERSONS

Stock photos should not be used in misleading ways. For example, when stock photography featuring a model is used in conjunction with a weight lifting supplement product, it can lead consumers to believe the model used the product to achieve his muscles, which the FTC views as misleading. There are also ways that stock photographs can be used in a manner that falsely suggests or implies certain product benefits. A thoughtful review of your stock photo usage is important before a product launch.

6. REVIEW AFFILIATE ADVERTISING AGREEMENTS

Using affiliate marketing networks to market your products can, in many product verticals, be a high-risk business model. The FTC takes the position that advertisers are responsible for the actions of rogue affiliates, even if the advertiser does not know of the misconduct, does not authorize the misconduct, or does not know or have a direct relationship with the rogue affiliate. Thus, for director affiliate relationships, well-drafted agreements with affiliates are important to limiting legal risk. Further, for affiliate relationships including through advertising networks, developing policies to monitor for unlawful affiliate conduct can greatly limit an advertiser’s legal exposure.

7. REVIEW OF OUTGOING EMAIL CAMPAIGNS

The most important anti-spam laws are the federal CAN-SPAM Act and the California anti-spam statute. The bad news is that the civil penalties or statutory damages resulting from violations of these statutes can cripple a company. However, the good news is that it is not difficult to comply with these laws. Thus,

legal review of your email campaigns is a wise move to limit your liability later.

8. REVIEW OF TELEMARKETING CAMPAIGNS

Telemarketing campaigns are filled with legal traps for the unwary. The FTC and FCC have overlapping rules and regulations relating to telemarketing campaigns, including campaigns involving SMS, pre-recorded calls, automated dialing systems. Penalties for violating certain telemarketing laws, like the Telephone Consumer Protection Act as an example, can be harsh due to statutory damages per call or text message. And penalties under the FTC Act can have business-ending consequences. Thus, if your company is engaging in any sort of telemarketing, a thorough legal review prior to marketing is important.

9. REVIEW OF NEGATIVE OPTION, SUBSCRIPTION BILLING, AND UPSELL TACTICS

A surefire way to attract FTC attention is through high-risk billing practices, such as subscription billing and upsells that are not clearly and conspicuously disclosed to consumers before they provide a merchant with their credit card information. The FTC's Negative Option Rule (16 CFR Part 425), the FTC Act, and the federal Restore Online Shoppers' Confidence Act, 15 U.S.C. §8401 (ROSCA), all apply to negative option billing plans and can be enforced by the FTC. Sellers often describe negative option offers as "free trials," where the consumer receives a product but is only charged if the product is not returned after a certain period of time. The State of California also has an Automatic Renewal Law (ARL) that is similar to ROSCA, and the law is enforced by the California Attorney General and a task force of local district attorneys. The consequences for violating ROSCA, the ARL, or the FTC Act for deceptive negative option billing practices are harsh due to the massive restitution amounts that are often demanded by government regulators. However, careful legal review of a company's negative option and subscription billing practices can reduce or eliminate these risks.

10. NICHE AREAS IN ADVERTISING LAW

There are a significant number of niche areas covered by advertising laws, or very specific advertising laws that apply to many businesses. For examples, the FTC has a regulation covering business opportunities (i.e. selling programs to help customers set up businesses and make money); almost every state has laws governing sweepstakes and games of chance; there are privacy laws that relate to the collection of information from children; the FTC and state Attorneys' General have compliance frameworks to police marketing claims in the realm of weight

loss, skincare/anti-aging, and other areas; and other areas too numerous to mention in this checklist. Experienced counsel can help identify all the relevant laws for your new marketing campaigns.

11. REVIEW OF TERMS AND CONDITIONS FOR ESSENTIAL PROVISIONS AND RISK MINIMIZATION TACTICS

Well-drafted terms and conditions can save tens or hundreds of thousands of dollars in future legal fees. There are many ways in which an advertiser can limit liability and put it in the best possible position in the event of a dispute with a consumer. Investing in well-drafted terms and conditions perhaps delivers the highest return on legal investment for a company.

12. REVIEW PRIVACY POLICY FOR COMPLIANCE WITH FEDERAL AND STATE LAWS (MOST IMPORTANTLY, CALIFORNIA'S CCPA)

Privacy policies are subject to a number of laws, including the California Consumer Privacy Act ("CCPA"). For example, the CCPA requires covered companies to inform consumers about the categories of personal information collected and the purposes for using the information and to outline consumer rights (such as the right to request certain disclosures, deletion of information, and opt-out of sales of information). Well-drafted and compliant privacy policies at the outset can minimize risks, including for government investigations and civil actions.

13. COOKIE/PRIVACY LAW NOTICES UNDER STATE LAW (E.G. THE CCPA) AND EU LAW (I.E. THE GDPR AND EPRIVACY DIRECTIVE)

Companies routinely track users through cookies and automated technologies, and experienced legal counsel can assist with navigating the different requirements for cookie banners and other privacy notices that vary by region. For example, while the issue is somewhat ambiguous under the CCPA in California, courts in certain EU member states have clarified that pre-checked boxes are not sufficient for obtaining consent to cookies (i.e. opt-in consent is required).



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