

FTC's Advertising and Marketing on the Internet: Rules of the Road

Consider some of these laws: do they seem to be broken often? Think of some examples for class discussion.

Advertising must tell the truth and not mislead consumers.
In addition, claims must be substantiated.

GENERAL OFFERS AND CLAIMS PRODUCTS AND SERVICES

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 Section 5 of the Act, the Commission has determined that 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 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's not true. For example, a lease advertisement for an automobile that promotes "\$0 Down" may be misleading if significant and undisclosed charges are due at lease signing.

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. If your ad specifies a certain level of support for a claim - "tests show X" - you must have at least that level of support.

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.

Advertising agencies or website designers are responsible for reviewing the information used to substantiate ad claims. They 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.

To protect themselves, catalog marketers should ask for material to back up claims rather than repeat what the manufacturer says about the product. If the manufacturer doesn't come forward with proof or turns over proof that looks questionable, the catalog marketer should see a yellow "caution light" and proceed appropriately, especially when it comes to extravagant performance claims, health or weight loss promises, or earnings guarantees. In writing ad copy, catalogers should stick to claims that can be supported. Most important, catalog marketers should trust their instincts when a product sounds too good to be true.

Other points to consider:

Disclaimers and disclosures must be clear and conspicuous. That is, consumers must be able to notice, read or hear, and understand the information. Still, a disclaimer or disclosure alone usually is not enough to remedy a false or deceptive claim.

Demonstrations must show how the product will perform under normal use.

Refunds must be made to dissatisfied consumers - if you promised to make them.

Advertising directed to children raises special issues. That's because children may have greater difficulty evaluating advertising claims and understanding the nature of the information you provide. Sellers should take special care not to misrepresent a product or its performance when advertising to children. The Children's Advertising Review Unit (CARU) of the Council of Better Business Bureaus has published specific guidelines for children's advertising that you may find helpful.

Dot Com Disclosures: Information About Online Advertising, an FTC staff paper, discusses the factors used to evaluate the clarity and conspicuousness of required disclosures in online ads. It also discusses how certain FTC rules and guides that use terms like "writing" or "printed" apply to Internet activities and how technologies such as email may be used to comply with certain rules and guides.

PROTECTING CONSUMERS' PRIVACY ONLINE

The Internet provides unprecedented opportunities for the collection and sharing of information from and about consumers. But studies show that consumers have very strong concerns about the security and confidentiality of their personal information in the online marketplace. Many consumers also report being wary of engaging in online commerce, in part because they fear that their personal information can be misused.

These consumer concerns present an opportunity for you to build on consumer trust by implementing effective voluntary industry-wide practices to protect consumers' information privacy. The FTC has held a number of workshops for industry, consumer groups and privacy advocates to explore industry guidelines to protect consumers' privacy online.

In June 1998, the FTC issued *Online Privacy: A Report to Congress*. The Report noted that while over 85 percent of all websites collected personal information from consumers, only 14 percent of the sites in the FTC's random sample of commercial websites provided any notice to consumers of the personal information they collect or how they use it. In May 2000, the FTC issued a follow-up report, *Privacy Online: Fair Information Practices in the Electronic Marketplace*. While the 2000 survey showed significant improvement in the percent of websites that post at least some privacy disclosures, only 20 percent of the random sample sites were found to have implemented four fair information practices: notice, choice, access and security. Even when the survey looked at the percentage of sites implementing the two critical practices of notice and choice, only 41 percent of the random sample provided such privacy disclosures. You can access the FTC's privacy report at www.ftc.gov.

The Children's Online Privacy Protection Act (COPPA) and the FTC's implementing Rule took effect April 21, 2000. Commercial websites directed to children under 13 years old or general audience sites that have actual knowledge that they are collecting information from a child must obtain parental permission before collecting such information.

The FTC also launched a special site at www.ftc.gov/kidzprivacy to help children, parents and site operators understand the provisions of COPPA and how the law will affect them.

LAWS ENFORCED BY THE FEDERAL TRADE COMMISSION

Business Opportunities

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; and
- * 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.

See Franchising and Business Opportunity Ventures.

Multi-level marketing (MLM)

MLM - also 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 - a form of multi-level marketing - involve 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 their money.

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.

See Franchising and Business Opportunity Ventures.

Credit and Financial Issues

The Truth in Lending Act requires creditors who deal with consumers to disclose information in writing about finance charges and related aspects of credit transactions, including finance charges expressed as an annual percentage rate. In addition, the Act establishes a three-day right of rescission in certain transactions involving the establishment of a security interest in the consumer's principal dwelling (with certain exclusions, such as interests taken in connection with the purchase or initial construction of a dwelling). The Act also establishes certain requirements for advertisers of credit terms.

The Fair Credit Billing Act is important if you are a creditor billing customers for goods or services. The Act requires you to acknowledge consumer billing complaints promptly in writing and to investigate billing errors. The Act prohibits creditors from taking actions that adversely affect the consumer's credit standing until the investigation is completed, and affords other consumer protections during disputes. The Act also requires that creditors promptly post payments to the consumer's account, and either refund overpayments or credit them to the consumer's account.

The Fair Credit Reporting Act requires that consumer reporting agencies (CRAs) - such as credit bureaus and resellers of consumer reports - that provide information to creditors, insurers, employers, and others, do so with due regard for the confidentiality, accuracy, and legitimate use of such data. When those parties take adverse action on the basis of information in a credit report, they must identify the CRA that provided the report so that the consumer can learn how to get a copy to verify or contest its accuracy and completeness. Creditors and others may not knowingly provide false information to CRAs, which are required to maintain reasonable procedures to ensure the maximum possible accuracy of their data.

The Equal Credit Opportunity Act prohibits lenders from discriminating on the basis of race, color, religion, national origin, sex, marital status, age, receipt of public assistance income, or an applicant's good faith exercise of any rights under the Consumer Credit Protection Act. The ECOA requires creditors to provide applicants with the reasons credit was denied if the applicant asks.

The Electronic Fund Transfer Act establishes the rights, liabilities, and responsibilities of participants in electronic fund transfer systems. The EFTA requires participants to adopt certain practices when they deal with transaction accounting and preauthorized transfers and error resolution, and sets liability limits for losses caused by unauthorized transfers.

The Consumer Leasing Act regulates personal property leases that exceed four months and are made to consumers for personal, family, or household purposes. The statute requires that certain lease costs and terms be disclosed, imposes limitations on the size of penalties for delinquency or default and on the size of residual liabilities, and in some instances, requires certain disclosures in lease advertising.

Environmental Claims

It's deceptive to misrepresent - directly or indirectly - that a product offers a general environmental benefit. Your ads should qualify broad environmental claims - or avoid them altogether - to prevent deception about the specific nature of the benefit. In addition, your ads shouldn't imply significant environmental benefits if the benefit isn't significant. Say a trash bag is labeled "recyclable" without qualification. Because trash bags ordinarily are not separated from other trash for recycling at a landfill or incinerator, it is unlikely that they will be used again. Technically, the bag may be "recyclable," but the claim is deceptive because it asserts an environmental benefit where there is no significant or meaningful benefit.

See Environmental Advertising and Marketing Practices Guide, and Complying with the Green Guides.

Free Products

A product that's advertised as free if another is purchased - "buy one, get one" - indicates that the consumer will pay nothing for the one item and no more than the regular price for the other. Ads like these should describe all the terms and conditions of the free offer clearly and prominently.

Jewelry

The FTC's Jewelry Guides tell you how to make accurate and truthful claims about jewelry you offer for sale.

The Guides cover claims made for gold, silver, platinum, pewter, diamonds, gemstones, and pearls and define how certain common terms may be used in ads. For example, the Guides explain when a product can be called "gold plated" or when a diamond can be called "flawless."

The Guides also describe information that sellers should disclose in their ads so that consumers are not misled. For example, if you sell synthetic or imitation gemstones, you must tell the consumer that the gemstone is not natural. In addition, you should tell consumers if the pearls that you are selling are cultured or imitation, so that consumers are not misled about the type of pearl being offered.

See Guides for the Jewelry, Precious Metals and Pewter Industries.

Mail and Telephone Orders

According to the Mail or Telephone Order Merchandise Rule, you must have a reasonable basis for stating or implying that a product can be shipped within a certain time. If your ad doesn't include a shipping statement, you must have a reasonable basis to believe you can ship within 30 days.

If you can't ship when promised, you must notify the customer of the delay and the right to cancel. For definite delays of up to 30 days, you may treat the customer's silence as agreement to the delay. For longer or indefinite delays, and second and subsequent delays, you must get the customer's consent. If you don't, you must promptly refund all the money the customer paid you without being asked.

You can give updated shipping information over the phone if your Internet ad prompts customers to call to place an order. This information may differ from what you said or implied about the shipping time in your ad. The updated phone information supersedes any shipping representation made in your ad, but you still must have a reasonable basis for the update.

Negative Option Offers

The Negative Option Rule applies to sellers of subscription plans who ship merchandise like books or compact discs to consumers who have agreed in advance to become subscribers. The Rule requires ads to clearly and conspicuously disclose material information about the terms of the plan. Further, once consumers agree to enroll, the company must notify them before shipping to allow them to decline the merchandise. Even if an automatic shipment or continuity program doesn't fall within the specifics of the Rule, companies should be careful to clearly disclose the terms and conditions of the plan before billing consumers or charging their credit cards.

900 Numbers

The 900-Number Rule requires that ads for pay-per-call services disclose the cost of the call. Ads for services that promote sweepstakes or games of chance, provide information about a federal program (but are not sponsored by a federal agency), or target individuals under 18 years of age require additional disclosures. Ads for 900-numbers cannot be directed to children under 12 unless the ads deal with a bona fide education service, as defined by the Rule.

See Telephone Disclosure and Dispute Resolution Act and Complying with the 900-Number Rule.

Telemarketing

Advertisements promoting credit repair, promising loans for a fee in advance, or touting investment opportunities may trigger application of the FTC's Telemarketing Sales Rule if the ad allows consumers to order goods or services by telephone. In general, this Rule does not apply to general media advertisements. If you're advertising credit repair, advance fee loans, or investment opportunities, or offering to recover money paid in previous telemarketing transactions, however, the Rule likely applies to you. Among other things, the Rule requires that certain disclosures be made before a customer pays for the goods or services. The Rule also prohibits material misrepresentations.

Testimonials and Endorsements

Testimonials and endorsements must reflect the typical experiences of consumers, unless the ad clearly and conspicuously states otherwise. A statement that not all consumers will get the same results is not enough to qualify a claim. Testimonials and endorsements can't be used to make a claim that the advertiser itself cannot substantiate.

Connections between an endorser and the company that are unclear or unexpected to a customer also must be disclosed, whether they have to do with a financial arrangement for a favorable endorsement, a position with the company, or stock ownership. Expert endorsements must be based on appropriate tests or evaluations performed by people that have mastered the subject matter.

Warranties and Guarantees:

Warranties

The Rule on Pre-Sale Availability of Written Warranty Terms requires that warranties be available before purchase for consumer products that cost more than \$15. If your ad mentions a warranty on a product that can be purchased by mail, phone or computer, it must tell consumers how to get a copy of the warranty.

Guarantees

If your ad uses phrases like "satisfaction guaranteed" or "money-back guarantee," you must be willing to give full refunds for any reason. You also must tell the consumer the terms of the offer.

Wool and Textile Products

The Textile and Wool Acts require you to disclose country of origin information in catalogs and other mail order advertising and in Internet ads that sell textile and wool products. The description of each advertised item must include a statement that it was made in the U.S.A., imported or both. A general statement in your ads that all products are either made in the U.S.A. or imported is not adequate.

Ads that say or imply anything about fiber content must disclose the generic fiber names (as assigned by the FTC) in order of predominance by weight. This requirement applies

to all ads, whether or not they solicit direct sales. It is not necessary to state the percentage of each fiber, but fibers present in an amount less than 5 percent should be listed as "other fiber(s)." (There is an exception to the 5 percent requirement for fibers that have a functional significance even in an amount less than 5 percent.)

Made in the U.S.A.

A product has to be "all or virtually all made in the United States" for it to be advertised or labeled as "Made in the U.S.A."

See Enforcement Policy Statement on U.S. Origin Claims.

NON-COMPLIANCE

The FTC periodically joins with other law enforcement agencies to monitor the Internet for potentially false or deceptive online advertising claims.

If your advertisements don't comply with the law, you could face enforcement actions or civil lawsuits. For advertisers under the FTC's jurisdiction, that could mean:

orders to cease and desist, with fines up to \$11,000 per violation should they occur.

injunctions by federal district courts. Violations of some Commission rules also could result in civil penalties of up to \$11,000 per violation. Violations of court orders could result in civil or criminal contempt proceedings.

in some instances, refunds to consumers for actual damages in civil lawsuits.

Note:

Listed here are some FTC laws about specific marketing practices and the promotion of products and services in specific industries. For copies of the rules and commentaries relevant to your Internet enterprise, contact: Consumer Response Center, Federal Trade Commission, Washington, DC 20580; toll-free: 1-877-FTC-HELP (382-4357); TDD: 1-866-653-4261. Or visit the FTC at www.ftc.gov.

Source: The Federal Trade Commission