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Advertising Pitfalls and Best Practices to Respond to False Advertising Challenges



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Advertising should command consumers' interest and improve sales, rather than draw costly legal challenges that can deplete a brand's resources and tarnish its reputation. For this reason, brands and their legal teams should carefully review and manage advertising to reduce the likelihood of scrutiny by state and federal regulators, plaintiffs' attorneys and competitors. Of course, aggressive ad campaigns that may trigger a challenge sometimes make sense for a brand, such as comparative campaigns against competing products or services. Campaigns for cutting-edge products or services may advertise novel capabilities or characteristics, while other campaigns may market products and services that tend to draw more legal attention, such as health, weight-loss, eco-friendly, financial and child-related products and services. For comparative, cutting-edge and other higher-risk campaigns, advertisers should shore up their defenses against, and develop an action plan for, potential challenges.

This article introduces the Federal Trade Commission's Operation Full Disclosure, provides case studies that illustrate some of the pitfalls facing digital and traditional advertising and proposes some practical, preventive steps for reducing the likelihood of a false advertising challenge and some defensive steps for responding to a regulator or other challenge on false advertising grounds. In addition, the case studies below, including the FTC settlements with Sony Computer Entertainment America LLC and Deutsch LA Inc., provide a reminder that regulators are actively scrutinizing both digital and traditional advertising, and that the same basic truth-in-advertising rules apply, regardless of whether advertising is in digital or social media, TV, print or other formats.

I. FTC's Operation Full Disclosure

The FTC recently sent a strong ''shape up'' message to advertisers as part of Operation Full Disclosure. It sent letters to more than 60 advertisers, including 20 of the nation's top 100 advertisers, warning that the brands failed to clearly and prominently disclose important information needed to prevent ads from misleading consumers. The FTC did not publicly disclose the recipients of the letters, but reported that they covered a wide range of industries, including consumer electronics, food, drugs, household items, personal care products and weight loss products. The FTC cautioned that advertisers ''who did not receive a letter should not assume that their advertisements are fine.''

The insufficient disclosures targeted by the FTC fall into many categories, including ads that:

- quoted the price of a product or service, but did not adequately disclose the conditions for obtaining that price;
- failed to adequately disclose an automatic billing feature;
- did not adequately disclose the need to first buy or own another product or service to use the advertised product;
- claimed that a product was unique or superior in a category, but did not adequately disclose how narrowly the advertiser defined the category;
- compared products, but did not adequately disclose the basis for the comparison;

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- promoted ''risk-free'' trial periods, but did not adequately disclose that consumers must pay for shipping;
- featured testimonials touting outlier results, but did not adequately disclose generally expected results;
- featured materially altered demonstrations, but did not adequately disclose the alteration; and
- sought to cure false claims with contradictory disclosures.

Although Operation Full Disclosure focused on TV and print ads, the FTC made clear that consumer protection laws also apply equally to marketers using digital media, ''whether delivered on a desktop computer, a mobile device,'' or traditional media, such as TV or print. The operation follows the FTC's 2013 update of the ''.com Disclosures'' report, which provides guidance for marketers on how to clearly and prominently convey material information in online advertising and comply with truth-in-advertising requirements. In ''.com Disclosures,'' the FTC reminded advertisers that ''[t]he same consumer protection laws that apply to commercial activities in other media apply online, including activities in the mobile marketplace,'' and the ''FTC Act's prohibition on 'unfair or deceptive acts or practices' encompasses online advertising, marketing and sales.''

II. Recent False Advertising Pitfalls

Three recent cases illustrate how digital and traditional advertising can trigger unwanted legal challenges, including from state and federal regulators, when the advertising is not carefully crafted and managed. The cases provide important lessons and takeaways, including:

- Advertisers should be careful not to overpromise or oversell product characteristics and capabilities, including via product demonstrations.
- Advertising should set accurate consumer expectations—including, for example, about key terms such as billing—by using truthful advertising messaging, and, when appropriate, clear and prominent disclosures that take into account the differences in relevant media (e.g., digital, mobile, social media and traditional advertising).
- Advertisers and their ad agencies should comply with the FTC's guidance regarding the use of testimonials and endorsements, including by ensuring that any social media endorsements clearly and prominently disclose any material connection between the advertiser or agency and the endorser.

A. *FTC v. Sony Computer Entertainment*

In late November, the FTC announced settlements with Sony Computer Entertainment America and its advertising agency, Deutsch LA, in connection with complaints filed against the companies related to Sony's PlayStation Vita gaming console. Sony launched an ad campaign to promote the Vita that included Internet ads and TV commercials, which the FTC alleged falsely claimed that users could play PS3 games and the popular Killzone 3 game on the Vita in ''remote play'' functionality. According to the FTC, Sony and Deutsch advertisements for the Vita suggested that users would ''Never stop playing'' and showed users enjoying the ''remote play,'' ''cross save'' and real-time 3G features. In fact, according to the FTC, users could not easily access their PS3 games or Killzone 3 on the Vita in the ways shown in Sony's ads, rendering the ads false or misleading.

The FTC's complaint against Deutsch focused on the agency's assertion that, by preparing and promulgating the ads, the company knew or should have known that Sony's statements were false or misleading when they were created. The FTC also faulted Deutsch for creating the social media hashtag ''#gamechanger'' and encouraging its employees to post complimentary comments about the Vita on their personal social media accounts, without disclosing their affiliation with Deutsch or Sony. As a result, the FTC alleged, Deutsch employees used their personal social media accounts to post positive comments about the PS Vita, including ''One thing can be said about PlayStation Vita . . . it's a #gamechanger'' and ''This is sick. . . . See the new PS Vita in action. The gaming #GameChanger.'' Because Deutsch represented that its employees' comments reflected ''the views of ordinary consumers who had used the PS Vita,'' the FTC asserted that they ''were not independent comments reflecting the views of ordinary consumers who had used the PS Vita.'' Rather, according to the FTC, Deutsch's conduct was false and misleading because social media postings were ''created by employees of [Deutsch], an advertising agency hired to promote the PS Vita.''

In their settlements with the FTC, Sony and Deutsch were barred from making unsupported claims in their advertising and agreed to pay compensation to some Vita owners. Further, Deutsch was also barred from misrepresenting that an endorser of any game console product or video game product is an independent user or ordinary consumer of the product. Deutsch must disclose any material connection that it has with any endorser of a game console or video game, or with any other entity involved in the manufacture or marketing of the product.

According to Jessica Rich, director of the FTC's Bureau of Consumer Protection, ''companies need to be reminded that if they make product promises to consumers—as Sony did with the 'game changing' features of its PS Vita—they must deliver on those pledges . . . . The FTC will not hesitate to act on behalf of consumers when companies or advertisers make false product claims.''

B. *FTC v. AT&T Mobility LLC*

In late October, the FTC brought a complaint against AT&T Mobility LLC,[1] seeking permanent injunctive relief, rescission or reformation of consumer contracts, restitution, refund of monies paid, disgorgement, costs and other equitable relief.

The complaint alleges that AT&T violated Section 5(a) of the FTC Act[2] in connection with the marketing of wireless broadband Internet access service for smartphones. Specifically, the FTC alleges that AT&T engaged in a ''deceptive act or practice'' when it represented that its customers' data plan would be ''unlim-

[1] *See FTC v. AT&T Mobility LLC*, No. 14-cv-04785-EMC (N.D. Cal. *complaint filed* Oct. 28, 2014).

[2] *See* 15 U.S.C. § 45(a) (hereinafter, the Act).

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ited,'' but then failed to adequately disclose that it imposes data speed restrictions for high-use customers. The FTC also alleges that AT&T engaged in an ''unfair act or practice'' when it entered into mobile data contracts with consumers that were advertised as providing access to ''unlimited data,'' for a fixed sum, but for some of its customers who used a large amount of data during a billing cycle, AT&T reduced the customer's data speed. Both claims are based on the argument that by reducing the data speed, or ''data throttling,'' AT&T did not provide its customers with the ''unlimited data'' promised, but instead restricted data. As a result, AT&T customers who had been told they would receive ''unlimited data'' are not able to load Web pages, or perform functions such as listening to music, without access to faster data speeds.

The FTC alleges that AT&T made misrepresentations or deceptive omissions of material fact by not affirmatively disclosing in its contracts or ads that it may modify, diminish or impair the service of certain customers using a specified amount of data. Also, even though some of AT&T's customers received a disclosure that AT&T may reduce speeds for the top 5 percent of users with unlimited data, other customers did not receive the notice or the disclosure failed to adequately convey how a customer's service could be affected.

To avoid FTC or other scrutiny, disclosures should be sufficiently clear and prominent, so that consumers will notice and understand the information disclosed. Here, for example, in addition to stating that AT&T's service could be modified, diminished or impaired for certain customers hitting a certain data usage, the disclosure could have communicated the nature and extent to which a customer's data speed could be reduced, including the expected range in reduction and how the reduction would affect downloading or listening to music, watching videos and other use. Giving more targeted disclosures could properly align consumer expectations and help avoid a costly investigation or litigation.

C. *Sirius XM Radio Inc., Assurance With the State of Ohio*

It is not just the FTC that is targeting companies for false or misleading digital advertising. States enforcing their consumer protection statutes pay close attention to consumer complaints and actively challenge advertising. For example, in December, SiriusXM Radio Inc. entered into a settlement (the Assurance) with the state of Ohio to pay 45 states and the District of Columbia $3.8 million collectively, and to provide restitution to eligible consumers in connection with those states' investigations and allegations that Sirius engaged in misleading advertising and billing practices.[3] Following consumer complaints and the states' investigations, Ohio's attorney general alleged that Sirius engaged in misleading, unfair and deceptive acts or practices in violation of consumer protection laws when it (1) automatically renewed consumer services without consumer consent or knowledge of the automatic renewal policy; (2) automatically charged or billed consumers for the automatic renewal of consumer services without the consent or knowledge of the renewal policy; (3) failed to honor cancellations or made it difficult for consumers to cancel their services; (4) failed to provide timely refunds or refused to refund payments; and (5) misrepresented that consumer services would be canceled, would not be renewed, or would be refunded.

Among the settlement's compliance requirements, Sirius agreed to modify its advertising disclosures. For example, Sirius must ''clearly and conspicuously'' disclose—and not misrepresent—any material term, condition or obligation of its subscription plans. Sirius also agreed to disclose all material terms, conditions and obligations if its subscription plans will automatically renew at the term end, including disclosing the new term and the new rate. The Assurance also requires Sirius to inform consumers that they must contact Sirius by phone to cancel. Further, if an advertisement contains a single offer that is repeated more than once, or multiple offers that contain the same material limitations, then each disclosure that Sirius must make related to the subscription plan must clearly and conspicuously identify that it applies to all offers.

The Assurance acknowledges that some disclosures required by the agreement may not be possible on all digital platforms, and provides Sirius with guidelines to follow in such circumstances. If restrictions exist—for example, on the number of characters, text size or graphics—which would make compliance with the terms of Assurance impossible, or if Sirius is placing ads in media where required disclosures cannot reasonably be clearly and conspicuously made, the agreement would not require compliance, provided that the advertisement is not otherwise misleading or deceptive. Notably, however, the FTC has stated in its ''.com Disclosures'' that ''If a disclosure is necessary to prevent an advertisement from being deceptive, unfair, or otherwise violative of a Commission rule, and it is not possible to make the disclosure clearly and conspicuously, then that ad should not be disseminated.''

The Assurance anticipates that the other 44 participating states and the District of Columbia will enter into agreements with Sirius XM that are ''substantially identical'' to the Assurance with the state of Ohio, and therefore the Assurance contains a uniform definition of ''clearly and conspicuously.'' Although this unified definition is specific to the Assurance, it provides some guidance to companies advertising electronically on how states may interpret the mandate that required disclosures are made ''clearly and conspicuously.''

Specifically, the Assurance defines ''clearly and conspicuously'' to mean that:

> the required disclosure is in a size, color, contrast location, duration, and audibility that makes it readily noticeable, readable, and understandable. A Clear and Conspicuous disclosure may not be contradicted by or be inconsistent with any other information with which it is presented. If any statement modifies, explains, or clarifies other information with which it is presented, it must be presented close to the information it modifies, in a manner that is readily noticeable, readable, and understandable and it must not be obscured in any manner.

The Assurance further provides detailed specifications for print advertisements, disclosures disseminated orally and those disseminated through electronic media. Regarding electronic disclosures, any audio disclosures shall be delivered in a volume and cadence for the

[3] Press Release, Ohio Attorney General Office, Attorney General DeWine Announces $3.8 Million Multistate Settlement with Sirius XM (Dec. 4, 2014), available at http://www.ohioattorneygeneral.gov/Media/News-Releases/December-2014/Attorney-General-DeWine-Announces-$3-8-Million-Mul

consumer to sufficiently comprehend. Likewise, visual disclosures should be of a size and shade and appear on the screen for a duration that is sufficient for a consumer to read and comprehend. The Assurance's requirements emphasize that whichever media is used, mandatory disclosures must be made prominently, either visually or orally, to increase the likelihood that consumers will receive and understand them.

III. Practical Guidance

How to Reduce the Likelihood of a False Advertising Challenge

Vague, unclear, inaccurate, unsupported and deceptive online (and offline) advertising can result in challenges by state and federal regulators, plaintiff's attorneys and competitors. Taking the following steps can go a long way to reducing the likelihood that an advertiser will receive a challenge to its advertising:

1. Review advertising guidelines, both internal materials for marketing and legal teams and external-facing materials for business partners and ad agencies. If these materials exist, they deserve a fresh review in light of recent regulator, competitor and class action challenges. If the materials do not exist, now is the time to craft them.

2. Given the dynamic nature of the law and guidance in this area, hold regular training sessions for in-house marketing and legal teams. Regular training sessions will streamline the workload for in-house and outside legal teams, and will demonstrate good housekeeping practices that could be perceived favorably if a regulator challenges or investigates a brand.

3. Analyze all advertising content to identify all express and implied claims reasonably communicated by the content, and ensure such claims are true and not misleading. Ensure qualifying information for express and implied claims is clearly and conspicuously disclosed to consumers. ''Clear and conspicuous'' varies depending on the nature of the content and claims. For example, some information might be clear and conspicuous on a Web page but not when viewed on a mobile device.

4. Ensure express and implied advertising claims are supported by well-documented, credible evidence before the claims are published. The nature and quality of substantiation needed will vary depending on the claims, products, and services. Be prepared to provide such substantiation upon request.

5. Take extra precautions for higher-risk messaging, such as health claims, food and beverage claims, eco-friendly claims, comparative claims, price claims and claims directed to children.

How to Respond to a False Advertising Challenge

If a brand receives an advertising challenge or investigation, it can take action to best position itself for a response to potentially resolve the matter and reduce further business disruption.

If a regulator intends to challenge advertisements, it will likely first contact an advertiser in writing to request the information that it would like the advertiser to provide; the steps requested to address the identified issue; and a deadline by which to comply with the regulator's requests. By failing to timely respond, the advertiser runs the risk of a more formal investigation or lawsuit, which would be more costly, cause business disruption and most likely lead to having the advertiser produce more information than originally requested. It therefore behooves a brand to be proactive in response to any request for information made by a regulator challenging an advertisement.

Similarly, a competitor or plaintiff's attorney may also first contact the advertiser in writing to allege false advertising. However, instead of opening a dialogue to review the advertiser's documents first, as more routinely followed by regulatory bodies, plaintiff's attorneys or competitors may immediately demand compensation for alleged damages and threaten an immediate lawsuit if their demands are not met.

Whether a brand is responding to a regulator, plaintiff's attorney or competitor advertising challenge, there are five simple steps an advertiser can take to help guide it toward an early resolution, or at least to minimize the potential exposure in litigation.

1. Determine the Form of Request the Advertiser Received. Identify the form of request received, which will dictate the advertiser's next steps. For regulatory investigations, there are several avenues the regulator can take to obtain information, including issuing a warning letter, an access letter, a preservation request or a civil investigative demand. Each of these communications requires a customized response and has different deadlines. If a plaintiff's attorney or competitor contacts the advertiser, he or she may also seek information, which the advertiser is usually not required to provide, but may wish to in order to resolve a dispute without a complaint being filed.

2. Preserve the Advertiser's Information. Identify the key custodians of the information requested, and institute a legal hold on those data and other documents related to the subject matters of the request made by the agency or other requesting party. This could include conducting interviews for possible sources of information from each custodian, suspending routine deletion practices and preserving information retained by departing employees.

3. Keep the Advertiser's Information and the Regulator's, Plaintiff's Attorney's or Competitor's Requests Confidential. During a regulator investigation, FTC inquiries, for example, are nonpublic, and warnings, access letters and civil investigative demands are not published online and are exempt from Freedom of Information Act requests. Similarly, many competitor or plaintiff's attorney requests are not made publicly. Therefore, work to preserve the confidentiality of the requests and the advertiser's response. Try to limit all communications about the matter internally to only those with a need to know to assist in the response, and instruct the advertiser's teams not to discuss the matter with anyone inside or outside the company who does not have a need to know.

4. Identify a Team to Address the Issues Raised by the Regulator, Plaintiff's Attorney or Competitor. Identify a legal and business team to respond to information requests. Within a few days of receiving a re-

quest, direct counsel to the requestor to confirm receipt and open a dialogue about the request's scope, burden issues and response schedule. The advertiser may be able to obtain agreements to narrow the scope of the request and obtain more time to respond. Early action to make these proposals and secure agreements with the requestor is important because agency staff attorneys, for example, generally need to obtain approval internally at the agency, and well in advance of a stated deadline.

5. Determine the Advertiser's Response Strategy. The advertiser's legal and business teams should be familiar with the advertiser's claims, claim substantiation, document systems and organizational structure. The first determination when deciding how to respond to a request is deciding which of the requests can be responded to in a short time frame, which are possible to respond to generally but will take more time and which requests cannot be responded to, either because the requested information does not exist, or for other reasons (e.g., laws preventing the advertiser from producing the requested information, such as the Electronic Communications Privacy Act). If, for example, the advertiser received a warning letter from a regulator that asks it to stop or revise specified advertising, a determination will have to be made about whether the advertiser has a basis to challenge the agency's position, or whether the advertiser is willing to make the change requested.

In the event of a regulator investigation, after working with the regulator and submitting the advertiser's final response, the agency may agree to close its investigation without taking any further action against the advertiser. If, however, the regulator determines that there is good reason to believe that the advertiser did not comply with the law, because it has determined that its advertising is false, misleading, unsubstantiated or otherwise not compliant, it may request a consent decree. This is a legally binding resolution that can last for many years, depending on the settlement, and contains requirements for the advertiser's business practices in order to prevent the conduct from occurring again. The agency also may obtain financial redress for the allegedly injured consumers. If the advertiser decides not to agree to the resolution, the agency may file a lawsuit against the advertiser.

Likewise, in the event the advertiser and a competitor or plaintiff's attorney cannot work out a resolution to a challenge, most likely, litigation will ensue. Litigation may take years and can be costly. Given the potential immediate harm to a competing product, competitors will request injunctive relief to end or modify the advertising campaign immediately, which will force the advertiser to litigate the matter on the merits within a very short time frame. Plaintiff's attorneys will likely try and pursue their claims through alleged class actions, which if certified by the court, can lead to substantial damages or lengthy appeals.

IV. Conclusion

Whether a brand is advertising in traditional media, such as print or TV, or in digital or social media, the same basic rules apply: Advertisements must truthfully describe products and services so consumers understand both what they are paying for and important limits on their purchases. Ads should incorporate important limitations or make disclosures that explain material limits in a clear and prominent manner. The FTC and other challengers are actively policing digital and traditional advertising, so a careful brand will work proactively to identify problematic advertising claims and needed disclosures before receiving a challenge.

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