GREEN LIGHTS AND RED FLAGS

FTC Rules of the Road for Business

August 15, 2019

10295
GREEN LIGHTS AND RED FLAGS

FTC Rules of the Road for Business

6 CLE Hours Including
1 Professionalism Hour | 1 Trial Practice Hour
Who are we?

SOLACE is a program of the State Bar of Georgia designed to assist those in the legal community who have experienced some significant, potentially life-changing event in their lives. SOLACE is voluntary, simple and straightforward. SOLACE does not solicit monetary contributions but accepts assistance or donations in kind.

How does SOLACE work?

If you or someone in the legal community is in need of help, simply email SOLACE@gabar.org. Those emails are then reviewed by the SOLACE Committee. If the need fits within the parameters of the program, an email with the pertinent information is sent to members of the State Bar.

What needs are addressed?

Needs addressed by the SOLACE program can range from unique medical conditions requiring specialized referrals to a fire loss requiring help with clothing, food or housing. Some other examples of assistance include gift cards, food, meals, a rare blood type donation, assistance with transportation in a medical crisis or building a wheelchair ramp at a residence.

Contact SOLACE@gabar.org for help.
The purpose of the SOLACE program is to allow the legal community to provide help in meaningful and compassionate ways to judges, lawyers, court personnel, paralegals, legal secretaries and their families who experience loss of life or other catastrophic illness, sickness or injury.

**TESTIMONIALS**

In each of the Georgia SOLACE requests made to date, Bar members have graciously stepped up and used their resources to help find solutions for those in need.

- A solo practitioner’s quadriplegic wife needed rehabilitation, and members of the Bar helped navigate discussions with their insurance company to obtain the rehabilitation she required.

- A Louisiana lawyer was in need of a CPAP machine, but didn’t have insurance or the means to purchase one. Multiple members offered to help.

- A Bar member was dealing with a serious illness and in the midst of brain surgery, her mortgage company scheduled a foreclosure on her home. Several members of the Bar were able to negotiate with the mortgage company and avoided the pending foreclosure.

- Working with the South Carolina Bar, a former paralegal’s son was flown from Cyprus to Atlanta (and then to South Carolina) for cancer treatment. Members of the Georgia and South Carolina bars worked together to get Gabriel and his family home from their long-term mission work.

Contact SOLACE@gabar.org for help.
Dear ICLE Seminar Attendee,

Thank you for attending this seminar. We are grateful to the Chairperson(s) for organizing this program. Also, we would like to thank the volunteer speakers. Without the untiring dedication and efforts of the Chairperson(s) and speakers, this seminar would not have been possible. Their names are listed on the AGENDA page(s) of this book, and their contributions to the success of this seminar are immeasurable.

We would be remiss if we did not extend a special thanks to each of you who are attending this seminar and for whom the program was planned. All of us at ICLE hope your attendance will be beneficial as well as enjoyable. We think that these program materials will provide a great initial resource and reference for you.

If you discover any substantial errors within this volume, please do not hesitate to inform us. Should you have a different legal interpretation/opinion from the speaker’s, the appropriate way to address this is by contacting him/her directly.

Your comments and suggestions are always welcome.

Sincerely,
Your ICLE Staff

Jeffrey R. Davis
Executive Director, State Bar of Georgia

Michelle E. West
Director, ICLE

Rebecca A. Hall
Associate Director, ICLE
AGENDA

PRESIDING:

Cindy Liebes, Presiding Chair, Federal Trade Commission, Atlanta

8:15  REGISTRATION AND CONTINENTAL BREAKFAST (All attendees must check in upon arrival. A jacket or sweater is recommended.)

9:00  WELCOME, PROGRAM OVERVIEW AND REMARKS

Daniel Kaufman, Deputy Director, FTC Bureau of Consumer Protection
Christopher M. Carr, Georgia Attorney General

9:30  THE TRUTH ABOUT FALSE ADVERTISING
An introduction to federal and state truth-in-advertising law.
Panelists:
Lesley Fair, Bureau of Consumer Protection, Federal Trade Commission
Melissa Devine, Assistant Attorney General, Office of the Georgia Attorney General

10:15  AVOIDING A PROMOTION COMMOTION
Legally compliant “free” offers, Made in USA claims, social media marketing, consumer reviews, and other timely topics.
Moderator: Anne Infinger, Director, Consumer Protection Unit, Office of the Georgia Attorney General
Panelists:
Anna Burns, Assistant Director, FTC Southeast Region
Lauren Villnow, Assistant Attorney General, Office of the Georgia Attorney General
Danica Kombol, CEO, Everywhere Agency

11:15  NETWORKING BREAK

11:30  THE SECURE ENTREPRENEUR
Data security basics for business
Moderator: Mitzi Hill, Taylor English Duma LLP
Panelists:
Cindy Liebes, Director, FTC Southeast Region
Ilunga L. Kalala, Privacy Counsel, Turner Broadcasting System, Inc.
Tyler Jones, President, Carmichael Consulting Solutions, LLC
Lara Tumeh, Alston & Bird LLP

12:30  NETWORKING LUNCH
featuring FTC Commissioner Rohit Chopra and Professor Mark Budnitz, Professor Emeritus, Georgia State University School of Law

1:45  COMPETITION COUNTS
The Basics of Antitrust Law. A dos and don’ts primer for businesses and attorneys
Moderator: William Dillon, Chair, Antitrust Section, Georgia Bar, Taylor English Duma LLP
Panelists:
Kelly Signs, Bureau of Competition, Federal Trade Commission
Lindsay Johnson, Vice Chair, Antitrust Section, Georgia Bar, Bryan Cave Leighton Paisner LLP
2:30  WHEN YOUR COMPETITOR CROSSES THE LINE
Information about avenues for challenging deceptive advertising by competitor: local BBB, National Advertising Division of the Council of Better Business Bureaus, and the Lanham Act
Moderator: Seena Gressin, Bureau of Consumer Protection, Federal Trade Commission
Panelists:
  Brian Catania, President & CEO, Better Business Bureau Serving Metro Atlanta
  Martin Zwerling, National Advertising Division, Council of Better Business Bureaus
  Russell Blythe, King & Spalding

3:15  NETWORKING BREAK

3:30  INTEGRITY AND CIVILITY IN LITIGATION
(Open to all, but meets Georgia's mandatory CLE requirements for Professionalism)
Moderator: Harold Kirtz, Senior Litigator, FTC, Southeast Regional Office
Panelists:
  Hon. Sara Doyle, Judge, Georgia Court of Appeals
  Hon. Catherine Salinas, Judge, Federal Magistrate Judge, Northern District of Georgia

4:30  ADJOURN

RECEPTION TO IMMEDIATELY FOLLOW
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THE TRUTH ABOUT FALSE ADVERTISING
I. LEGAL FRAMEWORK

A. Commission’s Statutory Authority in Advertising Cases

1. Section 5 of the FTC Act: 15 U.S.C. § 45 gives the Commission broad authority to prohibit “unfair or deceptive acts or practices.”


3. Section 13(b) of the FTC Act: 15 U.S.C. § 53 authorizes the FTC to file suit in United States District Court to enjoin an act or practice that is in violation of any provision of law enforced by the FTC.

B. Deception: Deception Policy Statement, appended to Cliffdale Associates, Inc., 103 F.T.C. 110, 174 (1984), cited with approval in Kraft, Inc. v. FTC, 970 F.2d 314 (7th Cir. 1992), cert. denied, 507 U.S. 909 (1993). An advertisement is deceptive if it contains a misrepresentation or omission that is likely to mislead consumers acting reasonably under the circumstances to their detriment. Although deceptive claims are actionable only if they are material to consumers’ decisions to buy or use the product, the Commission need not prove actual injury to consumers.

C. Unfairness: Unfairness Policy Statement, appended to International Harvester Co., 104 F.T.C. 949, 1070 (1984). A practice is unfair if it causes or is likely to cause substantial consumer injury that is not reasonably avoidable by consumers themselves and which is not outweighed by countervailing benefits to consumers or competition. “In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.” 15 U.S.C. § 45(n). According to the Conference Report, the definition of “unfair” is derived from the Commission’s 1980 Unfairness Policy Statement, the Commission’s 1982 letter on the subject, and interpretations and applications in specific proceedings before the Commission. Rep. No. 617, 103d Cong., 2d Sess. (1994), 140 Cong. Rec. H6006 (daily ed. July 21, 1994).
II. REMEDIES FOR VIOLATIONS OF THE LAW

A. Cease and Desist Orders: In advertising cases, the basic administrative remedy is a cease and desist order. The purpose of the order is two-fold: 1) to enjoin the illegal conduct alleged in the complaint; and 2) to prevent future violations of the law. FTC v. Colgate-Palmolive Co., 380 U.S. 374 (1965). The voluntary cessation of an advertising campaign is “neither a defense to liability, nor grounds for omission of an order.” Sears, Roebuck & Co., 95 F.T.C. 406, 520 (1980), citing Fedders Corp. v. FTC, 529 F.2d 1398, 1403 (2d Cir. 1976).

B. Fencing-In: “If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity.” FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952). Therefore, “those caught violating the Act must expect some fencing in.” FTC v. National Lead Co., 352 U.S. 419 (1957); see FTC v. Universal-Rundle Corp., 387 U.S. 244 (1967). The Supreme Court has afforded the Commission broad discretion in fashioning fencing-in provisions that will not be disturbed except “where the remedy selected has no reasonable relation to the unlawful practices found to exist.” Jacob Siegel Co. v. FTC, 327 U.S. 608, 612-13 (1946). Courts have upheld FTC orders encompassing all products the company markets or all products in a broad category, based on violations involving only a single product or group of products. ITT Continental Baking Co. v. FTC, 532 F.2d 207 (2d Cir. 1976). Among the factors the FTC will consider in determining the appropriate remedy are the seriousness of the violation, the violator’s record with respect to deceptive practices, and the potential transferability of the illegal practice to other products. Sears, Roebuck & Co. v. FTC, 676 F.2d 385, 391 (9th Cir. 1982). The weight given a particular factor or element will vary. The more egregious the facts with respect to a particular element, the less important it is that another negative factor be present. Id. at 391-92. See also Telebrands Corp. v. FTC, 457 F.3d 354 (4th Cir. 2006).

C. Corrective Advertising: If merely prohibiting future misrepresentations will not dispel misperceptions conveyed through prior misrepresentations, the FTC may order corrective advertising. See Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977) (upholding order enjoining company from representing that Listerine helps prevent colds and sore throats and requiring it for a specific period to state in future advertising “Listerine will not help prevent colds or sore throats or lessen their severity”). Representative corrective advertising cases:

- Novartis Corp. v. FTC, 223 F.3d 783 (D.C. Cir. 2000) (upholding Commission order requiring marketer of Doan’s pills to run corrective advertising to remedy deceptive claim that product is superior to other analgesics for treating back pain)

- Unocal Corp., 117 F.T.C. 500 (1994) (consent order) (requiring gasoline company to mail corrective notices to credit card holders who had received ads making unsubstantiated performance claims for higher octane fuels)
• Eggland’s Best, Inc., 118 F.T.C. 340 (1994) (consent order) (requiring egg marketer to label packaging for one year with corrective notice regarding product’s effect on serum cholesterol)

D. Other Remedies: The FTC may require advertisers to make accurate information available through disclosures, direct notification, or other forms of education or may seek additional remedies to correct deceptive or unfair practices.

1. Representative disclosure cases:

• FTC v. Western Botanicals, Inc., No. CIV-S-01-1332 DFL GGH (E.D. Cal. July 11, 2001); and FTC v. Christopher Enterprises, Inc., No. 2:01-CV-0505-ST (D. Utah Nov. 29, 2001) (stipulated orders) (prohibiting sale of comfrey without proof of safety and requiring warnings that internal use can cause serious liver damage or death)

• Panda Herbal Int’l, Inc., 132 F.T.C. 125 (2001), and ForMor, Inc., 132 F.T.C. 72 (2001) (consent orders) (requiring warnings in labeling and ads that St. John’s Wort can have dangerous interactions for patients taking certain prescription drugs and for pregnant women)

• Aaron Co., 132 F.T.C. 172 (2001) (consent order) (requiring warnings in labeling and ads that products with ephedra can have dangerous effects, including heart attack, stroke, seizure, and death)

• FTC v. Met-Rx USA, Inc., No. SAC V-99-1407 (D. Colo. Nov. 15, 1999), and FTC v. AST Nutritional Concepts & Research, No. 99-WI-2197 (C.D. Cal. Nov. 15, 1999) (stipulated orders) (requiring labeling and advertising for supplements containing androgen and other steroid hormones to disclose “WARNING: This product contains steroid hormones that may cause breast enlargement, testicle shrinkage, and infertility in males, and increased facial and body hair, voice deepening, and clitoral enlargement in females. Higher doses may increase these risks. If you are at risk for prostate or breast cancer, you should not use this product.”)

• R.J. Reynolds Tobacco Co., 128 F.T.C. 262 (1999) (consent order) (requiring marketer of Winston “no additives” cigarettes to disclose that “No additives in our tobacco does NOT mean a safer cigarette”)

• Global World Media Corp., 124 F.T.C. 426 (1997) (consent order) (requiring marketer to disclose “WARNING: This product contains ephedrine which can have dangerous effects on the central nervous system and heart and could result in serious injury. Risk of injury increases with dose.”)

• Safe Brands Corp., 121 F.T.C. 379 (1996) (consent order) (requiring marketer of Sierra antifreeze to include a statement on containers warning that product may be harmful if swallowed) practices.
2. Representative direct notification cases:

- **FTC v. Lumos Labs, Inc.**, No. 3:16-CV-00001 (N.D. Cal. Jan. 5, 2016) (stipulated final judgment) (requiring marketers of Lumosity “brain training” program to notify customers online and via email of one-step mechanism for cancelling product’s auto-renewal feature)

- **Oracle Corporation**, C-4571 (Dec. 29, 2015) (consent order) (requiring notice to consumers during Java SE update process if they have outdated versions of the software and announcement via social media to inform consumers about deceptive claims regarding security of Java SE)

- **BMW of North America, LLC**, C-4555 (Mar. 19, 2015) (consent order) (requiring company to contact affected MINI owners to correct false statement about warranty terms made in violation of the Magnuson-Moss Warranty Act and Section 5)

- **Brake Guard Products, Inc.**, 125 F.T.C. 138 (1998) (requiring seller of purported after-market braking system to notify distributors and purchasers that FTC has determined ad claims to be deceptive)

- **PhaseOut of America, Inc.**, 123 F.T.C. 395 (1997) (consent order) (requiring marketer of device advertised to reduce health risks of smoking to notify purchasers that the product has not been proven to reduce the risk of smoking-related diseases)

- **Consumer Direct, Inc.**, 113 F.T.C. 923 (1990) (consent order) (requiring marketer of Gut Buster exercise device to mail warnings to purchasers regarding serious safety hazard) practices.

3. Representative consumer education cases:

- **FTC v. WebTV Networks, Inc.**, C-3988 (Dec. 12, 2000) (consent order) (to settle charges that company made deceptive claims about product’s capabilities, requiring educational campaign to inform consumers about evaluating internet access devices)

- **United States v. Macys.com, Inc.**, (D. Del. July 26, 2000) (consent decree) ($350,000 civil penalty to settle Mail Order Rule violations and requirement that company post ads on search engines to alert consumers about online shopping rights)

- **United States v. Bayer Corp.**, No. CV-00-132 (NHP) (D.N.J. Jan. 11, 2000) (consent decree) (to settle charges that company made deceptive claims about use of aspirin to prevent heart attacks and strokes in the general population, requiring campaign about proper use of aspirin therapy and disclosure in ads, “Aspirin is not
appropriate for everyone, so be sure to talk with your doctor before beginning an aspirin regimen”)


- **Exxon Corp.**, 124 F.T.C. 249 (1997) (consent order) (to settle charges that advertiser made misleading claims about gasoline’s ability to clean engines and reduce maintenance costs, requiring consumer education campaign, including TV ads and brochure)

- **Schering-Plough Healthcare Products, Inc.**, 123 F.T.C. 1301 (1997) (consent order) (requiring marketer of Coppertone Kids Waterproof Sunblock to distribute educational brochures about sunscreen protection)

- **California SunCare, Inc.**, 123 F.T.C. 332 (1997) (consent order) (requiring prominent cautionary statement about hazards of sun exposure in future advertising for sun tanning products)

- **Blenheim Expositions**, 120 F.T.C. 1078 (1995) (consent order) (requiring producer of franchise trade shows to distribute copies of FTC’s *Consumer’s Guide to Buying a Franchise* to attendees)

4. Other conduct-based remedies

- **FTC v. v. Herbalife International of America, Inc.**, No. 2:16-CV-05217 (C.D. Cal. July 15, 2016) (stipulated order) ($200 million redress and requiring multilevel marketing company to restructure U.S. operations to, among other things, eliminate incentives that reward distributors primarily for recruiting, rather than retail sales)

- **HTC America, Inc.**, 155 F.T.C. 1617 (2013) (consent order) (requiring mobile device manufacturer to implement program to install patches to correct security flaws)

- **Phusion Projects, LLC.**, 155 F.T.C. 212 (2013) (consent order) (requiring relabeling and repackaging to settle charges that company made false claims for malt beverage)

- **United States v. Telebrands Corp.**, No. 96-0827-R (W.D. Va. Sept. 2, 1999) (consent decree) (ordering recidivist to pay $800,000 civil penalty and to hire FTC-approved monitor to audit compliance with the Mail Order Rule)
E. **Bans and bonds:** Courts have banned individuals from certain industries, required them to post bonds before engaging in business, or ordered other remedies to ensure compliance. See, e.g., FTC v. Douglas Gravink and Gary Hewitt, No. 09-CV-4719 (C.D. Cal. Aug. 23, 2012) (final judgment) (lifetime ban from infomercials, telemarketing, or assisting others in those fields). See also Synchronal Corp., 116 F.T.C. 1189 (1993) (consent order). Representative cases:

- **FTC v. E.M.A. Nationwide, Inc.,** 767 F.3d 611 (6th Cir. 2014) (upholding district court order banning telemarketer from pitching mortgage and debt relief programs)

- **FTC v. NHS Systems, Inc.,** No. 08-CV-2215 (E.D. Pa. Apr. 24, 2013) (permanent injunction) (lifetime ban from telemarketing and charging consumers’ bank accounts)

- **FTC v. Fereidoun “Fred” Khalilian,** No. 10-21788-CIV (S.D. Fla. Jan. 10, 2011) (stipulated injunction) (lifetime ban from telemarketing to settle charges of using illegal robocalls to sell auto service contracts)

- **FTC v. United Credit Adjusters, Inc.,** No. 09-798 (JAP) (D.N.J. Apr. 22, 2010) (default order) ($7.5 million judgment and lifetime ban from selling credit repair and mortgage relief services)

- **United States v. Global Mortgage Funding, Inc.,** No. SA CV 07-1275 (C.D. Cal. July 23, 2009) (five-year ban for calling numbers on Do Not Call Registry and failing to transmit accurate caller ID information)


- **FTC v. 7 Day Marketing, Inc.,** No. CV-08-01094-ER-FFM (C.D. Cal. Feb. 27, 2008) (permanent injunction) (banning individuals who sold “7 Day Miracle Cleanse Program” from marketing via infomercial or marketing any health-related product in any medium)

- **FTC v. AmeriDebt, Inc. and Andris Pukke,** No. PJM-03-3317 (D. Md. Sept. 13, 2006) (stipulated judgment) ($13 million redress and lifetime ban from credit counseling, debt management, and credit education activities)


F.  Trade Name Excision: The FTC has authority to forbid the future use of a brand name or trade name when less restrictive remedies, such as disclosures, would be insufficient to eliminate the deception conveyed by the name or would lead to a confusing contradiction in terms.  ABS Tech Sciences, Inc., 126 F.T.C. 229 (1998) (enjoining company from using “ABS” as part its trademark or trade name because consumers would likely confuse it with factory-installed anti-lock braking systems).  See also Continental Wax Corp. v. FTC, 330 F.2d 475 (2d Cir. 1964); Thompson Medical Co., 104 F.T.C. at 837-39.

G.  Consumer Redress, Disgorgement, and Other Financial Remedies: Pursuant to its inherent equitable powers, a district court may order redress or disgorgement under Section 13(b).  See FTC v. Ross, 743 F.3d 886 (4th Cir. 2014); FTC v. Bronson Partners, LLC, 654 F.3d 359 (2d Cir. 2011); FTC v. H.N. Singer, Inc., 668 F.2d 1107 (9th Cir. 1982). In addition, Commission consent orders often include provisions for marketers to pay redress or disgorge profits.  The FTC also may seek redress pursuant to Section 19 of the FTC Act, 15 U.S.C. § 57b.

1.  Representative Section 13(b) cases:

   • FTC v. Help the Vets, Inc., No. 6:18-CV-01153-CEM (M.D. Fla. July 12, 2018) (stipulated order) (as part of Operation Donate with Honor, $20.4 million partially suspended judgment and lifetime ban from paid charitable fundraising and charity management to settle charges that “charities” falsely claimed to fund medical care, suicide prevention program, and treatment for veterans with breast cancer)


   • FTC v. Reebok International Ltd., No. 1:11-CV-02046-DCN (N.D. Ohio Sept. 28, 2011) (stipulated judgment) ($25 million redress for deceptive claims that Reebok EasyTone and RunTone shoes would provide extra toning and strengthening of leg and buttock muscles)


• FTC v. AmeriDebt, Inc., No. PJM-03-3317 (D. Md. Sept. 13, 2006) (stipulated judgment) ($13 million for false claims that company was nonprofit credit counseling organization when, in fact, company funneled money to affiliated for-profit entities and individuals and didn’t provide advertised services to consumers)

• FTC v. Rexall Sundown, Inc., No. 00-706-CIV (S.D. Fla. Mar. 11, 2003) (stipulated order) (up to $12 million redress for deceptive claims for purported anti-cellulite product Cellasene)

• FTC v. Smolev and Triad Discount Buying Service, Inc., No. 01-8922- CIV-Zloch (S.D. Fla. Oct. 24, 2001) (stipulated order) (action by FTC and 40 states ordering $9 million redress from buying clubs that misled consumers into accepting trial memberships and obtained consumers’ billing information from telemarketers without authorization)


• FTC v. Amy Travel Service, Inc., 875 F.2d 564 (7th Cir. 1988) (upholding district court’s award of redress under Section 13(b) to victims of fraudulent travel promotion)
• FTC v. International Diamond Corp., No. C-82-078 WAI (JSB) (N.D. Cal. Nov. 8, 1983) (upholding court’s authority to order redress under Section 13(b) of the FTC Act)

2. Representative Section 19 cases:


• FTC v. Figgie, Inc., 994 F.2d 595 (9th Cir. 1993) (upholding award of redress following FTC’s finding of Section 5 violation for deceptive safety representations for heat detectors)

3. Representative administrative orders with financial or other remedies:

• Sony Computer Entertainment America LLC, 159 F.T.C. 1128 (2014) (consent order) (requiring company to give consumers choice of $50 merchandise voucher or $25 refund for deceptive claims about capabilities of PS Vita gaming device)

• Beiersdorf, Inc., 152 F.T.C. 414 (2011) (consent order) ($900,000 redress for deceptive claims that Nivea My Silhouette! skin cream can significantly reduce users’ body size)


• Weider Nutrition International, Inc., C-3983 (Nov. 17, 2000) (consent order) ($400,000 redress for false weight loss claims for PhenCal, marketed as safe alternative to prescription drug combination Phen-Fen)

• Dura Lube, Inc., D-9292 (May 5, 2000) (consent order) ($2 million redress for deceptive claims for engine treatment)

• Apple Computer, Inc., 128 F.T.C. 190 (1999) (consent order) (challenging company’s practice of charging owners for technical support despite advertising that services were free and requiring company to honor representation that customers would receive free support for as long as they own the product)

• Apple Computer, Inc., 124 F.T.C. 184 (1997) (consent order) (requiring company to provide computer upgrade kits at reduced cost and to offer rebates to purchasers)
• **Azrak-Hamway International.** 121 F.T.C. 507 (1996) (consent order) (requiring toymaker to offer refunds to consumers and to notify TV stations that ran ad of Children’s Advertising Review Unit’s policies)

• **L & S Research Corp.**. 118 F.T.C. 896 (1994) (consent order) ($1.45 million in disgorgement for deceptive claims for Cybergenics bodybuilding products)

H. Civil Penalties for Violations of FTC Orders and Trade Regulation Rules: Section 5(l) of the FTC Act authorizes the Commission to seek civil penalties in federal court for violations of cease and desist orders. Section 5(m) authorizes the Commission to seek civil penalties for violations of trade regulation rules.

1. Representative order violation cases:

• **United States v. iSpring Water Systems, LLC.** No. 1:19-CV-01620-AT (stipulated order) ($110,000 civil penalty for deceptive Made in USA claims for water filtration systems imported from China, in violation of 2017 FTC order)

• **United States v. New World Auto Imports.** No. 3:16-CV-2401-K (N.D. Tex. Aug. 18, 2016) (stipulated order) ($85,000 civil penalty for deceptive auto ads, in violation of 2014 FTC order)

• **United States v. Billion Auto.** No. C-14-4118-MWB (N.D. Ia. Dec. 12, 2014) (stipulated order) ($360,000 civil penalty for deceptive auto ads, in violation of 2012 FTC order)


• **FTC v. AJM Packaging Corp.**. No. 1:13-CV-1510 (D.D.C. Oct. 29, 2013) (stipulated order) ($450,000 civil penalty for violating 1994 FTC order barring deceptive environmental claims)

• **United States v. Google Inc.**. No. 5:12-CV-04177-HRL (N.D. Cal. Aug. 9, 2012) (stipulated order) ($22.5 million civil penalty for misrepresenting privacy assurances to users of Apple’s Safari browser, in violation of 2011 FTC order)

• **United States v. Bayer Corp.**. No. 07-01 (HAA) (D.N.J. Jan. 4, 2007) (consent decree) ($3.2 million civil penalty for deceptive weight loss claims for One-A-Day WeightSmart, in violation of 1991 FTC order)
• United States v. NBTY, Inc., No. CV-05-4793 (E.D.N.Y. Oct. 12, 2005) (consent decree) ($2 million civil penalty for violating terms of FTC order by making deceptive health claims for Royal Tongan Limu and Body Success PM Diet Program)


• United States v. Nu Skin International, Inc., No. 97-CV-0626G (D. Utah Aug. 6, 1997) (stipulated permanent injunction) ($1.5 million civil penalty against seller of weight loss products for violating FTC order barring deceptive claims)

• United States v. STP Corp., No. 78 Civ. 559 (CBM) (S.D.N.Y. Dec. 1, 1995) (stipulated permanent injunction) ($888,000 civil penalty against motor oil additive manufacturer for violating FTC order barring deceptive claims)

• In re Dahlberg, No. 4-94-CV-165 (D. Minn. Nov. 21, 1995) (stipulated injunction) ($2.75 million civil penalty against hearing aid manufacturer for violating FTC order)


2. Representative rule violation cases:

• United States v. Dish Network, 309-CV-03073-JES-CHE (June 6, 2017) (amended order for permanent injunction) ($280 million civil penalty in federal-state action finding Dish Network violated Telemarketing Sales Rule by initiating, or causing others to initiate, calls to numbers on Do Not Call Registry)


• United States v. Sumpolec, No. 6:09-CV-00378-CEH-KRS (M.D. Fla. Jan 31, 2013) (judgment and order) ($350,000 civil penalty for R-value Rule violations and deceptive claims about insulation)
• United States v. Prochnow, No. 1 02-CV-917 (N.D. Ga. Sept. 11, 2006) (permanent injunction) ($5.4 million civil penalty and disgorgement of $1.6 million for magazine seller’s violations of Telemarketing Sales Rule and 1996 FTC consent order)

• United States v. Scholastic Inc. and Grolier Inc., No. 1:05CV01216 (D.D.C. June 21, 2005) (consent decree) ($710,000 civil penalty for book clubs’ violations of Negative Option Rule, Unordered Merchandise Statute, Telemarketing Sales Rule, and FTC Act)

• United States v. Igia, No. 04-CV-3038 (S.D.N.Y. Apr. 21, 2004) (consent decree) ($300,000 civil penalty for violations of Mail Order Rule by marketer of Epil-Stop depilatory product)

• United States v. Deer Creek Products, No. 03-61592-CIV (S.D. Fla. Aug. 19, 2003) (consent decree) (suspended $150,000 civil penalty against marketer of Big Mouth Billy Bass for violations of Mail Order Rule)

• United States v. Staples, Inc., No. 03-10958 GAO (D. Mass. May 22, 2003) (consent decree) ($850,000 civil penalty for office supply company’s violation of the Mail Order Rule through misleading “real time” inventory availability and delivery claims)


• United States v. Iomega Corp., No. 98-CV-00141C (D. Utah Dec. 9, 1998) (consent decree) ($900,000 civil penalty for Mail Order Rule violation)


I. Contempt Actions for Violations of District Court Orders: Federal district court orders may be enforced through civil or criminal contempt actions. Representative cases:
• FTC v. BlueHippo Funding, LLC, BlueHippo Capital, LLC, and Joseph Rensin, No. 08-CIV-1819 (PAC) (S.D.N.Y. May 2, 2016) (opinion) ($13.4 million compensatory contempt sanction for violations of order regarding marketing computers to consumers with poor credit). See also In re Joseph K. Rensin, Ch. 7 Case No. 17-11834-EPK, Adv. Pro. 17-01185-EPK (S.D. Fla. Feb. 1, 2019) (memorandum opinion) (ruling that operator of computer financing company can’t use bankruptcy filing as a shield from contempt order requiring him to pay $13.4 million for violating a 2008 FTC order)

• FTC v. LifeLock, Inc., No. 2:10-CV-00530-MHM (D. Ariz. Jan. 5, 2016) (amended order) ($100 million to settle contempt charges that LifeLock violated terms of 2010 court order requiring company to secure consumers’ personal information and prohibiting deceptive advertising)


• United States v. Ferrara, 334 F.3d 774 (8th Cir. 2003) (upholding 125-month sentence for criminal contempt arising from violation of court order barring violations of the FTC’s Franchise Rule)

III. ADVERTISING SUBSTANTIATION

A. Advertising Substantiation Policy Statement: Appended to Thompson Medical Co., 104 F.T.C. 648, 839 (1984), aff’d, 791 F.2d 189 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987), the statement sets forth the requirement, articulated in prior Section 5 cases, that advertisers must have a reasonable basis for making objective claims before claims are disseminated. This doctrine was first announced in Pfizer, Inc., 81 F.T.C. 23 (1972). “In reviewing whether there is appropriate scientific substantiation for the claims made,” reviewing courts are “mindful of the Commission’s special expertise in determining what sort of substantiation is necessary to assure that advertising is not deceptive.” POM Wonderful LLC v. FTC, 777 F.3d 478 (D.C. Cir. 2015).

B. An advertiser must possess at least the level of substantiation expressly or impliedly claimed in the ad. See, e.g., Honeywell, Inc., 126 F.T.C. 202 (1998) (consent order) (requiring claims that imply a level of performance under
specific conditions, such as household use, to be substantiated by evidence relating to those conditions).

C. If no specific level of substantiation is claimed, what constitutes a reasonable basis is determined on a case-by-case basis by analyzing six “Pfizer factors”:

1. the type of claim;
2. the benefits if the claim is true;
3. the consequences if the claim is false;
4. the ease and cost of developing substantiation for the claim;
5. the type of product; and
6. the level of substantiation experts in the field would agree is reasonable.

D. For health, safety, or efficacy claims, the FTC has generally required that advertisers possess “competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true.” FTC orders have typically defined “competent and reliable scientific evidence” to means “tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons and that are generally accepted in the profession to yield accurate and reliable results.” See, e.g., HealthyLife Sciences LLC, C-4492, and John Matthew Dwyer III, C-4493 (Sept. 11, 2011) (consent orders); Brake Guard Products, Inc., 125 F.T.C. 138 (1998). Depending on the nature of the claim, the Commission has imposed more specific requirements, including randomized clinical trials (RCTs). Representative cases:

- **POM Wonderful LLC v. FTC**, 777 F.3d 478 (D.C. Cir. 2015) (“Here, insofar as the Commission’s order imposes a general RCT-substantiation requirement for disease claims – i.e., without regard to any particular number of RCTs – the order satisfies the tailoring components of *Central Hudson* review.”)

- **The Dannon Corp.**, 151 F.T.C. 62 (2010) (consent order) (requiring two well-designed human clinical studies for certain future health claims made by company under order for deceptive representations for Activia yogurt and DanActive beverage)

- **Nestlé Healthcare Nutrition, Inc.**, 151 F.T.C. 1 (2010) (consent order) (requiring two well-designed human clinical studies for certain future health claims made by company under order for deceptive representations for Boost Kid Essentials)

- **Schering Corp.**, 118 F.T.C. 1030 (1994) (consent order) (requiring that tests and studies relied upon as reasonable basis must employ appropriate methodology and address specific claims made in ad)
• **FTC v. Pantron I Corp.,** 33 F.3d 1088 (9th Cir. 1994) (holding that consumer satisfaction surveys are insufficient to meet “competent and reliable scientific evidence” standard)

• **Removatron Int’l Corp.,** 111 F.T.C. 206 (1988), aff’d, 884 F.2d 1489 (1st Cir. 1989) (requiring “adequate and well-controlled clinical testing” to substantiate claims for hair removal product)

• **Thompson Medical Co.,** 104 F.T.C. 648 (1984), aff’d, 791 F.2d 189 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987) (requiring two well-controlled clinical studies to substantiate certain drug claims)

IV. LIABILITY FOR FALSE OR UNSUBSTANTIATED CLAIMS

A. **Principals:** An advertiser is responsible for all claims, express and implied, that are reasonably conveyed by the ad. See Sears, Roebuck & Co., 95 F.T.C. 406, 511 (1980), aff’d, 676 F.2d 385 (9th Cir. 1982). Advertisers are strictly liable for violations of the FTC Act. Neither proof of intent to convey a deceptive claim nor evidence that consumers have actually been misled is required for a finding of liability. Chrysler Corp. v. FTC, 561 F.2d 357, 363 & n.5 (D.C. Cir. 1977); Regina Corp., 322 F.2d 765, 768 (3d Cir. 1963). See also Orkin Exterminating Co. v. FTC, 849 F.2d 1354 (11th Cir. 1988) (holding that company’s purported good faith reliance on the advice of counsel is not a defense under Section 5).

B. **Individual Liability:** Corporate officers may be held individually liable for FTC Act violations if the officer “owned, dominated and managed” the company and if naming the officer individually is necessary for the order to be fully effective in preventing the deceptive practices found to exist. FTC v. Standard Education Society, 302 U.S. 112 (1937). See also FTC v. Ross, 743 F.3d 886 (4th Cir. 2014) (holding corporate Vice President jointly and severally liable for $163 million judgment); POM Wonderful LLC v. FTC, 777 F.3d 478 (D.C. Cir. 2015) (holding former CEO and company president liable for deceptive practices). The Commission is not required to show that defendants intended to defraud consumers in order to hold them personally liable. FTC v. Affordable Media, 179 F.3d 1228 (9th Cir. 1999). See also FTC v. Commerce Planet, Inc., 815 F.3d 593, 601 (9th Cir. 2016) (upholding joint and several liability).

1. Individual liability is justified “where an executive officer of the respondent company is found to have personally participated in or controlled the challenged acts or practices” or if the officer held a “control position” over employees who committed illegal acts. See Rentacolor, Inc., 103 F.T.C. 400 (1984); Thiret v. FTC, 512 F.2d 176 (10th Cir. 1975).

2. Individuals are personally liable for restitution for corporate misconduct if they “had knowledge that the corporation or one of its agents engaged in dishonest or fraudulent conduct, that the misrepresentations were the type upon which a reasonable and prudent person would rely, and that
consumer injury resulted.” FTC v. Ross, 743 F.3d 886 (4th Cir. 2014). The knowledge requirement can be satisfied by showing the individuals had actual knowledge of a material misrepresentation, were recklessly indifferent to the deception, or were aware of the probability of fraud along with an intentional avoidance of the truth. See FTC v. Affordable Media, 179 F.3d 1228 (9th Cir. 1999); FTC v. Publishing Clearing House, Inc., 104 F.3d 1168, 1171 (9th Cir. 1996).

3. Requisite authority may be inferred from activities that exhibit signs of planning, decision making, and supervision, such as preparing or approving ads containing deceptive representations. See Southwest Sunsites, Inc. v. FTC, 785 F.2d 1431 (9th Cir. 1986).

C. Advertising Agency Liability An advertising agency may be liable for a deceptive ad if the agency was an active participant in the preparation of the ad and if it knew or should have known the ad was deceptive. Standard Oil Co., 84 F.T.C. 1401, 1475 (1974), aff’d and modified, 577 F.2d 653 (9th Cir. 1978). An ad agency will be held to know what express or implied claims are conveyed to consumers by it ads. ITT Continental Baking Co., 83 F.T.C. 865, 968 (1973), aff’d as modified, 532 F.2d 207 (2d Cir. 1976). An ad agency does not have to independently substantiate the claims or scientifically re-examine the advertiser’s evidence. However, it can’t ignore obvious shortcomings or facial flaws. Bristol-Myers Co., 102 F.T.C. 21, 364 (1983). Representative cases:

- FTC and Maine v. Marketing Architects, Inc., No. 2:18-CV-00050 (D. Me. Feb. 6, 2018) (stipulated permanent injunction) ($2 million settlement for ad agency’s role in creating and disseminating deceptive ads for weight loss products on behalf of client Direct Alternatives)
- Deutsch LA, Inc., 159 F.T.C. 1164 (2014) (consent order) (alleging that ad agency staff tweeted favorable comments about client Sony’s gaming console without disclosing material connection to company)
- TBWA Worldwide, Inc., C-4455 (Jan. 23, 2014) (consent order) (challenging agency’s role in deceptive on-camera demonstration of Nissan Frontier truck)
- Campbell Mithun, L.L.C., 133 F.T.C. 702 (2002) (consent order) (challenging agency’s role in ads claiming that calcium in Wonder Bread could improve children’s brain function and memory)
• Grey Advertising, Inc., 122 F.T.C. 343 (1996) (consent orders) (challenging agency’s role in advertisements containing deceptive demonstration for Hasbro paint-sprayer toy and deceptive claims for Dannon frozen yogurt)

• Jordan McGrath Case & Taylor, 122 F.T.C. 152 (1996) (consent order) (challenging agency’s role in ads containing deceptive claims for Doan’s pills)

• Young & Rubicam, Inc., 122 F.T.C. 79 (1996) (consent order) (challenging agency’s role in ads containing deceptive claims for Ford’s auto air filtration system)

• NW Ayer & Son, Inc., 121 F.T.C. 656 (1996) (consent order) (challenging agency’s role in ads containing deceptive claims regarding the effect of Eggland’s Best eggs on cholesterol)

• BBDO Worldwide, Inc., 121 F.T.C. 33 (1996) (consent order) (challenging agency’s role in ads containing deceptive claims for Häagen-Dazs frozen yogurt)

• Scali, McCabe, Sloves, Inc., 115 F.T.C. 96 (1992) (consent order) (challenging agency’s role in ad containing deceptive demonstration of Volvo)

D. **Means and Instrumentalities:** Companies may be liable if they provide others with the means and instrumentalities for engaging in deceptive conduct. Castrol North America Inc., 128 F.T.C. 682 (1999), and Shell Chemical Co., 128 F.T.C. 749 (1999) (consent orders) (challenging Castrol’s role in disseminating deceptive claims for its Syntec fuel additives and Shell’s role in providing trade customers, including Castrol, with promotional materials containing deceptive claims for purported active ingredient of Syntec, which Shell developed). See Nice-Pak Products, Inc., C-4556 (May 18, 2015) (consent order); FTC v. Applied Food Sciences, Inc., No. 1-14-CV-00851 (W.D. Tex. Sept. 8, 2014) (stipulated order); Oreck Corp., 151 F.T.C. 289 (2011) (consent order).

E. **Liability of Other Parties:** Depending on the circumstances, the FTC has held other parties – including retailers, catalogs, infomercial producers, home shopping companies, public relations firms, and payment processors – liable for their role in deceptive practices. Representative cases:

• Creaxion Corp. and Inside Publications LLC of Georgia, C-4668 (Nov. 13, 2018) (consent order) (challenging public relations firm and publisher’s roles in Olympians’ promotion of insect repellent in social media and in a format that deceptively appeared to be independent magazine content)
• FTC v. Temecula Equity Group, LLC, No. 8:18-CV-03118-PX (D. Md. Oct. 10, 2018) (challenging marketing firm’s role in car dealerships’ mailing of more than 21,000 fake “urgent recall” notices – similar in appearance to official NHTSA safety recall notices – to consumers in an effort to bring them to the dealerships)


• FTC v. E.M. Systems & Services, LLC, No. 8:15-CV-01417-SDM-EAJ (M.D. Fla. July 7, 2015) (FTC-Florida AG action challenging role of payment processor in alleged credit card laundering and illegally assisting and facilitating debt relief telemarketing scheme)

• FTC v. Applied Food Sciences, Inc., No. 1-14-CV-00851 (W.D. Tex. Sept. 8, 2014) (stipulated order) ($3.5 million to settle charges that company used flawed study to make baseless weight loss claims about green coffee extract to retailers, who repeated claims in marketing products to consumers)

• Neiman Marcus Group, 156 F.T.C. 95 (2013); Dr.Jays.com, Inc., 156 F.T.C. 116 (2013); and Eminent, Inc., 156 F.T.C. 132 (2013) (consent orders) (challenging retailers’ false claims that products containing real fur were made with faux fur, in violation of FTC Act and Fur Products Labeling Act)


• FTC v. Neovi, Inc., d/b/a Qchex.com, 604 F.3d 1150 (9th Cir. 2010) (upholding that Internet-based check creation and delivery service’s actions violated FTC Act)


• CompUSA Inc., 139 F.T.C. 357 (2005) (consent order) (requiring retailer to pay rebates for bankrupt manufacturer when retailer continued to advertise rebates despite knowing that manufacturer was not fulfilling requests)

• FTC v. Modern Interactive Technology, Inc., No. CV 00–09358 GAF (CWx) (C.D. Cal. Mar. 1, 2005) (stipulated order) (holding infomercial producer and two principals liable for deceptive weight loss claims made for the Enforma system)


• FTC v. Lane Labs-USA, Inc., No. 00CV3174 (D.N.J. June 28, 2000) (stipulated order) (applying common enterprise theory to hold product manufacturer and company that distributed information about use of product liable for deceptive cancer treatment claims for BeneFin shark cartilage product). See FTC v. Lane Labs-USA, Inc., 624 F.3d 575 (3d Cir. 2010).

• QVC, Inc., C-3955 (June 16, 2000) (consent order) (holding home shopping company liable for its role in making and disseminating deceptive cold prevention claims)

• Home Shopping Network, Inc., 122 F.T.C. 227 (1996) (consent order) (holding home shopping company liable for its role in making and disseminating deceptive claims for vitamin and stop-smoking sprays)

• Sharper Image Corp., 116 F.T.C. 606 (1993) (consent order) (holding catalog company liable for deceptive claims for telephone tap detector, exercise device, and dietary supplement)


• Walgreen Co., 109 F.T.C. 156 (1987) (holding retail drugstore chain liable for deceptive advertising of OTC pain reliever)
V. LIABILITY FOR PARTICULAR KINDS OF CLAIMS

A. Claims Made through Endorsements: False or deceptive endorsements or testimonials violate Section 5. See Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255. The Guides are premised on the principle that because consumers rely on endorser’ opinions in making product decisions, endorsements must be non-deceptive. Endorsements “may not contain any representations which would be deceptive or could not be substantiated if made directly by the advertiser.” 16 C.F.R. § 255.1(a). In other words, endorsements are not themselves substantiation; rather, they give rise to the need for the advertiser to possess competent and reliable evidence to support the underlying efficacy representations conveyed to consumers. In addition, any material connection between the endorser and the advertiser (i.e., a relationship not reasonably expected by a consumer that might materially affect the weight or credibility of the endorsement) must be disclosed. See Numex Corp., 116 F.T.C. 1078 (1993) (consent order) (challenging endorser’s status as corporate officer to be a material connection that must be disclosed); TrendMark Int’l, Inc., 126 F.T.C. 375 (1998) (consent order) (challenging consumer endorsers’ status as distributors of weight loss product or their spouses to be a material connection that must be disclosed). In 2009, the FTC issued its revised Endorsement Guides, modifying the standard for typicality claims and adding examples to demonstrate the Guides’ applicability in new marketing media, including blogs.

1. Expert Endorsers: An “expert” is defined as “an individual, group, or institution possessing, as a result of experience, study, or training, knowledge of a particular subject, which knowledge is superior to that generally acquired by ordinary individuals.” 16 C.F.R. § 255.0(d). Endorsers represented directly or by implication to be experts must have qualifications sufficient to give them the represented expertise. 16 C.F.R. § 255.3(a); see FTC v. Lark Kendall, No. 00-09358-AHM (C.D. Cal. Aug. 31, 2000) (challenging false claim that person touting a diet product was a nutritionist) (stipulated order). An expert endorsement must be supported by an examination or testing of the product at least as extensive as experts in the field generally agree would be needed to support the conclusions presented in the endorsement. 16 C.F.R. § 255.3(b). Both the advertiser and the expert endorser may be held liable for deceptive claims made by the endorser. See Synchronal Corp., 116 F.T.C. 1189 (1993) (consent order) (holding advertiser and expert endorsers liable for deceptive claims for a purported baldness remedy and cellulite treatment). Representative cases:


- Moonlight Slumber, LLC, C-4634 (Sept. 28, 2017) (consent order) (challenging company’s claim that baby mattresses had earned the “Green Safety Shield” while failing to disclose that shield was the company’s own designation and not a third-party certification)
• **Benjamin Moore & Co., Inc., C-4646, and ICP Construction, Inc., C-4648 (July 11, 2017) (consent orders) (challenging paint companies’ use of environmental seals that falsely conveyed that products had been endorsed or certified by independent third party when companies had actually awarded seals to their own products)**

• **FTC v. Supple LLC, 1:16-CV-1325 (E.D. Wis. Oct. 5, 2016) (stipulated judgment) (challenging inadequate disclosure of material connection between company selling glucosamine and chondroitin liquid supplement and doctor recommending it)**


• **ADT, LLC, C-4460 (Mar. 6, 2014) (consent order) (alleging that on Today Show and in other media, home security company misrepresented that paid endorsements from safety and technology experts were independent reviews)**


• **EcoBaby Organics, Inc., C-4416 (July 25, 2013) (consent order) (challenging false claim that National Association of Organic Mattress Industry was independent third-party certifier with expertise)**


• **Gerber Products Co., 123 F.T.C. 1365 (1997) (consent order) (challenging deceptive claim regarding pediatricians’ endorsement of baby food in survey)**

• **The Eskimo Pie Corp., 120 F.T.C. 312 (1995) (consent order) (challenging deceptive claim that line of frozen desserts was approved or endorsed by American Diabetes Association)**
• Third Option Laboratories, Inc., 120 F.T.C. 973 (1995) (consent order) ($480,000 redress for deceptive claim that Jogging in a Jug cider beverage was approved by the Department of Agriculture)

• James McElhaney, M.D., 116 F.T.C. 1137 (1993) (consent order) (challenging deceptive representations made by a physician for a purported pain relief and arthritis treatment device)

• Steven Victor, M.D., 116 F.T.C. 1189 (1993), and Patricia Wexler, M.D., 115 F.T.C. 849 (1992) (consent orders) (challenging deceptive claims by dermatologists for a purported baldness remedy)

• Black & Decker (U.S.) Inc., 113 F.T.C. 63 (1990) (consent order) (challenging deceptive claim that iron received endorsement of the National Fire Safety Council because the group did not have expertise to evaluate appliance safety)

2. **Consumer Endorsers:** Anecdotal evidence, such as consumer testimonials, is generally inadequate to substantiate efficacy claims. See, e.g., Removatron, 111 F.T.C. at 302; Original Marketing, Inc., 120 F.T.C. 278 (1995) (consent order) (challenging use of testimonials that didn’t represent typical experience of consumers who used weight loss ear clip). Consumer testimonials may not contain claims that could not be substantiated if the advertiser made them directly. An ad using consumer endorsements will generally be interpreted to convey that the endorser’s experience is representative of what consumers will typically achieve with the product in actual use. 16 C.F.R. § 255.2(a); see Cliffdale Associates, 103 F.T.C. 110, 173 (1984). If the advertiser doesn’t have substantiation that the endorser’s experience is representative of what consumers will generally achieve, the ad should clearly and conspicuously disclose the generally expected performance in those circumstances, and the advertiser must have adequate substantiation for that claim. 16 C.F.R. § 255.2(b). Statements like “Your results may vary” or “Not all consumers will get this result” are insufficient. 16 C.F.R. § 255.2(b). Furthermore, a material connection between an endorser and an advertiser, i.e., a relationship not reasonably expected by a consumer that might materially affect the weight or credibility of the endorsement, must be disclosed. 16 C.F.R. § 255.5. Representative cases:

• CSGOLotto, Trevor Martin, and Thomas Cassell, C-4632 (Sept. 13, 2017) (consent order) (alleging that social media influencers endorsed online gaming site while failing to disclose that they owned the company)

• Son Le and Bao Le, C-4619 (May 31, 2017) (consent order) (alleging respondents directed consumers to trampoline review sites that falsely claimed to be independent and posted endorsements without disclosing financial interest in sale of product)
FTC v. Aura Labs, Inc., 8:16-CV-02147-DOC-KES (C.D. Cal. Dec. 12, 2016) (stipulated injunction) (alleging CEO of blood pressure app company posted anonymous review of his own product in app store and used testimonial from business partner’s family members without disclosing material connection)


Warner Bros. Home Entertainment, Inc., C-4595 (July 8, 2016) (consent order) (challenging practice of paying online influencers to post videos endorsing company’s videogame without adequately disclosing material connection)

Lord & Taylor, LLC, C-4573 (Mar. 15, 2016) (consent order) (alleging that company deceived consumers by not disclosing payments for article in online fashion magazine and Instagram posts for fashion influencers)

FTC v. Lumos Labs, Inc., No. 3:16-CV-00001 (N.D. Cal. Jan. 5, 2016) (stipulated judgment) (challenging company’s practice of publishing testimonials without disclosing they were solicited through contests where consumers received significant prizes)

Machinima, Inc., C-4569 (Sept. 2, 2015) (consent order) (challenging online entertainment network’s failure to disclose that it paid influencers to post YouTube videos endorsing client Microsoft’s Xbox One system and game titles)

AmeriFreight, Inc., 159 F.T.C. 1627 (2015) (consent order) (challenging company’s practice of touting online customer reviews, while failing to disclose that reviewers were compensated with discounts and incentives)

Deutsch LA, Inc., 159 F.T.C. 1164 (2014) (consent order) (alleging that ad agency staff tweeted favorable comments about client Sony’s gaming console from their personal accounts without disclosing material connection to the company)


United States v. Spokeo, Inc., No. CV-12-05001 (C.D. Cal. June 12, 2012) (consent decree) (alleging that company deceptively posted endorsements of its own services on news and tech sites)
• **FTC and State of Colorado v. Marsha Kellogg,** No. 1:11-CV-01396-CMA-KLM (D. Colo. May 31, 2011) (stipulated order) (holding consumer endorser liable for overstating the amount she earned with a purported money-making program)

• **Legacy Learning Systems, Inc.,** 151 F.T.C. 383 (2011) (consent order) ($250,000 to settle charges that company deceptively advertised its products through online affiliate marketers who falsely posed as ordinary consumers or independent reviewers)

• **Reverb Communications, Inc.,** 150 F.T.C. 782 (2010) (consent order) (alleging public relations firm hired by game developers engaged in deceptive practices by having employees pose as consumers and post reviews on iTunes store site without disclosing the reviews came from employees working on behalf of the developers)

3. **Celebrity Endorsers:** Celebrity endorsements must reflect the celebrity’s “honest opinions, findings, beliefs, or experience.” Advertisers must substantiate the accuracy of claims made by the celebrity and any efficacy claims conveyed. 16 C.F.R. § 255.1(a). A celebrity represented to use the product must be a *bona fide* user. See generally FTC v. Garvey, 383 F.3d 891 (9th Cir. 2004) (holding that celebrity endorser possessed requisite level of substantiation). Advertisers may use an endorsement only as long as they have reason to believe the endorser continues to subscribe to the views presented. The FTC has challenged ads in which defendants falsely claimed a celebrity endorsed the product. See FTC v. Central Coast Nutraceuticals, Inc., No. 10C4931 (N.D. Ill. Jan. 9, 2012) (stipulated order) ($1.5 million redress for false claim that products were endorsed by Oprah Winfrey and Rachael Ray). In April 2017, FTC staff sent letters to more than 90 celebrities, athletes, and marketers reminding them that influencers should clearly disclose their relationship to brands when promoting or endorsing products through social media.

B. **Consumer Reviews:** Applying 16 C.F.R. § 255.5, the FTC Endorsement Guides’ provision related to the disclosure of material connections between endorsers and advertiser, the Commission has challenged various forms of deception related to the publication of consumer reviews that falsely claimed to be independent. The FTC also has alleged that it is an unfair trade practice to use threats, intimidation, or non-disparagement clauses in an effort to prohibit consumers from speaking or publishing truthful or non-defamatory comments or reviews about companies, their employees, or their products. See FTC v. Roca Labs, Inc., No. 8:15-CV-02231-MSS-TBM (M.D. Fla. Sept. 25, 2018) (Order Granting Amended Motion for Summary Judgment as to Liability) (ruling that defendants’ use of gag clauses to stop consumers from posting negative online reviews was a violation of the FTC Act); FTC v. World Patent Marketing Inc., No. 1:17-CV-20848 (S.D. Fla. May 16, 2018) (stipulated order for permanent injunction) (settlement reached after court ruled that defendants’ attempts to
squelch consumer complaints was a violation of the FTC Act) In 2016, Congress passed the Consumer Review Fairness Act, which – among other things – makes it illegal for companies to include standardized contract provisions that threaten or penalize people for posting honest reviews. Representative cases:

- A Waldron HVAC, LLC, FTC File No. 182-3077; National Floors Direct, Inc., FTC File No. 182-3085; and LVTR, LLC, FTC File No. 182-3098 (proposed consent orders issued for public comment May 8, 2019) (first stand-alone law enforcement actions alleging violations of the Consumer Review Fairness Act for including consumer gag clauses in form contracts for HVAC services, flooring, and trail rides)

- UrthBox, Inc., C-4676 (April 3, 2019) (consent order) (alleging snack box sellers misrepresented that customer reviews were independent when they had provided customers with free products and other incentives to post positive reviews online)

- FTC v. Cure Encapsulations, Inc., No. 1:19-CV-00982 (E.D.N.Y. Feb. 26, 2019) (stipulated order) (partially suspended $12.8 million judgment to settle charges that defendants made deceptive claims for garcinia cambogia diet pill and paid a third-party website to post fake reviews on Amazon)


- Creaxion Corp., C-4668 (Nov. 13, 2018) (consent order) (alleging public relations firm reimbursed employees and others for buying client’s product and posting online reviews without disclosing affiliation with the brand)

- Mikey & Momo, Inc., C-4655 (May 3, 2018) (consent order) (alleging corporate officers’ relatives posted favorable reviews of Aromaflage anti-mosquito perfume and candles without disclosing material connection)

C. Claims Made Through Demonstrations: Product demonstrations must accurately depict how the product will perform under normal consumer use. See FTC v. Colgate-Palmolive Co., 380 U.S. 374 (1965). Representative cases:

- Nissan North America, Inc., C-4454, and TBWA Worldwide, Inc., C-4455 (Jan. 23, 2014) (consent orders) (challenging car company’s and ad agency’s role in deceptive representation of Nissan Frontier truck pushing a dune buggy up a sand dune)

• **Arak-Hamway International, Inc.,** 121 F.T.C. 507 (1996) (consent order) (challenging company’s use of deceptive off-camera techniques to depict performance of toy cars)

• **National Media Corp.,** 116 F.T.C. 549 (1993) (consent order) (challenging deceptive demonstration of kitchen mixer “whipping” skim milk and “pureeing” fresh pineapple)

• **Hasbro, Inc.,** 116 F.T.C. 657 (1993) (consent order) (challenging deceptive use of wire to show G.I. Joe helicopter flying)

• **Volvo North America Corp.,** 115 F.T.C. 87 (1992), and Scali, McCabe, Sloves, Inc., 115 F.T.C. 96 (1992) (consent orders) (challenging deceptive demonstration depicting monster truck driving over row of cars because Volvo had been reinforced and roof supports of other cars had been severed)

D. **Comparative Advertising:** Commission policy encourages truthful references to competitors or competing products, but requires clarity and, if necessary, appropriate disclosures to avoid deception. Statement of Policy Regarding Comparative Advertising, 16 C.F.R. § 14.15. Representative cases:

• **KFC Corp.,** 138 F.T.C. 442 (2004) (consent order) (challenging deceptive claims about relative nutritional value and healthiness of company’s fried chicken compared to a Burger King Whopper)

• **Novartis Corp. v. FTC,** 223 F.3d 783 (D.C. Cir. 2000) (upholding FTC ruling that marketer of Doan’s pills misrepresented that product is superior to other analgesics for treating back pain)

• **London International Group,** 125 F.T.C. 726 (1998) (consent order) (challenging claims that Ramses condoms are “30% stronger” than competing products)

• **Kraft, Inc.,** 114 F.T.C. 40 (1991), aff’d, 970 F.2d 311 (7th Cir. 1992), cert. denied, 507 U.S. 909 (1993) (holding ads for Kraft Singles cheese slices deceptive because ads falsely implied that product contained more calcium than imitation cheese slices)

E. **Safety, Risk-Reduction, and Related Claims:** Advertisers must have reliable substantiation to support safety-related or risk reduction claims and must carefully qualify claims to indicate the level of safety or significant risks. Representative cases:

• **FTC v. Passport Import, Inc.,** No. 8:18-CV-03118-PX (D. Md. Oct. 10, 2018) (alleging that car dealerships mailed more than 21,000 fake “urgent recall” notices – similar in appearance to official NHTSA safety recall notices – to consumers in an effort to bring them to the dealerships)

• **FTC v. Breathometer, Inc.,** No. 3:17-CV-00314-LB (N.D. Cal. Jan 23,
(challenging deceptive claims for app-supported smartphone accessory pitched in ads and on TV show “Shark Tank” to accurately measure consumers’ blood alcohol content (BAC))

- CarMax, Inc., C-4605, Asbury Automotive Group, Inc., C-4606, and West-Herr Automotive Group, Inc., C-4607 (Dec. 16, 2016) (consent orders) (challenging companies’ practice of touting inspection procedures for used cars while failing to disclose some were subject to unrepaired safety recalls)

- General Motors LLC, C-4596, Lithia Motors, C-4597, and Jim Koons Management Company, C-4598 (Dec. 16, 2016) (consent orders) (challenging practice of touting inspection procedures for used cars while failing to disclose some were subject to unrepaired safety recalls)

- Brain-Pad, Inc., C-4375 (Aug. 16, 2012) (consent order) (challenging unsubstantiated claims that company’s mouth guards reduced the risk of sports-related concussions)

- Prince Lionheart, Inc., 138 F.T.C. 403 (2004) (consent order) (challenging claims for the Love Bug, a device designed to clip onto a baby stroller and advertised to repel mosquitos and protect children from the West Nile Virus)


• Conopco, Inc. (Unilever Home and Personal Care), C-3914 (Jan. 7, 2000) (consent order) (challenging antimicrobial and disease prevention claims for Vaseline Intensive Care Anti-Bacterial Hand Lotion)

• Safe Brands Corp., 121 F.T.C. 379 (1996) (consent order) (challenging comparative safety claims for Sierra antifreeze)

F. Made in USA Claims: On December 1, 1997, the FTC issued an Enforcement Policy Statement retaining the “all or virtually all standard” for merchandise advertised and labeled as “Made in USA.” The FTC issued Complying with the Made in USA Standard, a guide for businesses making country-of-origin claims. Representative cases:

• United States v. iSpring Water Systems, LLC, No. 1:19-CV-01620-AT (stipulated order) ($110,000 civil penalty to settle charges that distributor of water filtration systems violated 2017 FTC administrative order by making false claims that imported Chinese water filtration systems were made in the United States). See also iSpring Water Systems, LLC, C-4611 (Feb. 1, 2017) (consent order) (challenging deceptive “Built in USA” claims for water filtration devices).

• Underground Sports Inc. d/b/a Patriot Puck, C-4674 (Sept. 12, 2018) (consent order) (alleging that company falsely represented that its products were “The only American Made Hockey Puck!” when they were actually made in China)

• Sandpiper of California, Inc., C-4675 (Sept. 12, 2018) (consent order) (alleging that company falsely claimed that foreign-made backpacks, wallets, etc. were “U.S. Made”)

• Nectar Brand LLC, C-4656 (Mar. 20, 2018) (consent order) (alleging company made false “Assembled in the USA” claims for Chinese-made mattresses)

• Bollman Hat Company, C-4643 (Jan. 23, 2018) (consent order) (alleging company made deceptive Made in USA claims for its own products and deceptive claims about its “American Made Matters” certification program)

• Block Division, Inc., C-4613 (Mar. 6, 2017) (consent order) (challenging deceptive “Made in USA” claims for block pulleys and other products)
• FTC v. Chemence, Inc., No. 1:16-CV-00228 (N.D. Ohio Oct. 19, 2016) (stipulated order) ($220,000 judgment to settle charges that company made deceptive Made in USA claims for cyanoacrylate glues)

• Made in the USA Brand, LLC, C-4497 (July 22, 2014) (consent order) (challenging company’s misleading issuance of Made in USA certification seals)

• E.K. Ekcessories, Inc., 156 F.T.C. 442 (2013) (consent order) (challenging deceptive Made in USA claims on packages and website for outdoor accessories)

• United States v. The Stanley Works, No. 3:06-CV-883(JBA) (D. Conn. June 9, 2006) (stipulated order) ($205,000 civil penalty to settle charges that company falsely claimed ratchets were Made in USA)


• Jore Corp., 131 F.T.C. 585 (2001) (consent order) (challenging deceptive Made in USA claims for power tool accessories)

• Black & Decker Corp., 131 F.T.C. 439 (2001) (consent order) (challenging deceptive Made in USA claims for Kwikset locks)

• Physicians Formula Cosmetics, Inc., 128 F.T.C. 676 (1999) (consent order) (challenging deceptive Made in USA claims for Physicians Formula skincare products and cosmetics)

• The Stanley Works, 127 F.T.C. 897 (1999) (consent order) (challenging deceptive Made in USA claims for mechanics tools)

• American Honda Motor Co., Inc., 127 F.T.C. 461 (1999) (consent order) (challenging deceptive Made in USA claims for lawn mowers)

G. Rebates, “Free” Offers, Continuity Plans, Gift Cards, Etc.: Deceptive or unfair practices related to rebates, free offers, continuity plans, gift cards, etc., are actionable under the FTC Act. Marketers also may be subject to the Restore Online Shoppers’ Confidence Act (ROSCA), Mail Order Rule, the Telemarketing Sales Rule, the Negative Option Rule, and the Unordered Merchandise Statute.

1. **Rebates.** On April 27, 2007, the FTC sponsored *The Rebate Debate*, a national workshop on complying with Section 5 and other laws and rules when advertising the availability of rebates. Representative cases:
• **American Telecom Services, Inc., C-4256 (Mar. 11, 2009)** (consent order) (challenging telephone seller’s failure to pay timely rebates)

• **FTC v. Wintergreen Systems, No. 3:09-CV-00124-EMC (N.D. Cal. Jan. 13, 2009)** (stipulated judgment) (challenging company’s failure to pay advertised rebates and banning defendants for life from involvement in rebate programs)

• **Soyo, Inc., 143 F.T.C. 717 (2007)** (consent order) (challenging company’s practice of delaying rebates for purchasers of computer motherboards and other products despite representation that company would mail rebate checks within “10 to 12 weeks”)

• **InPhonic, 143 F.T.C. 687 (2007)** (consent order) (challenging mobile phone retailer’s failure to disclose adequately before purchase that consumers would have to wait at least three months to submit rebate requests and at least six months after purchase to get their rebate)

• **CompUSA Inc., 139 F.T.C. 357 (2005), and Priti Sharma and Rajeev Sharma, 139 F.T.C. 343 (2005)** (consent orders) (alleging retailer and manufacturer failed to pay timely rebates and requiring retailer to pay rebates for bankrupt manufacturer when retailer advertised rebates despite knowing that manufacturer was not fulfilling requests)


• **Philips Electronics North America Corp., 134 F.T.C. 532 (2002), and OKie Corp., 134 F.T.C. 511 (2002)** (consent orders) (challenging misrepresentations about rebate delivery time and modification of terms of rebate programs after they had begun)

• **America Online, Inc. and Compuserve Interactive Services, Inc., 137 F.T.C. 117 (2004)** (consent order) (challenging companies’ failure to deliver timely $400 rebates to eligible consumers)

• **FTC and New York v. UrbanQ, No. CV-0333147 (E.D.N.Y. June 26, 2003)** (stipulated injunction) ($600,000 in refunds for failure to provide advertised rebates and related deceptive representations)

• **Memtek Products, Inc., C-3927 (Feb. 17, 2000)** (consent order) (challenging delays in issuing advertised rebates and gift checks to purchasers of Memorex diskettes and tapes)

• **UMAX Technologies, Inc., C-3928 (Feb. 17, 2000)** (consent order) (challenging delays in issuing rebates)
• United States v. Iomega Corp., No. 1:98-CV-00141C (D. Utah Dec. 9, 1998) (imposing $900,000 civil penalty for failure to fulfill rebate and premium requests in violation of the Mail Order Rule)

7. **“Free” offers and continuity plans.** On February 9, 2009, the FTC issued *Negative Options*, a staff report outlining principles for avoiding deception in negative option offers, including disclosing material terms in an understandable manner, making disclosures clear and conspicuous, disclosing material terms before consumers incur a financial obligation, getting affirmative consent, and honoring cancellation requests. On April 2, 2010, a rule took effective requiring clear and conspicuous disclosures on websites and other advertisements that market credit reports as “free.” See 16 C.F.R. § 610. Congress passed the Restore Online Shoppers’ Confidence Act (ROSCA) in 2010, requiring online marketers offering negative options to: 1) clearly and conspicuously disclose material terms before obtaining a consumer’s billing information; 2) get consumer’s express informed consent before making the charge; and 3) provide a simple mechanism for stopping recurring charges. Representative cases:

- **UrthBox, Inc.**, C-4676 (April 3, 2019) (consent order) ($100,000 redress for snack box seller’s violations of ROSCA by failing to adequately disclose material terms of “free trial” offer and by failing to get consumers’ informed consent before charging them for negative option subscription)


- **FTC v. Triangle Media**, No. 18-CV-1338-MMA (NLS) (S.D. Cal. July 3, 2018) (complaint filed) (alleging violations of FTC Act and ROSCA for deceptively advertising free trial offers, enrolling consumers in inadequately disclosed continuity plans, and billing their credit cards without their consent)

- **FTC v. AdoreMe, Inc.**, No. 1:17-CV-09083 (S.D.N.Y. Nov. 21, 2017) (stipulated order) ($1.3 million in refunds to settle charges that online lingerie marketer deceived consumers about the terms of a negative option membership program and made it difficult for them to cancel their memberships)

• FTC v. NutriClick Media LLC, No. 2:16-CV-06819-DMG (C.D. Cal. Sept. 22, 2016) ($350,000 redress to settle charges that marketer violated FTC Act and ROSCA by advertising “free” samples of products and then charging unauthorized monthly fee)

• FTC v. iWorks, Inc., No. 2:10-CV-02203 (D. Nev. Aug. 29, 2016) (stipulated order) (partially suspended $281 million judgment to settle charges that enterprise illegally lured consumers into “trial” memberships for bogus government-grant and money-making schemes, and charged monthly fees without authorization)

• FTC v. Commerce Planet, Inc., 815 F.3d 593 (9th Cir. 2016) (upholding redress and individual liability and ruling that defendants’ failure to adequately disclose negative options related to purported online auction businesses violated the FTC Act)


• FTC v. Allstar Marketing Group, LLC, No. 1:15-cv-01945 (N.D. Ill. Mar. 5, 2015) (total of $8 million to settle FTC and New York AG charges that marketer of “as seen on TV” products such as the Snuggie made deceptive buy-one-get-one-free promotions)

• FTC v. One Technologies, LP, No. 3:14-cv-05066 (N.D. Cal. Nov. 19, 2014) (stipulated order) (with Ohio and Illinois AGs, $22 million redress for deceptive “free” credit score claims, in violation of FTC Act and ROSCA)

• FTC v. Willms, No. 2:11-CV-00828 (W.D. Wash. Feb. 23, 2012) (final judgment) (challenging deceptive practice of charging consumers without authorization for “free” or “risk-free” offers and banning defendants from negative option promotions)

• FTC v. Moneymaker, No. 2:11-CV-00461-JCM-RJJ (D. Nev. Feb. 1, 2012) (stipulated order) ($9.9 million redress to settle charges that as part of a payday lending promotion, defendants enrolled consumers without their permission in continuity programs, illegally billed them, and failed to provide promised refunds)
• FTC v. Central Coast Nutraceuticals, Inc., No. 10C4931 (N.D. Ill. Jan. 9, 2012) (stipulated order) ($1.5 million redress for deceptive claims that acai berry supplements and “colon cleansers” could cause weight loss and prevent cancer, falsely claiming products were endorsed by Oprah Winfrey and Rachael Ray, and making unauthorized charges to consumers’ credit cards for “free” or “risk free” trial offers)

• FTC v. Commerce Planet, Inc., No. 09-CV-01324 (C.D. Cal. Nov. 19, 2009) (stipulated judgment as to certain defendants) ($19.7 million suspended judgment and up to $1 million redress for deceptive “free” claims for internet auction kits and unauthorized monthly charges)

• FTC v. NextClick Media, LLC, No. C08-1718 VRW (D. Del. Nov. 9, 2009) (stipulated order) ($3.4 million suspended judgment and $315,000 redress for deceptive “free trial” of bogus smoking cessation patches and debiting consumers’ bank accounts without consent)

• FTC and Kentucky v. Direct Connection Consulting, Inc., No. 1-08-CV-1739 (N.D. Ga. Apr. 1, 2009) (final judgment) ($5 million bond for deceptive “free” offers in which defendants misled consumers into thinking they were calling from a major retailer or from consumer’s credit card company and didn’t deliver “free” goods as promised)

• FTC v. JAB Ventures, No. 2:08-CV-04648-SVW-RZ (C.D. Cal. Feb. 9, 2009) (stipulated order) (partially suspended $7.8 million judgment for deceptive weight loss claims for hoodia products and bogus “free” sample offers in which consumers were charged for products without their consent)

• FTC v. Complete Weightloss Center, Inc., No. 1:08-CV-00053-DLH-CSM (D.N.D. Feb. 9, 2009) (partially suspended $2.5 million judgment for deceptive diet claims and bogus “free” offers for which consumers were charged without their consent)

• FTC v. PureHealth Laboratories, No.: 2:08-CV-07655-DSF-PJW (C.D. Cal. Dec. 3, 2008) (stipulated order) (partially suspended $9.9 million judgment for offering “free” sample of purported weight loss product and then enrolling consumers in a continuity plan and billing their credit cards without consent)

- United States v. ValueClick, Inc., No. CV08-01711 MMM (Rzx) (C.D. Cal. Mar. 17, 2008) ($2.9 million civil penalty for violations of CAN-SPAM Act related to deceptive emails, banner ads, and pop-ups deceptively claiming consumers were eligible for “free” gifts)

- United States v. Member Source Media, Inc., No.: CV-08 0642 (N.D. Cal. Jan. 30, 2008) ($200,000 civil penalty for CAN-SPAM violations and deceptive claim that recipient of spam had won “free” prizes)

- United States v. Adteractive, Inc., No. CV-07-5940 SI (N.D. Cal. Nov. 28, 2007) (stipulated judgment) ($650,000 civil penalty for violation of CAN-SPAM Act and failure to disclose that consumers have to spend money to receive “free” gifts)

- FTC v. Consumerinfo.com., Inc. d/b/a Experian Consumer Direct, No. CV-SACV05-801 AHS (MLGx) (C.D. Cal. Feb. 21, 2007) (supplemental stipulated judgment) ($300,000 for violating FTC order regarding disclosures about “free” credit reports); and (C.D. Cal. Aug. 16, 2005) (stipulated judgment) ($950,000 payment and refunds for deceptive marketing of “free” credit reports without disclosing that consumers would be charged annually for monitoring service)

- FTC v. Berkeley Premium Nutraceuticals, Inc., No. 1:06-CV-51 (S.D. Ohio July 22, 2009) (stipulated judgment) (charging that marketers offered “free” supplements only to enroll consumers in automatic shipment program and bill them without authorization)

- United States v. Scholastic Inc. and Grolier Incorporated, No. 1:05CV01216 (D.D.C. June 21, 2005) (consent decree) ($710,000 civil penalty for book clubs’ violations of Negative Option Rule, Unordered Merchandise Statute, Telemarketing Sales Rule, and Section 5)

- FTC v. Conversion Marketing, Inc., No. SACV 04-1264 (C.D. Cal. Jan. 17, 2006) (stipulated order) ($474,000 in redress and civil penalties for offering “free samples” of diet and tooth-whitening products and then debited consumer’s accounts and enrolled them in automatic shipment programs without consent)

- United States v. Mantra Films, Inc., No. CV-03-9184 RSWL (C.D. Cal. July 30, 2004) (stipulated order) ($1.1 million civil penalty and redress in settlement of charges that marketers of “Girls Gone Wild” videos violated Section 5, the Electronic Fund Transfer Act, and the Unordered Merchandise Statute by billing consumers for products without their express consent)
• United States v. Micro Star Software, Inc., (S.D. Cal. May 22, 2002) (consent decree) ($90,000 civil penalty for failure to disclose adequately that 30-day “no risk” trial offer obligated consumers to continuous unordered shipments of software and a $49.95 non-refundable membership fee)

• FTC v. Smolev and Triad Discount Buying Service, Inc., No. 01-8922- CIV-Zloch (S. D. Fla. Oct. 24, 2001) (stipulated order) ($9 million redress from buying clubs that misled consumers into accepting trial memberships and obtained consumers’ billing information from telemarketers without authorization)


• Value America, Inc., C-3976, Office Depot, Inc., C-3977, and BUY.COM, Inc., C-3978 (Sept. 8, 2000) (consent orders) (challenging claims for “free” and “low-cost” computers that failed to disclose true costs and important restrictions, including that consumers had to agree to a three-year ISP contract)

4. **Gift cards and stored value cards.** On August 22, 2010, new Federal Reserve Board rules went into effect that restrict the fees and expiration dates that may apply to gift cards and require that gift card terms and conditions be clearly stated. Representative FTC cases:

• **FTC v. EdebitPay, LLC, No. CV-07-4880 ODW (AJWx) (C.D. Cal. May 25, 2011)** (order holding defendants in contempt) (challenging marketers of stored value cards from making unauthorized debits from consumers’ bank accounts)

• **Darden Restaurants, 143 F.T.C. 610 (2007)** (consent order) (challenging company’s failure to clearly and conspicuously disclose dormancy fees for non-use of Olive Garden, Red Lobster, Bahama Breeze, and Smokey Bones gift cards)

• **Kmart Corp., 144 F.T.C. 539 (2007)** (consent order) (challenging company’s failure to clearly disclose dormancy fees for non-use of gift card and falsely claims that cards would never expire)

5. **Pricing claims, financing claims, and other forms of promotion.** Representative cases:

• **FTC v. Tate’s Auto Center, No. 3:18-CV-08176-DJH (D. Ariz. Aug. 1, 2018)** (complaint filed) (alleging auto dealerships falsified consumers’ income and down payment on vehicle financing applications and misrepresented advertised financial terms)
• Cowboy AG LLC, C-4639 (Dec. 1, 2017) (consent order) (alleging that car dealership deceptively advertised loan and leasing terms in Spanish-language ads)


• Progressive Chevrolet Company and Progressive Motors, Inc., C-4578 (Nov. 24, 2015) (consent order) (challenging auto dealers’ deceptive advertising of low monthly lease payments without clearly disclosing key terms)

• FTC v. Ramey Motors, No. 1:14-CV-29603 (S.D.W.V. Sept. 18, 2015) (stipulated order) ($80,000 civil penalty for violations of 2012 FTC consent order related to auto financing)

• TC Dealership, L.P., (Planet Hyundai), C-4536 (June 29, 2015), JS Autoworld, Inc. (Planet Nissan), C-4535 (June 29, 2015) (consent orders) (alleging that auto dealers made deceptive pricing and financing claims)

• Operation Ruse Control. On March 26, 2015, the FTC and 32 law enforcement partners announced a nationwide and cross-border crackdown on deception in auto advertising and financing. The sweep included 252 actions, including seven FTC cases.


• TXVT Limited Partnership (Trophy Nissan), 159 F.T.C. 726 (2014) (consent order) (challenging deceptive advertising claims for auto financing)

• Courtesy Auto Group, Inc., D-9359 (consent order) (Mar. 21, 2014) (challenging deceptive lease advertising by Massachusetts auto dealer)

• Norm Reeves Honda Superstore, Rainbow Auto Sales, Casino Auto Sales, New World Auto Imports (Southwest Kia), Infiniti of Clarendon Hills, Nissan of South Atlanta, Fowlerville Ford, Inc., Paramount Kia of Hickory, and Honda of Hollywood, (Jan. 9, 2014) (consent orders) (as part of Operation Steer Clear, challenging deceptive claims by auto dealers about sale, financing, and leasing of motor vehicles). See also United v. New World Auto Imports, No.

- Ganley Ford West, Inc., C-4428, and Timonium Chrysler, Inc., C-4429 (Sept. 2, 2013) (consent orders) (challenging deceptive representations about automobile pricing)

- CVS Caremark Corp., C-4357 (Jan. 12, 2012) (consent order) ($5 million to settle charges that company misrepresented prices of certain Medicare Part D drugs at CVS and Walgreens pharmacies)

- Bumble Bee Seafoods, Inc., C-3954 (June 16, 2000) (consent order) (challenging “75¢ off next purchase” promotion that did not adequately disclose coupon required purchase of five cans of tuna)

- Benckiser Consumer Products, Inc., 121 F.T.C. 644 (1996) (consent order) (challenging deceptive cause-related marketing campaign in which advertiser falsely claimed a portion of proceeds from EarthRite products would be donated to non-profit environmental groups)

H. Unauthorized Billing: Companies need consumers’ express authorization to bill them or place charges on their credit cards. The FTC has used Section 5 and other statutes to challenge unauthorized billing as unfair or deceptive. Representative cases:

- **FTC v. Amazon.com, Inc., No. 2:14-CV-01038 (W.D. Wash. Apr. 27, 2016)** (order granting motion for summary judgment) (finding Amazon liable for billing consumers for unauthorized in-app charges incurred by children, resulting in consumers’ eligibility for more than $70 million in refunds)


- **Google, Inc., C-4499 (Sept. 4, 2014)** (consent order) (at least $19 million to settle allegations that company charged for children’s in-app purchases without account holders’ authorization)

- **Apple, Inc., C-4444 (Jan. 15, 2014)** (consent order) (at least $32.5 million to settle allegations that company charged for children’s in-app purchases without account holders’ authorization)

I. Earnings Claims: The FTC has used Section 5 to challenge false and deceptive business opportunity and earnings representations. In addition, the FTC enforces the Franchise Rule and the Business Opportunity Rule, 16 C.F.R. §§ 436-437, which require that consumers receive certain disclosures before investing. Representative cases:


• FTC v. Herbalife International of America, Inc., No. 2:16-CV-05217 (C.D. Cal. July 15, 2016) (stipulated order) ($200 million redress and business restructuring to settle claims that company deceived consumers into believing they could earn substantial money selling products as part of multilevel marketing program)

• FTC v. BurnLounge, Inc., 753 F.3d 878 (9th Cir. 2014) (upholding $16.2 million judgment for operating a pyramid scheme)


J. Educational Claims: The FTC has used Section 5 to challenge false and deceptive claims about educational opportunities. Representative cases:


• FTC v. Stratford Career Institute, No. 1:16-CV-00371 (N.D. Ohio Feb. 3, 2017) (stipulated order) (partially suspended $6.5 million judgment for deceptive claims about company’s high school equivalency program)
• FTC v. DeVry Educational Group, No. X160022 (C.D. Cal. Jan. 27, 2016) (stipulated order) ($100 million redress for deceptive claims about likelihood students would find jobs in their fields and would earn more than students graduating from other colleges)

• FTC v. Professional Career Development Institute, LLC d/b/a Ashworth College, No. 1:15-MI-99999-UNA (N.D. Ga. May 26, 2015) (challenging misrepresentations that students would get training and credentials needed to get jobs and that course credits would transfer)

K. Advertising and Marketing Directed to Spanish-Speaking Consumers: On May 12, 2004, the FTC hosted a workshop to explore strategies for effective education and law enforcement to protect Hispanic consumers from fraud and deception and followed up with a series of regional events. Representative cases:

• Cowboy AG LLC, C-4639 (Dec. 1, 2017) (consent order) (alleging that car dealership deceptively advertised loan and leasing terms in Spanish-language ads)


L. Advertising and Marketing Related to Mortgages, Loans, Credit, and Other Financial Representations: Although banks, thrifts, credit unions, and others in the financial sector are exempt from FTC jurisdiction, see 15 U.S.C. 45(a)(2), illegal practices by certain other entities are within Section 5’s purview. The FTC has frequently challenged unfair or deceptive financial practices. For example, the FTC has taken action against deceptive claims by companies promising to “rescue” homeowners from foreclosure or modify mortgage or debt terms. The FTC also enforces the Mortgage Assistance Relief Services (MARS) Rule and the debt relief services amendments to the Telemarketing Sales Rule, which ban upfront fees. On November 19, 2012, the FTC and CFPB announced warning letters to more than 30 companies for possible violations of the Mortgage Acts and Practices (MAP) Advertising Rule, now Regulation N. In addition, the FTC has hosted three FinTech Forums to explore developing financial technology, including blockchain, crowdfunding, marketplace lending, and peer-to-peer payment systems. Representative cases:

- **FTC v. iBackPack of Texas, LLC, No. 3:19-CV-00160 (S.D. Tex. May 6, 2019) (complaint filed)** (alleging that defendant made deceptive claims on crowdfunding platforms about raising money for the development of a high-tech backpack, while using the funds for personal expenses)

- **FTC v. Avant, LLC, No. 1:19-CV-02517 (N.D. Ill. Apr. 15, 2019) (stipulated order)** ($3.85 million to settle charges that online lender engaged in deceptive and unfair loan servicing practices, such as imposing unauthorized charges and unlawfully requiring consumers to consent to automatic payments from their bank accounts)

- **Social Finance, Inc. and Sofi Lending Corp., C-4673 (Oct. 29, 2018) (consent order)** (alleging online student loan refinance company made deceptive claims about loan refinancing savings)

- **PayPal, Inc., C-4561 (consent order) (Feb. 27, 2018)** (alleging Venmo failed to disclose material information about fund transfers and privacy settings and violated Gramm-Leach-Bliley Safeguards and Privacy Rules)

- **Operation Game of Loans.** On October 13, 2017, the FTC and 12 state Attorney General announced Operation Game of Loans, a total of 36 law enforcement actions targeting allegedly deceptive claims of student loan debt relief.

- **FTC v. NetSpend Corporation, No. 1:16-CV-04203-AT (N.D. Ga. Apr. 10, 2017) (stipulated order)** (at least $53 million to settle charges that many consumers’ access to funds on reloadable debit cards were denied or delayed, despite company’s advertising claims of “immediate access”)


• **Operation Collection Protection.** On November 25, 2015, the FTC announced the first coordinated federal-state enforcement initiative targeting deceptive and abusive debt collection practices.

• FTC and CFPB v. Green Tree Servicing, LLC, No. 15-2064 (D. Minn. Apr. 21, 2015) ($63 million to settle charges that mortgage servicer engaged in illegal servicing and debt collection practices)

• FTC v. AMG Services, Inc., No. 212-CV-00536 (D. Nev. Oct. 4, 2016) (order) (record $1.3 billion judgment against defendants involved in online payday lending scheme). See also FTC v. AMG Services, Inc., No. 212-CV-00536 (D. Nev. June 4, 2014) (order) (adopting Magistrate Judge’s recommendation that FTC has authority to regulate arms of Indian tribes and their employees and contractors, and that defendants engaged in deceptive payday lending practices)

• FTC v. FMC Counseling Services, Inc., No. 0:14-cv-61545-WJZ (S.D. Fla. Dec. 15, 2014) (stipulated order) ($815,865 redress and lifetime ban from debt relief for misleading mortgage relief claims and deceptive use of FDIC logo and name “Federal Debt Commission”)  

• FTC v. E.M.A. Nationwide, Inc., 767 F.3d 611 (6th Cir. 2014) (upholding district court order awarding $5.7 million consumer redress and permanently barring telemarketer from pitching mortgage and debt relief programs)

• United States v. Intermundo Media, LLC, No. 1:14-CV-2529-WYD (D. Colo. Sept. 12, 2014) (stipulated order) ($500,000 to settle charges that mortgage lead generator deceptively advertised mortgage refinancing)


• United States v. GoLoansOnline.com, No. 4:14-CV-1262 (S.D. Tex. May 8, 2014) (stipulated order) ($225,000 civil penalty for lead generator’s role in violating MAP Rule and FTC Act)

• FTC v. Payday Financial, LLC; Great Sky Finance, LLC; Western Sky Financial, LLC; Martin Webb et al., No. 3:11-CV-03017-RAL (D.S.D. Apr. 11, 2014) (stipulated order) ($967,740 redress from payday lenders that used tribal affiliation to illegally garnish wages)

• FTC v. DirectBenefits Group, LLC, No. 6:11-CV-01186-JA-GJK (M.D. Fla. Aug. 12, 2013) (final judgment) ($9.5 million redress for unauthorized debits from consumers’ bank accounts when consumers visited websites seeking payday loans)
• FTC v. American Tax Relief LLC, No. 1:10-CV-06123 (N.D. Ill. Feb. 5, 2013) (final order) ($15 million to settle charges that company made deceptive claims that it could reduce consumers’ tax obligations)

• FTC v. Broadway Global Master, Inc., No. 2:12-CV-00855-JAM-GGH (E.D. Cal. Apr. 11, 2012) (temporary restraining order) (challenging allegedly deceptive acts of “phantom debt collector” that collected debts consumers didn’t owe or didn’t owe them)

• Key Hyundai of Manchester, LLC, C-4358, Frank Myers AutoMaxx, LLC, C-4353, Ramey Motors, Inc., C-4354, and Billion Auto, Inc., C-4356 (Mar. 14, 2012) (consent orders) (challenging dealerships’ practice of deceptively advertising they would pay off consumers’ trade-in)

• FTC v. U.S. Mortgage Funding, Inc., No. 11-CIV-80155 (S.D. Fla. Feb. 14, 2012) (stipulated judgment) (alleging that defendants’ charged illegal upfront fees, falsely promising consumers they would get loan modifications or fully refund their money if they failed)

• FTC v. Flora, No. SACV11-00299-AG-(JEMx) (C.D. Cal. Sept. 29, 2011) (stipulated permanent injunction) (challenging marketer’s practice of sending out 5.5 million text messages pitching deceptive mortgage modification site)

• FTC v. Truman Foreclosure Assistance, LLC, No. 09-CV-23543 (S.D. Fla. Aug. 25, 2011) (stipulated order) ($1.8 million redress and lifetime ban from mortgage relief business for deceptive claims that company would negotiate to stop foreclosures)

• FTC v. Cantkier, No. 09-CV-00894 (D.D.C. Aug. 25, 2011) (stipulated order) ($710,000 suspended judgment for marketing bogus mortgage relief services and impersonating government website that helps eligible homeowners modify mortgages)

• FTC v. Dominant Leads, LLC, No. 1:10-CV-00997 (D.D.C. Aug. 25, 2011) (stipulated order) ($1 million suspended judgment for marketing bogus mortgage relief services with false claim of government affiliation)

• FTC v. First Universal Lending, LLC, No. 09-CV-82322 (S.D. Fla. June 21, 2011) (stipulated order) ($18 million redress and lifetime ban from mortgage modification for deceptive claims that company would negotiate with lenders to modify mortgages)

• FTC v. Kirkland Young LLC, No. 09-CV-23507 (S.D. Fla. April 11, 2011) ($2.2 million redress and lifetime ban from mortgage relief services for falsely promising modifications to consumers’ mortgages)
• **Operation Empty Promises:** On March 2, 2011, the FTC announced an initiative involving more than 90 law enforcement actions – including developments in 10 FTC cases, 48 Department of Justice criminal actions, 7 actions by the Postal Inspection Service, and 28 actions by state law enforcers – related to practices targeting consumers in financial distress.


• FTC v. Federal Housing Modification Department, No. 09-CV-01753 (D.D.C. Nov. 19, 2010) (stipulated order against certain defendants) ($900,000 suspended judgments for false promise of loan modifications and bogus claims of government affiliation)

• FTC v. Golden Empire Mortgage, No. CV09-03227 (Shx) (C.D. Cal. Sept. 20, 2010) (stipulated judgment) ($1.5 million to settle charges that mortgage company charged Hispanic consumers higher prices for mortgages than other consumers)

• FTC v. New Hope Property LLC, No. 1:09-CV-01203-JBS-JS, and FTC v. Hope Now Modifications, LLC, No. 1:09-CV-01204-JBS-JS (D.N.J. June 17, 2010) (stipulated orders) (challenging false claims that companies were part of a government-endorsed mortgage assistance network and could modify most mortgages)


• FTC v. Home Assure LLC, No. 8:09-CV-547-T-23TBM (M.D. Fla. July 29, 2010) (stipulated judgment) ($2.4 million redress for deceptive claims about mortgage foreclosure “rescue” services)


• **Operation Stolen Hope.** On November 24, 2009, the FTC announced Operation Stolen Hope involving 118 cases by 26 agencies as part of ongoing crackdown on mortgage foreclosure rescue and loan modification scams.
• FTC v. Lucas Law Center, No. 09-CV-770 (C.D. Cal. Sept. 17, 2009) (preliminary injunction) (challenging practices of using an attorney to circumvent state prohibitions against receiving a fee before providing any purported services and advising clients to stop paying their mortgages in order to pay fees of up to $3,995)

• FTC v. United Home Savers, LLP, No. 8:08-CV-01735-VMC-TBM (M.D. Fla. Aug. 24, 2009) (stipulated permanent injunction) (challenging company’s deceptive claims it could prevent homes from being foreclosed)

• FTC v. Freedom Foreclosure Prevention Services LLC, No. CV-09-1167-PHX-FJM (D. Az. Nov. 24, 2009) (stipulated permanent injunction) ($5 million suspended judgment for deceptive claims alleging that company could prevent foreclosure in 97% of cases)

• FTC v. Mortgage Foreclosure Solutions, Inc., No. 8:08-CV-00388- SDM-EAJ (M.D. Fla. Jan. 8, 2009) (stipulated judgment) (challenging deceptive claims that company would stop foreclosure for a $1,200 fee)

• Good Life Funding, C-4248; American Nationwide Mortgage Company, Inc., C-4249; and Shiva Venture Group, C-4250 (Jan. 8, 2009) (consent orders) (challenging companies’ deceptive advertising of low monthly payments and low rates without fully disclosing loan terms, in violation of Section 5, Truth in Lending Act, and Regulation Z)

• FTC v. The Bear Stearns Companies, No. 4:08-CV-338 (E.D. Tex. Sept. 9, 2008) ($28 million redress for violations of FTC Act, Fair Debt Collection Practices Act, Fair Credit Reporting Act, and Reg Z for practices related to servicing mortgage loans, including misrepresenting amounts owed, charging unauthorized fees, and engaging in abusive collection practices)

• FTC v. Capital City Mortgage Corp., No. 1:98-CV-00237 (D.D.C. Feb. 24, 2005) (consent decree) ($750,000 redress for companies’ practice of including phony charges in monthly statements, foreclosing on borrowers who were in compliance, and failing to release liens on homes after loans were paid off)

• United States v. Fairbanks Capital Corp., No. 03-12219-DPW (D. Mass. Nov. 12, 2003 and Aug. 2, 2007) (stipulated judgments) ($40 million redress for deceptive mortgage practices, including charging consumers illegal late fees and other unauthorized fees and failing to post mortgage payments on time)

• FTC v. The Associates and Citigroup, Inc., No. 1:01-CV-00606-JTC (N.D. Ga. Sept. 29, 2002) (stipulated settlement) ($215 million redress for deceptive practices that induced consumers to refinance existing debts into home loans with high interest rates and fees, and to purchase high-cost credit insurance)
• FTC v. First Alliance Mortgage Co., No. SA-CV-00-964 DOC (C.D. Cal. Mar. 22, 2002) (stipulated settlement) ($74 million redress for deceptive mortgage practices in case brought in cooperation with states and consumer groups)

M. Deceptive Format. The FTC has alleged that the deceptive format of advertising – for example, ads that mimic the appearance of news, entertainment, or other independent content – violates Section 5. In 2013, the agency sponsored Blurred Lines, a workshop on native advertising, the practice of blending ads with other content, especially in digital media. On December 22, 2015, the FTC issued an Enforcement Policy Statement on Deceptively Formatted Advertisements, including online native advertising. Representative cases:

• Creaxion Corp. and Inside Publications LLC of Georgia, C-4668 (Nov. 13, 2018) (consent order) (challenging the roles a public relations firm and specialty sports publisher played in Olympic gymnasts’ promotion of insect repellent in a format that deceptively appeared to be independent editorial magazine content)

• FTC v. Passport Import, Inc., No. 8:18-CV-03118-PX (D. Md. Oct. 10, 2018) (alleging that car dealerships mailed more than 21,000 fake “urgent recall” notices – similar in appearance to official NHTSA safety recall notices – to consumers in an effort to bring them to the dealerships)

• Lord & Taylor, LLC, C-4573 (Mar. 15, 2016) (consent order) (alleging that company deceived consumers by not disclosing payment for native advertising in online fashion magazine)

• ADT, LLC, C-4460 (Mar. 6, 2014) (consent order) (alleging that on Today Show and in other media, home security company misrepresented that paid endorsements from safety and technology experts were independent reviews)

• Clickbooth.com, LLC, No. 1:12-CV-09087 (N.D. Ill. Nov. 14, 2012) ($2 million redress to settle charges that company’s affiliate marketers deceived consumers through bogus weight loss claims on fake news sites about acai berry supplements and “colon cleansers”)


• **Georgetown Publishing,** 122 F.T.C. 391 (1996) (consent order) (challenging the format of a direct mail promotion for a book that appeared to be an independent review from a magazine sent with a handwritten note, “[Recipient’s name], Try this. It works! J.”)

• **JS&A Group, Inc.,** 111 F.T.C. 522 (1989) (consent order) (challenging as deceptive the format of a program-length advertisement for BlueBlocker sunglasses that appeared to be an investigative news program)

**VI. DETERMINING AD MEANING**

A. **Express Claims:** Because express claims unequivocally state the representation, the representation itself establishes the meaning of the claim. No further proof about the meaning of the claim is necessary. Deception Policy Statement, 103 F.T.C. at 176; Thompson Medical Co., 104 F.T.C. at 788.

B. **Implied Claims:** Implied claims are any claims that are not express and range on a continuum from language virtually synonymous with an express claim to language that literally says one thing but strongly suggests something else to language that relatively few consumers would interpret as making the claim. See Kraft, Inc., 114 F.T.C. 40, 120 (1991), aff’d, 970 F.2d 311 (7th Cir. 1992), cert. denied, 507 U.S. 909 (1993); Thompson Medical Co., 104 F.T.C. at 789. When the language or depictions in an ad are clear enough to permit the FTC to conclude with confidence that an implied claim is conveyed to consumers acting reasonably under the circumstances, no extrinsic evidence is necessary to determine that an ad makes an implied claim. Kraft, 114 F.T.C. at 121. In determining if reasonable consumers are likely to take an implied claim, the FTC examines the net impression created by the ad, looking at “the entire mosaic, rather than each tile separately.” Deception Policy Statement, 103 F.T.C. at 179 & n. 32; Stouffer Foods Corp., 118 F.T.C. 746, 799 (1994); FTC v. Sterling Drug, 317 F.2d 669, 674 (2d Cir. 1963).

C. **Extrinsic Evidence:** Courts give FTC determinations of ad meaning substantial deference. “The Kraft court further noted that deferential review is particularly appropriate when the FTC is the factfinder, given the Commission’s expertise in the field of deceptive advertising and the often exceedingly complex and technical factual issues that the Commission resolves on a nationwide basis.” POM Wonderful LLC v. FTC, 777 F.3d 478 (D.C. Cir. 2015) (citations omitted). When an implied claim is not clear enough to permit the Commission to determine its existence by examining the ad alone, extrinsic evidence may be
required. Stouffer Foods Corp., 118 F.T.C. at 798-99. In all cases, if extrinsic evidence is available, the Commission will consider it, taking into account its relative quality and reliability. Kraft, 114 F.T.C. at 121.

1. Copy tests are one form of extrinsic evidence used to establish that an implied claim is conveyed. To be reliable, the copy test must be methodologically sound. Kraft, 114 F.T.C. at 121; Thompson Medical Co., 104 F.T.C. at 790; Stouffer Foods Corp., 118 F.T.C. at 807 (“Perfection is not the prevailing standard for determining whether a copy test may be given any weight. The appropriate standard is whether the evidence is reliable and probative.”). The FTC has issued the results of copy tests that examine consumer perception of certain kinds of claims. For example, on in 2012, the FTC published results of a study evaluating how consumers interpret “up to” claims in ads for replacement windows.

2. Other forms of extrinsic evidence include testimony by marketing experts regarding principles derived from marketing research showing how consumers generally respond to ads presented in a particular way, and evidence of the advertiser’s intent. Kraft, Inc., 114 F.T.C. at 121-22; Thompson Medical Co., 104 F.T.C. at 790.

D. Disclosures in Ads: Advertisements often contain fine-print footnotes or video superscripts that attempt to disclaim, limit, or modify claims made elsewhere in the ad. Advertisers cannot use fine print to contradict other statements in an ad or to clear up misimpressions the ad would otherwise leave. Deception Policy Statement, 103 F.T.C. at 180-81. Similarly, accurate information in a footnote or text will likely not remedy a false headline because reasonable consumers may glance only at the headline. Id. See .com Disclosures, How to Make Effective Disclosures in Digital Advertising (Mar. 12, 2013).

1. To be effective, disclosures must be clear and conspicuous. E.g., Thompson Medical Co., 104 F.T.C. 648, 842-43 (1984), aff’d, 791 F.2d 189 (D.C. Cir. 1986) (requiring simultaneous audio and visual disclosure of certain information). See also FTC v. Cyberspace.com, 453 F.3d 1196 (9th Cir. 2006) (holding that fine-print statement on purported rebate check was insufficient to disclose that cashing the check would prompt monthly charges for internet services); United States v. Bayer Corp., No. CV 00-132 (NHP) (D.N.J. Jan. 11, 2000) (consent decree) (requiring audio and visual disclosure of information when ads make certain representations about the benefits of aspirin in the prevention of heart attacks).

2. In evaluating the effectiveness of disclosures, the FTC considers factors like:

• **Prominence:** whether the qualifying information is prominent enough for consumers to notice and read (or hear)

• **Presentation:** whether the qualifying information is presented in
easy-to-understand language that does not contradict other things said in the ad and is presented at a time when consumers’ attention is not distracted elsewhere

- **Placement:** whether the qualifying information is located in a place and conveyed in a format that consumers will read (or hear)

- **Proximity:** whether the qualifying information is located in close proximity to the claim being qualified.

3. The FTC has convened workshops, issued policy statements, and sent warning letters to reiterate disclosure requirements and the “clear and conspicuous” standard. See, e.g., Disclosure Exposure: An FTC-NAD Workshop on Effective Disclosures in Advertising (May 22, 2001); Dot Com Disclosures: Information about Online Advertising (May 3, 2000); Joint FTC-FCC Policy Statement on the Advertising of Dial-Around and Other Long-Distance Services to Consumers (Mar. 1, 2000); Improving Consumer Mortgage Disclosures: An Empirical Assessment of Current and Prototype Disclosure Forms: A Bureau of Economics Staff Report (June 13, 2007). On May 26, 2011, FTC staff announced that it was seeking input on revisions to Dot Com Disclosures and followed up with a national workshop in 2012. The revised staff guidance document, .com Disclosures, How to Make Effective Disclosures in Digital Advertising, was issued on March 12, 2013. On September 23, 2014, the FTC staff announced that as part of Operation Full Disclosure, more than 60 national advertisers received letters warning about the possible failure to make adequate disclosures in television and print ads.

4. In addition to Section 5, other federal laws mandate that information about certain products and services be clearly and conspicuously disclosed. See, e.g., Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992, 16 C.F.R. § 308; Dell Computer Corp., 128 F.T.C. 151 (1999), and Micron Electronics, Inc., 128 F.T.C. 137 (1999) (consent orders) (challenging under Section 5 and Consumer Leasing Act ads for consumer leases that placed material cost information in fine print). On September 11, 2007, the FTC sent over 200 warning to mortgage brokers and lenders – and media outlets carrying those ads – that ads may violate FTC Act and Truth in Lending Act by touting low monthly payments or rates without adequate disclosure of other key loan terms. On January 9, 2014, the FTC announced Operation Steer Clear, settlements with nine auto dealers focusing on deceptive claims about auto financing, and leasing.

5. **Print disclosures:** In print ads and point-of-sale materials, the FTC has found fine-print footnotes or blocks of text to be inadequate to disclaim or modify a claim made elsewhere in the ad. Representative cases:
• Budget Rent-A-Car Systems, Inc., 145 F.T.C. 1 (2008) (consent order) (challenging car rental company’s failure adequately to disclose fuel fees automatically charged to customers who drove fewer than 75 miles)

• Palm, Inc., 133 F.T.C. 715 (2002) (consent order) (challenging ads for personal digital assistants that represented that products came with built-in wireless access and email while revealing in fine print down the side of the ad “Application software and hardware add-ons may be optional and sold separately. Applications may not be available on all Palm handhelds”)

• Gateway Corp., 131 F.T.C. 1208 (2001) (consent order) (challenging ads for “free” or flat-fee internet services that disclosed in a fine-print footnote that many consumers would incur significant additional telephone charges)

• Hewlett-Packard Co., 131 F.T.C. 1086 (2001), and Microsoft Corp., 131 F.T.C. 1113 (2001) (consent orders) (challenging ads for personal digital assistants that represented that products came with built-in wireless access and email while revealing in fine print “Modem required. Sold separately.”)

• Value America, Inc., C-3976, Office Depot, Inc., C-3977, and BUY.COM, Inc., C-3978 (Sept. 8, 2000) (consent orders) (challenging promotions for low-cost computer systems that disclosed true costs of the offer and important restrictions in fine-print footnotes)

• Häagen-Dazs Co., 119 F.T.C. 762 (1995) (consent order) (challenging effectiveness of fine-print footnote modifying claim that frozen yogurt was “98% fat free”)

• Stouffer Food Corp., 118 F.T.C. 746 (1994) (holding that sodium content claims for Lean Cuisine products were false and unsubstantiated and not cured by fine-print footnote)

5. **Television disclosures:** Visual superscripts that are difficult to understand, superimposed over distracting backgrounds, compete with audio elements, or are placed in parts of the ad less likely to be remembered have been found to be ineffective in modifying a claim made in the body of the ad. **Thompson Medical Co., 104 F.T.C. at 797-98.** Representative cases:

• TXVT Limited Partnership (Trophy Nissan), C-4508 (Dec. 23, 2014) (consent order) (charging that car dealership used deceptive fine print disclosures to bury key financing terms and conditions)


• Frank Bommarito Oldsmobile, 125 F.T.C. 1 (1998); Beuckman Ford, 125 F.T.C. 59 (1998); Suntrup Buick-Pontiac-GMC Truck, 125 F.T.C. 91 (1998); and Lou Fusz Automotive Network, 125 F.T.C. 111 (1998) (consent orders) (requiring clear and conspicuous disclosure of car lease terms in TV ads, defined as “readable [or audible] and understandable to a reasonable consumer”)


• Kraft, Inc., 114 F.T.C. at 124 (Initial Decision) (holding that complicated superscript – “one ¾ ounce slice has 70% of the calcium of five ounces of milk” – didn’t cure deceptive calcium content claim for cheese slices)

6. Internet disclosures: On May 3, 2000, staff issued Dot Com Disclosures: Information about Online Advertising, examining how disclosures required by FTC rules and guides apply to online advertising and sales. The FTC issued revised staff guidance on March 13, 2013, .com Disclosures, How to Make Effective Disclosures in Digital Advertising. FTC staff sent letters to search engines on June 27, 2002, regarding the clear and conspicuous disclosure of paid placements. See Letter to Gary Ruskin, Executive Director of Commercial Alert. On June 25, 2013, staff sent letters updating that guidance on distinguishing paid search results and other forms of advertising from natural search results. The staff sent letters to 22 hotel operators on November 28, 2012, warning that online price quotes that excluded “resort fees” and other mandatory charges may be deceptive. The FTC also has brought numerous cases challenging online promotions that failed to meet the “clear and conspicuous” standard. Representative cases:
• Network Solutions, LLC, 159 F.T.C. 1859 (2015) (consent order) (alleging that company failed to clearly disclose materials limitations on advertised “30 Day Money Back Guarantee”)

• FTC v. One Technologies, No. 3:14-CV-05066 (N.D. Cal. Nov. 19, 2014) (stipulated order) ($22 million redress for deceptive online “free” credit score claims and inadequately disclosed negative option, in violation of FTC Act and Restore Online Shoppers’ Confidence Act).

VII. FOOD ADVERTISING

A. FTC-FDA Liaison Agreement: Under a longstanding agreement between the Commission and the Food and Drug Administration, the FTC has primary responsibility for food advertising, while the FDA has primary responsibility for food labeling. See Working Agreement Between the FTC and FDA, 3 Trade Reg. Rep. ¶ 9851 (CCH) (1971).

B. Nutrition Labeling and Education Act (NLEA), 21 U.S.C. § 343(I), (q), and (r). The NLEA and FDA’s implementing regulations effected broad changes in the regulation of nutrition information on food labels. Under the NLEA, only FDA-approved nutrient content and health claims may appear on labels.

C. Enforcement Policy Statement on Food Advertising, 59 Fed. Reg. 28388 (June 1, 1994). The FTC issued its Enforcement Policy Statement to provide guidance regarding the use of nutrient content and health claims in food advertising, in light of the NLEA and FDA’s regulations. The Statement clarifies how the FTC’s deception and substantiation standards apply. Issues addressed by the Enforcement Policy Statement include:

1. Absolute nutrient content claims: The Commission will apply FDA’s definitions for terms such as low fat and high fiber.

2. Serving size: The Commission will use FDA’s serving sizes in analyzing nutrient content claims.

3. Relative or comparative nutrient content claims: Unqualified comparative claims must meet FDA’s minimum percentage difference requirements, although other comparative claims that are accurately qualified to identify the nature of the increase or reduction in a nutrient and to eliminate misleading implications may also comply with Section 5, even if increase or reduction does not meet FDA’s prescribed levels.

4. Synonyms: Claims that characterize the level of a nutrient, including those using synonyms not provided for in FDA regulations, must be consistent with FDA definitions.
5. **Health Claims**: The FTC will use FDA’s “significant scientific agreement” standard as its principal guide in determining whether unqualified health claims are substantiated. Health claims that are not yet FDA-approved must be adequately qualified so that consumers understand both the extent of the support for the claim and any significant contrary evidence in the scientific community. In many cases, the presence and significance of risk-increasing nutrients must be disclosed to prevent a health claim from being deceptive.

D. **Representative health benefits cases:**

- **FTC v. Gerber Products Co. d/b/a Nestlé Nutrition**, No. 2:33-AV-00001 (D.N.J. July 15, 2019) (stipulated final judgment) (settling FTC action alleging that Gerber deceptively advertised that Good Start Gentle formula would prevent or reduce risk of allergies in babies with a family history of allergies and that product had FDA approval)

- **POM Wonderful LLC v. FTC**, 777 F.3d 478 (D.C. Cir. 2015) (upholding FTC ruling that advertisers made false and unsubstantiated claims for POM Wonderful 100% Pomegranate Juice and POMx supplements)

- **The Dannon Company, Inc.**, 151 F.T.C. 62 (2010) (consent order) (challenging deceptive health claims for Activia yogurt and DanActive dairy drink)

- **Nestlé HealthCare Nutrition, Inc.**, 151 F.T.C. 1 (2010) (consent order) (challenging deceptive claims that Boost Kid Essentials prevents upper respiratory infections in children, protects against colds and flu, and reduces absences from daycare or school)

- **Kellogg Co.**, C-4262 (2009) (consent order) (challenging false claims touting Frosted Mini-Wheats as “clinically shown to improve kids’ attentiveness by nearly 20%”). See also **Kellogg Co.**, C-4262 (June 3, 2010) (order modification) (modifying order to resolve FTC investigation into questionable immunity-related claims for Rice Krispies)

- **Tropicana Products, Inc.**, 140 F.T.C. 176 (2005) (consent order) (challenging unsubstantiated claims that drinking 2-3 glasses a day of “Healthy Heart” orange juice would produce dramatic effects on blood pressure, cholesterol, and homocysteine levels, thereby reducing risk of heart disease and stroke)

- **KFC Corp.**, 138 F.T.C. 422 (2004) (consent order) (challenging deceptive claims about relative nutritional value and healthiness of fried chicken)

- **Unither Pharma, Inc., and United Therapeutics Corp.**, 136 F.T.C. 145 (2003) (consent order) (challenging claims that bar containing amino acid reduces the risk of heart disease and reverses damage to the heart)
• Interstate Bakeries Corp., 133 F.T.C. 687 (2002) (consent order) (challenging claims that calcium in Wonder Bread could improve children’s brain function and memory)

• Conopco, Inc., 123 F.T.C. 131 (1997) (consent order) (challenging heart-health claims for Promise margarine)

• United States v. Eggland’s Best, Inc., No. 96 CV-1983 (E.D. Pa. Mar. 12, 1996) (stipulated permanent injunction) ($100,000 civil penalty for violation of previous order challenging claims about product’s effect on cholesterol)

• The Isaly Klondike Co., 116 F.T.C. 74 (1993) (consent order) (challenging claims about effect of Klondike Lite frozen dessert bars on consumers’ serum cholesterol levels)

• Bertolli USA, Inc., 115 F.T.C. 774 (1992) (consent order) (challenging claims that olive oil had been medically proven to reduce cholesterol, blood pressure, and blood sugar)

• Campbell Soup Co., 115 F.T.C. 788 (1991) (consent order) (challenging heart-health claims for soups that are high in sodium)

• CPC International, Inc., 114 F.T.C. 1 (1991) (consent order) (challenging claims about the effect of Mazola Corn Oil and Mazola Margarine on cholesterol levels)

E. Representative nutrient content claim cases:

• Pizzeria Uno Corp., 123 F.T.C. 1038 (1997) (consent order) (challenging misleading low-fat representations for Thinzetta pizzas)

• Mrs. Fields Cookies, Inc., 121 F.T.C. 599 (1996) (consent order) (challenging low-fat claims for cookies)

• The Dannon Co., 121 F.T.C. 136 (1996) (consent order) (challenging low-fat, low-calorie, and lower in fat than ice cream claims for Pure Indulgence frozen yogurt)


• The Eskimo Pie Corp., 120 F.T.C. 312 (1995) (consent order) (challenging low-calorie claims for Sugar Freedom products)

• Stouffer Food Corp., 118 F.T.C. 746 (1994) (holding that sodium content claims for Lean Cuisine products were deceptive)
VIII. OVER-THE-COUNTER DRUGS AND TREATMENTS, DIETARY SUPPLEMENTS, WEIGHT LOSS PRODUCTS, AND OTHER HEALTH-RELATED PROMOTIONS

A. Pursuant to the FTC-FDA Liaison Agreement, the FTC has primary responsibility for over-the-counter (OTC) drug advertising, while the FDA has primary responsibility for OTC drug labeling, prescription drug labeling, and prescription drug advertising. See Working Agreement Between the FTC and FDA, 3 Trade Reg. Rep. ¶ 9851 (CCH) (1971).

B. OTC Drugs: Section 15 of the FTC Act defines the terms “drug” to include articles intended “for use in the diagnosis, cure, mitigation, treatment, or prevention of disease” or intended “to affect the structure or any function of the body.” Representative drug cases:

• United States v. Bayer Corp., No. CV 00-132 (NHP) (D.N.J. Jan. 11, 2000) (consent decree) (challenging unsubstantiated claims that regular use of aspirin is appropriate therapy for the prevention of heart attacks and strokes in the general population)
• **Novartis Corp. v. FTC, 223 F.3d 783 (D.C. Cir. 2000)** (upholding Commission finding that marketer of Doan’s pills misrepresented that product is superior to other analgesics for treating back pain)

• **Pfizer, Inc., 126 F.T.C. 847 (1998); Del Pharmaceuticals, Inc., 126 F.T.C. 775 (1998); and Care Technologies, Inc., 126 F.T.C. 830 (1998)** (consent orders) (challenging claims for anti-lice shampoos)


• **United States v. Sterling Drug, Inc., No. CA-90-1352 (D.D.C. June 12, 1990)** (consent decree) ($375,000 civil penalty for unsubstantiated claims for Midol, in violation of previous order)

C. **Devices, Cosmetics, Treatments, and Other Health-Related Claims or Promotions:** Section 15 of the FTC Act defines “device” to include “instruments, apparatus, and contrivances” intended “for use in the diagnosis, cure, mitigation, treatment, or prevention of disease” or intended “to affect the structure or any function of the body.” That section defines “cosmetic” to include “articles to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof intended for cleansing, beautifying, promoting attractiveness, or altering the appearance.” In addition, the FTC enforces the Contact Lens Rule, 16 C.F.R. § 31, which mandates procedures for prescribers and sellers to release and verify prescriptions. After a September 21, 2015, conference, the FTC issued an Enforcement Policy Statement regarding marketing claims for OTC homeopathic drugs. Representative cases dealing with health-related products and services:

• **FTC v. Regenerative Medical Group, Inc., No. 8:18-CV-01838-AG-KES (C.D. Cal. Oct. 18, 2018)** (stipulated order) (partially suspended $3.3 million judgment for unsubstantiated claims for purported stem cell treatments for Parkinson’s disease, autism, macular degeneration, stroke, kidney disease, and other serious conditions)

• **FTC v. Global Concepts Limited, Inc., No. 0:18-CV-60990 (S.D. Fla. May 2, 2018)** (stipulated order for permanent injunction) (partially suspended $47 million judgment for deceptive hearing claims for MSA 30X sound amplifier)

• **Mikey & Momo, Inc., C-4655 (May 3, 2018)** (consent order) (challenging deceptive mosquito-repellent and anti-Zika claims for Aromaflage perfume and candles)

• **FTC v. Aura Labs, Inc., 8:16-CV-02147-DOC-KES (C.D. Cal. Dec. 12, 2016)** (stipulated permanent injunction) (challenging accuracy claims for mobile app advertised to measure blood pressure)
• Mars Petcare US, Inc., C-4599 (Aug. 4, 2016) (consent order) (challenging misleading longevity claims for Eukanuba dog food)


• FTC v. v. LearningRx Franchise Corp., No. 1:16-CV-01159-RM (D. Colo. May 18, 2016) (stipulated order) ($200,000 redress for deceptive claims that learning programs were clinically proven to permanently improve ADHD, autism, dementia, Alzheimer’s disease, strokes, concussions, etc., and would substantially improve grades, test scores, and job and athletic performance)

• FTC v. Mercola.com LLC, No. 16CV4282 (N.D. Ill. Apr. 14, 2016) (stipulated order) (refunds for consumers for deceptive “safe” tanning claims and anti-aging claims for tanning beds)

• FTC v. Lumos Labs, Inc., No. 3:16-CV-00001 (N.D. Cal. Jan. 5, 2016) (stipulated final judgment) ($2 million to settle charges that company made deceptive claims about Lumosity “brain training” program)

• FTC v. Tommie Copper, Inc., No. 7:15-CV-09304-VB (S.D.N.Y. Dec. 2, 2015) (stipulated judgment) ($1.35 million to settle charges that company’s copper-infused clothing relieved pain and inflammation caused by arthritis and other diseases)

• Carrot Neurotechnology, Inc., C-4567 (Sept. 17, 2015) (consent order) ($150,000 disgorgement to settle allegations that company made deceptive vision improvement claims for Ultimeyes app)


• FTC v. New Consumer Solutions LLC, No. 1:15-cv-01614 (N.D. Ill. Feb 25, 2015) (stipulated judgment) (challenging claim that Mole Detector app could detect symptoms of melanoma)

• Health Discovery Corporation, C-4516 (consent order) (Feb. 25, 2015) (challenging claim that MelApp mobile app could detect symptoms of melanoma)
• **Focus Education, LLC**, 159 F.T.C. 1345 (2015) (consent order) (challenging claims that computer game would improve the focus, memory, behavior, and school performance of children, including those with ADHD)


• **FTC v. Solace International, No. 3:14-cv-00638-MMD-WGC** (D. Nev. Dec. 23, 2014) (stipulated injunction) (challenging deceptive claims that DermaTend was a safe at-home way to remove moles and genital warts)

• **L’Oreal USA, Inc., C-4489** (June 30, 2014) (consent order) (challenging false and unsubstantiated claims that Génifique and Youth Code products provided anti-aging benefits by targeting users’ genes)

• **Lornamead, Inc., C-4488** (May 28, 2014) (consent order) ($500,000 redress for deceptive efficacy claims for Lice Shield line of lice prevention products)

• **FTC v. Springtech 77376, LLC d/b/a Cedarcide.com**, No. CV12-4631 JCS (N.D. Cal. July 18, 2013) (stipulated order) ($4.8 million suspended judgment for deceptive claims for anti-lice and bedbug products)

• **FTC v. RMB Group, LLC, No. CV-12-4632 EDL** (N.D. Cal. Sept. 10, 2012) (stipulated order) (challenging deceptive claims for Rest Easy anti-bedbug product)

• **Brain-Pad, Inc., C-4375** (Aug. 16, 2012) (consent order) (challenging unsubstantiated claims that company’s mouth guards reduced the risk of sports-related concussions)

• **FTC and Florida AG v. Alcoholism Cure Corp.**, No. 3:10-CV-266-F-34TEM (M.D. Fla. July 19, 2012) (judgment) ($700,000 redress for company’s deceptive claims about alcohol treatment program and practice of responding to consumers’ attempts to cancel by threatening to publicly revealing their alcohol dependence)


• **Dermapps, Koby Brown, and Gregory Pearson, 152 F.T.C. 466 (2011), and Andrew N. Finkel, 152 F.T.C. 490 (2011)** (consent orders) ($15,000 total redress from marketers of two mobile apps that claimed to treat acne)
• United States v. Jokeshop USA, LLC, No. 1:11-CV-11221-MLW (D, Mass. July 20, 2011) (consent decree) ($200,000 civil penalty for selling contact lenses to consumers without a prescription)

• Oreck Corp., 151 F.T.C. 289 ( 2011) (consent order) ($750,000 redress to settle charges that company made false and unproven claims that Oreck Halo vacuum cleaner and Oreck ProShield Plus air cleaner can reduce risk of flu and other illnesses and eliminate virtually all common germs and allergens)


• FTC v. Xacta 3000, Inc., No. 3:09-CV-00399-JAP-TJB (D.N.J. Nov. 4, 2010) (stipulated order) (suspended $14.5 million judgment for deceptive claims that Kinoki Foot Pads would remove toxins, treat high blood pressure and depression, and cause weight loss)

• Operation Health Care Hustle: On August 11, 2010, the FTC and 24 state agencies charged companies with falsely marketing “medical discount plans” as health insurance. See, e.g., FTC and Tennessee v. United States Benefits, LLC, No. 3:10-0733 (M.D. Tenn. Nov. 7, 2011).

• Indoor Tanning Association, C-4290 (May 19, 2010) (consent order) (challenging trade association’s deceptive health and safety claims about indoor tanning)

• FTC v. Roex, Inc., No. SA-CV-090266 (C.D. Cal. Mar. 6, 2009) (final order) ($3 million redress for deceptive claims disseminated through a call-in radio program for device sold to treat cancer and supplements advertised to treat or prevent cancer, AIDS, diabetes, Alzheimer’s disease, Parkinson’s disease, and other conditions)

• United States v. See Right Vision and Vision Contact Lenses, No. 08-CIV-11793 (D. Mass. Dec. 11, 2008) (consent decree) ($27,000 civil penalty for selling cosmetic contact lenses without a prescription)

• United States v. Contact Lens Heaven, Inc., No. 08CV61713 (S.D. Fla. Dec. 11, 2008) (consent decree) (partially suspended $233,498 civil penalty for selling cosmetic contact lenses without a prescription)

• FTC v. Myfreemedicine.com, LLC, No. CV5 1607 (W.D. Wash. Mar. 15, 2007) (stipulated permanent injunction) (challenging deceptive practice of representing that consumers who paid company $199 could get free prescription medicine)
- **FTC v. Q-Ray Company**, No. 03C 3578 (N.D. Ill. Sept. 20, 2006), aff’d, 512 F.3d 858 (7th Cir. 2008) ($16 million redress for deceptive pain relief claims for metal bracelet)

- **United States v. Walsh Optical, Inc.**, No.: 06-3591 (D.N.J. Aug. 7, 2006) ($40,000 civil penalty for failing to verify consumers’ contact lens prescriptions, in violation of the Contact Lens Rule)


- **FTC v. Smart Inventions, Inc.**, No. CV 04-4431 Mm(ex) (C.D. Cal. Sept. 18, 2007) (stipulated order for permanent injunction) (up to $2.5 million redress for deceptive claims for Biotape, adhesive strips advertised to relieve pain)


- **FTC v. Seville Marketing, Ltd.**, No. C04-1181L (W.D. Wash. May 19, 2005) (stipulated final judgment) (challenging efficacy claims for at-home HIV test kits advertised as 99.4% accurate, but with error rates of 59.3%)

- **Laser Vision Institute**, 136 F.T.C. 1 (2003); and **LCA-Vision, Inc. d/b/a LasikPlus**, 136 F.T.C. 41 (2003) (consent orders) (challenging claims that LASIK would eliminate the need for glasses, contact lenses, reading glasses, and bifocals and would eliminate the risk of haloing and glare)

- **FTC v. CSCT, Inc.**, No. 03 C 00880 (N.D. Ill. Feb. 17, 2004) (stipulated judgment) (in conjunction with Canadian and Mexican authorities, challenging anti-cancer claims by Canadian company for electromagnetic treatments in Tijuana clinic)


• FTC v. Vital Living Products, Inc., No. 3:02CV74-MU (W.D.N.C. Feb. 27, 2002) (stipulated order) (challenging deceptive claims that do-it-yourself test kit could detect presence of anthrax bacteria and spores)


• Magnetic Therapeutic Technologies, Inc., 128 F.T.C. 380 (1999) (consent order) (challenging claims that purported magnetic therapy devices could treat a multitude of diseases, including cancer, high blood pressure, HIV, multiple sclerosis, and diabetic neuropathy)

• American College for Advancement in Medicine, 127 F.T.C. 890 (1999) (consent order) (challenging representations that chelation therapy is an effective treatment for arteriosclerosis)

• London International Group, 125 F.T.C. 726 (1998) (consent order) (challenging comparative efficacy claims for Ramses condoms)

• Natural Innovations, Inc., 123 F.T.C. 698 (1997) (consent order) (challenging pain relief claims for the Stimulator, a device emitting a purported acupressure-like electrical charge)

• Zygon International, Inc., 122 F.T.C. 195 (1996) (consent order) ($195,000 redress for deceptive claims for The Learning Machine, a device purported to enable users to lose weight, quit smoking, increase IQ, and learn foreign languages overnight)

• Numex Corp., 116 F.T.C. 1078 (1993) (consent order) (challenging arthritis treatment and pain relief claims for roller device)

• Viral Response Systems, Inc., 115 F.T.C. 676 (1992) (consent order) (challenging claims that inhaler device can remedy colds)
D. Dietary Supplements, Herbal Products, and Related Advertising Claims: The FTC has challenged deceptive claims for dietary supplements and related products through law enforcement, industry outreach, and education. The Commission issued *Dietary Supplements: An Advertising Guide for Industry*, describing how the basic principles of advertising law apply to the marketing of dietary supplements. Representative cases:


- **FTC v. NextGen Nutritionals, LLC**, No. 8:17-CV-2807-T-36AEP (M.D. Fla. Nov. 20, 2017) (stipulated order) (partially suspended $1.3 million judgment for deceptive treatment claims for HIV, MS, high blood pressure, and other serious conditions; false weight loss claims; and use of fake testimonials and certification seals)

- **FTC and Maine v. Health Research Laboratories, LLC**, No. 2:17-CV-00467-JDL (D. Me. Nov. 30, 2017) (partially suspended $3.7 million judgment for deceptive claims that supplements could treat liver disease, Alzheimer’s disease, dementia, and other serious conditions and for deceptive “risk free” trial offer)


- **FTC v. COORGA Nutraceuticals Corp.**, No. 15-CV-72-S (D. Wyo. Sept. 23, 2016) (order for summary judgment) (ruling that company made misleading claims that “Grey Defence” would reverse or prevent gray hair)
• FTC v. Sunrise Nutraceuticals, LLC, No. 9:15-CV-81567 (S.D. Fla. July 6, 2016) (stipulated judgment) ($235,000 redress for false and deceptive claims that dietary supplement Elimidrol could treat opiate withdrawal)

• FTC v. Brain Research Labs, LLC, No. 8:15-cv-01047 (C.D. Cal. July 8, 2015) (stipulated judgment) ($1.4 million to settle charges that marketers of made false and unsubstantiated claims that Procera AVH was clinically proven to improve memory and cognitive function)

• POM Wonderful LLC v. FTC, 777 F.3d 478 (D.C. Cir. 2015) (upholding FTC ruling that advertisers made false and unsubstantiated heart disease, cancer, and erectile dysfunction claims for POM Wonderful 100% Pomegranate Juice and POMx supplements)

• FTC v. NourishLife LLC, No. 1:15-cv-00093 (N.D. Ill. Jan. 9, 2015) (stipulated order) (partially suspended $3.68 million judgment for deceptive claims that dietary supplements were proven to treat childhood speech disorders, including those associated with autism)


• i-Health, Inc., and Martek Biosciences Corp., C-4486 (June 9, 2014) (consent order) (challenging deceptive claims that BrainStrong Adult will improve adult memory and prevent cognitive decline)


• Foru International Corp., C-4457, and Genelink, Inc., C-4456 (Jan. 7, 2014) (consent orders) (challenging deceptive claims about supplements and skincare products advertised as genetically customized)

• FTC v. Central Coast Nutraceuticals, No. 10C4931 (N.D. Ill. Jan. 9, 2012) (stipulated order) ($1.5 million redress for deceptive claims that acai berry supplements and “colon cleansers” could cause weight loss and prevent cancer, falsely claiming products were endorsed by Oprah Winfrey and Rachael Ray, and making unauthorized charges to consumers’ credit cards for “free” or “risk free” trial offers)

• NBTY, Inc., 151 F.T.C. 201 (2010) (consent order) ($2.1 million redress for deceptive brain and eye development claims for Disney- and Marvel Heroes-licensed children’s multivitamins)
• Mark Dreher, C-4306 (Nov. 16, 2010) (consent order) (challenging role of then-Vice President of Science and Regulatory Affairs of POM Wonderful LLC in making false and unsubstantiated claims that POM Wonderful 100% Pomegranate Juice and POMx supplements could prevent or treat heart disease and prostate cancer)

• FTC v. Direct Marketing Concepts, Inc., 624 F.2d 1 (1st Cir. 2010) (upholding $48.2 million judgment against marketers of Supreme Greens and Coral Calcium dietary supplements)

• FTC v. Iovate Health Sciences USA, Inc., No. 10-CV-587 (W.D.N.Y. July 29, 2010) (stipulated judgment) ($5.5 million redress for deceptive health claims for Accelis, nanoSLIM, Cold MD, Germ MD, and Allergy MD)


• Omega-3 Fatty Acid Supplements: On February 16, 2010, the FTC sent warning letters to 11 companies that promote Omega-3 fatty acid supplements, telling them to review their product packaging and labeling to make sure they do not violate federal law by making baseless claims about how the supplements benefit children’s brain and vision function and development.


• FTC v. CVS Pharmacy, Inc., No. CA-09-420 (D.R.I. Sept. 8, 2009) (stipulated order) ($2.8 redress for deceptive claims that AirShield product could prevent and treat colds and flu)

• Daniel Chapter One, D-9329 (Dec. 24, 2009) (Commission Decision) (holding company and corporate officer liable for deceptive claims that shark cartilage and herbal formulations would prevent, treat, and cure cancer, and heal effects of chemotherapy and radiation), aff’d, 405 Fed. Appx. 505 (D.C. 2010). See also United States v. Daniel Chapter One, No. 10-1362 (D.D.C. May 9, 2012) (order holding Daniel Chapter One, James Feijo and Patricia Feijo in civil contempt)

• United States v. QVC, Inc., No. 04-CV-1276 (E.D. Pa. Mar. 19, 2009) (consent decree) ($6 million redress for deceptive claims for For Women Only weight loss pills, Lite Bites bars and shakes, and Bee-Alive Royal Jelly energy supplements, and $1.5 civil penalty for deceptive claims for Lipofactor Cellulite Target Lotion, in violation of 2000 FTC order)


• FTC v. Airborne, Inc., No. CV-08-05300 (C.D. Cal. Aug. 14, 2008) (stipulated judgment) (total of up to $30 million in redress to settle FTC and class actions alleging false and unsubstantiated cold prevention and germ-fighting claims for Airborne)

• FTC v. North American Herb and Spice Co., No. 08 CV 3169 (N.D. Ill. Aug. 12, 2008) (stipulated judgment) ($2.5 million redress for deceptive claims that oregano-based dietary supplements are scientifically proven to prevent or treat colds and flu, boost the immune system, and kill avian bird flu virus, hepatitis C, staph, and other pathogens)


• FTC v. Pacific Herbal Sciences, Inc., (C.D. Cal. May 29, 2007) (stipulated judgment) ($172,500 redress for deceptive weight loss, anti-aging, and disease treatment claims for oral sprays sold via spam that claimed to contain human growth hormone)
• FTC v. Sunny Health Nutrition Technology & Products, No. 8:06-CV-2193-T-24EAJ (M.D. Fla. Apr. 24, 2007 and Nov. 28, 2006) (stipulated order) ($1.9 million redress for deceptive claims for HeightMax, dietary supplement purporting to make teens and young adults taller)


• United States v. NBTY, Inc., No. CV-05-4793 (E.D.N.Y. Oct. 12, 2005) ($2 million civil penalty against company formerly known as Nature’s Bounty for violating terms of FTC order by making deceptive claims that Royal Tongan Limu was clinically proven to treat diabetes, Alzheimer’s disease, and cancer and that Body Success PM Diet Program increases metabolism and causes weight loss, even during sleep)

• FTC v. Direct Marketing Concepts, Inc., 624 F.2d 1 (1st Cir. 2010) (upholding $48.2 million judgment against marketers of Supreme Greens and Coral Calcium dietary supplements for deceptive claims that products could prevent or treat serious conditions such as cancer)

• FTC v. Emerson Direct, Inc., No 2-05-CV-377-AM-33 (M.D. Fla. Aug. 23, 2005) (stipulated order) ($1.3 million redress for deceptive claims that Smoke Away would allow smokers to quit smoking quickly and without cravings and for deceptive use of purported expert endorsements)

• FTC v. Harry, No. 04C-4790 (N.D. Ill. June 15, 2005) (stipulated order) ($485,000 redress and $5.9 million suspended judgment for unsubstantiated anti-aging claims for purported human growth hormone product and violations of CAN-SPAM Act)

• FTC v. Braswell, No. CV 03-3700 DT (PJWx) (C.D. Cal. 2005 and 2006) (stipulated judgments) ($5 million redress, lifetime ban, and $30 million suspended judgment from multiple individual and corporate defendants for deceptive claims that products could treat asthma, diabetes, Alzheimer’s disease, overweight, and sexual dysfunction)
• FTC v. Great American Products, Inc., No. 3:05-CV-00170-RV-MD (N.D. Fla. May 20, 2005), aff’d, 200 Fed. Appx. 897 (4th Cir. 2006) (up to $20 million redress for deceptive anti-aging claims for purported human growth hormone product, deceptive format for radio and TV infomercials, and violations of the Telemarketing Sales Rule)


• FTC v. VisionTel Communications LLC, No. 1:04CV01412 (D.D.C. Aug. 26, 2004) (stipulated judgment) ($750,000 redress for deceptive efficacy and safety claims for Impulse Female Herbal Blend and Maximus Male Herbal Blend, dietary supplements advertised to treat sexual dysfunction)


• Nutramax Laboratories, Inc., 138 F.T.C. 380 (2004) (consent order) (challenging deceptive claims that Senior Moment could prevent memory loss and restore memory function)

• Dynamic Health Of Florida, LLC, D-9317 (June 16, 2004) (consent order) (challenging deceptive libido-enhancement representations for Fabulously Feminine, a dietary supplement containing L-arginine, ginseng, damiana leaf, gingko biloba, and horny goat weed)

• Vital Basics, Inc., 137 F.T.C. 254, and Creative Health Institute, Inc., 137 F.T.C. 350 (2004) (consent orders) ($1 million redress for deceptive claims that Focus Factor could improve focus, concentration, or memory in children, adults, and older persons, and for deceptive sexual performance claims for V-Factor)

• United States v. Estate of Michael Levey, No. CV 03-4670 GAF (AJWx) (C.D. Cal. Mar. 9, 2004) (consent decree) ($2.2 million redress for deceptive weight loss and arthritis cure claims for dietary supplements)
• Unither Pharma, Inc., and United Therapeutics Corp., 136 F.T.C. 145 (2003) (consent order) (challenging claims that bar containing amino acid reduces the risk of heart disease and reverses damage to the heart)

• FTC v. Kevin Trudeau, No. 98C0168 and No. 03C904 (N.D. Ill. Sept. 4, 2004) (stipulated order) ($2 million redress for deceptive claims that Coral Calcium Supreme can treat cancer, multiple sclerosis, heart disease, and other serious diseases); FTC v. Robert Barefoot, No. 03C904 (N.D. Ill. Jan. 22, 2004) (stipulated order) (challenging deceptive claims that Coral Calcium Supreme can treat cancer, multiple sclerosis, heart disease, and other diseases). See also FTC v. Trudeau, 662 F.3d 947 (7th Cir. 2011) (upholding $37 million redress order).


• Snore Formula, Inc., 136 F.T.C. 214 (2003) (consent order) (challenging unsubstantiated claims about product’s efficacy in preventing sleep apnea and significantly reducing snoring)


• Kris A. Pletschke d/b/a Raw Health, 133 F.T.C. 574 (2002) (consent order) (challenging deceptive claims that colloidal silver product could treat 650 diseases, eliminate pathogens, and is proven to kill anthrax, Ebola virus, and flesh-eating bacteria)


• FTC v. Liverite Products, Inc., No. SA 01-778 AHS (ANx) (S.D. Cal. Aug. 21, 2001) (stipulated order) (challenging deceptive claims that dietary supplement was effective in treating hepatitis C, cirrhosis, and hang-overs and could prevent liver damage and side effects from use of drugs for HIV and hepatitis C, chemotherapy, and anabolic steroids)
• FTC v. Western Botanicals, Inc., No. CIV.S-01-1332 DFL GGH (E.D. Cal. July 11, 2001); and FTC v. Christopher Enterprises, Inc., No. 2:01 CV-0505 ST (D. Utah Dec. 6, 2001) (stipulated orders) (prohibiting sale of comfrey for internal use without proof of safety and requiring warnings on labels and ads that internal use can cause serious liver damage or death)

• Panda Herbal Int’l, Inc., 132 F.T.C. 125 (2001) (consent order) (challenging claims that St. John’s Wort product could safely treat AIDS, tuberculosis, hepatitis B, and other serious conditions and requiring warning that St. John’s Wort can have dangerous interactions for pregnant women and patients taking certain prescription drugs)

• ForMor, Inc., 132 F.T.C. 72 (2001) (consent order) (challenging claims that products containing St. John’s Wort, colloidal silver, and shark cartilage could treat AIDS, tuberculosis, cancer, dysentery, and other conditions and requiring warning that St. John’s Wort can have dangerous interactions for patients taking certain prescription drugs and for pregnant women)

• Aaron Co., 132 F.T.C. 174 (2001) (consent order) (challenging claims that products containing colloidal silver could treat cancer, multiple sclerosis, and AIDS, that products containing chitin could cause weight loss without diet and exercise, and requiring safety warnings on promotional materials for ephedra products)

• MaxCell BioScience, Inc., 132 F.T.C. 1 (2001) (consent order) (challenging claims that products containing DHEA could reverse the aging process and treat or prevent age-related diseases such as atherosclerosis, arthritis, high blood pressure, and elevated cholesterol and ordering $150,000 redress)

• Tru-Vantage International, LLC, 133 F.T.C. 229 (2002) (consent order) (challenging deceptive anti-snoring and sleep apnea claims for Snor-enz, a supplement containing oils and vitamins)

• SmartScience Laboratories, Inc., C-3980 (Nov. 7, 2000) (challenging pain relief claims for Joint Flex, a topically applied cream containing glucosamine and chondroitin sulfate)

• FTC v. Rexall Sundown, Inc., No. 00-706-CIV (S.D. Fla. Mar. 11, 2003) (stipulated order) (up to $12 million redress for deceptive efficacy representations by the marketers of Cellasene, a purported anti-cellulite dietary supplement)

• FTC v. Lane Labs-USA, Inc., No. 00 CV 3174 (D.N.J. June 28, 2000) (stipulated order) ($1 million judgment for unsubstantiated cancer treatment claims for BeneFin shark cartilage product, and SkinAnswer anti-skin cancer cream). See also FTC v. Lane Labs-USA, Inc., 624 F.3d 575 (3d Cir. 2010).
• **Natural Heritage Enterprises, C-3941** (May 23, 2000) (consent order) (challenging claims that essiac tea, a mixture of burdock and rhubarb root, sheep sorrel, and slippery elm bark, was effective in curing cancer, diabetes, AIDS, and feline leukemia)

• **CMO Distribution Centers of America, Inc., C-3942** (May 23, 2000) (consent order) (challenging claims that product containing cetylmyristoleate could treat arthritis and other conditions and had been proven through clinical testing and recognized by the medical community to be a breakthrough in arthritis treatment)

• **EHP Products, Inc., C-3940** (May 23, 2000) (consent order) challenging claims that product containing cetylmyristoleate could prevent and treat rheumatoid arthritis, osteoarthritis, and other conditions, and that scientific studies and the issuance of patents proved effectiveness of product)

• **J & R Research, Inc., C-3961** (July 25, 2000) (consent order) (challenging claims that supplement containing pycnogenol was effective in treating ADD, cancer, heart disease, arthritis, diabetes, and multiple sclerosis)

• **FTC v. Rose Creek Health Products, Inc., No. CS-99-0063-EFS** (E.D. Wash. May 1, 2000) (consent decree) ($375,000 redress for deceptive claims that Vitamin O could prevent cancer, pulmonary disease, and other conditions by providing oxygen to the body)

• **Quigley Corp., C-3926** (Feb. 10, 2000) (consent order), and **QVC, Inc., C-3955** (June 16, 2000) (consent order) (challenging unsubstantiated claims that Cold-Eeze zinc supplement would prevent colds, relieve allergy symptoms, and reduce the severity of cold symptoms in children)

• **FTC v. Met-Rx USA, No. SAC V-99-1407** (D. Colo. Nov. 15, 1999), and **FTC v. AST Nutritional Concepts & Research, No. 99-WI-2197** (C.D. Cal. Nov. 15, 1999) (stipulated orders) (challenging unsubstantiated safety claims for purported body building supplements containing androgen and other steroid hormones and requiring disclosures in labeling and ads of the risks of breast enlargement, testicle shrinkage, and infertility in males, and increased facial and body hair, voice deepening, and clitoral enlargement in females)

• **Body Systems Technology, Inc., 128 F.T.C. 299** (1999) (as part of first phase of Operation Cure.All, challenging deceptive claims about effectiveness of shark cartilage in preventing or treating cancer and effectiveness of uña de gato, or Cat’s Claw, in the treatment of cancer, HIV/AIDS, and arthritis.)

• **Bogdana Corp.**, 126 F.T.C. 37 (1998) (consent order) (challenging claims that Cholestaway and Flora Source could lower blood pressure, reduce cholesterol, and treat AIDS and chronic fatigue syndrome)

• **Nutrivida, Inc.**, 126 F.T.C. 339 (1998) (consent order) (challenging claims for shark cartilage product purported to treat cancer, arthritis, diabetes, and other serious conditions)

• **Venegas, Inc.**, 125 F.T.C. 266 (1998) (consent order) (challenging deceptive claims that product containing wheat germ, bran, soybean extract, and seaweed could treat diabetes, anemia, high blood pressure, and other serious conditions)

• **Global World Media Corp.**, 124 F.T.C. 426 (1997) (consent order) (challenging safety claims and requiring safety disclosures in ads for Herbal Ecstasy, ephedra-based product advertising as a natural high)


• **FTC v. Redhead**, No. 93-1232-JO (D. Ore. June 20, 1994) (stipulated permanent injunction) (challenging deceptive claims that algae-based product could treat AIDS)


E. **Weight Loss and Fitness**: The FTC has challenged deceptive weight loss claims for products, services, and exercise devices through traditional law enforcement actions and industry outreach and education.

Commission, the percentage of ads for weight loss products that contain claims that the FTC considers to be patently false dropped from almost 50% in 2001 to 15% in 2004.

2. Representative weight loss and fitness cases:

- **FTC v. Cure Encapsulations, Inc.**, No. 1:19-CV-00982 (E.D.N.Y. Feb. 26, 2019) (stipulated order) (partially suspended $12.8 million judgment to settle charges that defendants made false and unsubstantiated claims for garcinia cambogia weight loss pill and paid a third-party website to post fake reviews on Amazon)

- **FTC v. Roca Labs, Inc.**, No. 8:15-CV-02231-MSS-TBM (M.D. Fla. Jan. 4, 2019) (final judgment) (challenging defendants’ deceptive weight loss claims and their practice of enforcing “gag clauses” to stop consumers from posting negative reviews)


- **FTC v. Nicholas Scott Congleton and Dylan Loher**, No. 8:14-CV-0155-SDM-TGW (M.D. Fla. Nov. 14, 2016) (order) ($30 million judgment against Pure Green Coffee pitchman, who used false diet claims, testimonials, and news websites). See also **FTC v. NPB Advertising, Inc.**, No. 8:14-CV-0155-SDM-TGW (M.D. Fla. Nov. 17, 2015) (stipulated order) (partially suspended $30 million judgment for deceptive weight loss claims for dietary supplement containing green coffee bean extract promoted, among other places, on The Dr. Oz Show)

- **FTC v. Lunada Biomedical, Inc.**, No 2:15-CV-03380-MWF (PLAx) (C.D. Cal. May 20, 2016) (stipulated order) ($40 million partially suspended judgment for deceptive claims that Amberen causes weight loss, fat loss, and increased metabolism in women over 40)

- **FTC v. HCG Diet Direct, LLC.**, No. 2:14-CV-00015-NVW (D. Az. Feb. 25, 2016) (order) (lifting suspension of $3.2 million judgment for weight loss claims for product marketed as homeopathic HCG drops based on defendants’ untruthful financial information)


• Crystal Ewing, Classic Productions, Inc., and Ricki Black, (D. Nev. Nov. 17, 2015) (stipulated order) ($2.7 judgment against Ewing and corporate defendant and partially suspended $1.6 million judgment against Black for deceptive weight loss claims for W8-B-Gone, CITRI-SLIM 4, and Quick & Easy)

• FTC v. Genesis Today, Pure Health, and Lindsey Duncan, No. 1:15-cv-62 (W.D. Tex. Jan. 26, 2015) ($9 million redress for deceptive weight loss claims for green coffee bean extract made through campaign that included appearances on Dr. Oz Show)


• Wacoal America, Inc., C-4496 (Sept. 29, 2014) (consent order) ($1.3 million for deceptive reduction claims for caffeine-infused shapewear)

• Norm Thompson Outfitters, Inc., C-4495 (Sept. 29, 2014) (consent order) ($230,000 redress for deceptive reduction claims for caffeine-infused shapewear and false claim that products were endorsed by Dr. Oz)


• HealthyLife Sciences LLC, C-4492, and John Matthew Dwyer III, C-4493 (Sept. 11, 2011) (consent orders) (challenging false and deceptive claims that Healthe Trim would cause substantial weight loss and banning officer from weight loss industry)
• FTC v. Applied Food Sciences, Inc., No. 1-14-CV-00851 (W.D. Tex. Sept. 8, 2014) (stipulated order) ($3.5 million to settle charges that company used flawed study results to make baseless weight loss claims about green coffee extract to retailers, who repeated claims to consumers)


• L’Occitane, Inc. C-4445 (Jan. 7, 2014) (consent order) ($450,000 redress for deceptive slimming claims for Almond Beautiful Shape and Almond Shaping Delight skin creams)

• FTC v. Clickbooth.com, LLC, No. 1:12-CV-09087 (N.D. Ill. Nov. 14, 2012) ($2 million redress to settle charges that affiliate marketers make deceptive weight loss claims on bogus news sites about acai berry supplements and “colon cleansers”)


• FTC v. Skechers U.S.A. Inc., No 1:12-CV-01214-JG (N.D. Ohio May 16, 2012) (stipulated judgment) ($40 million redress for deceptive claims that Skechers Shape-ups and other shoes would help people lose weight, and strengthen and tone their buttocks, legs and abdominal muscles)

• FTC v. Central Coast Nutraceuticals, Inc., No. 10C4931 (N.D. Ill. Jan. 9, 2012) (stipulated order) ($1.5 million redress for deceptive claims that acai supplements and “colon cleansers” could cause weight loss and prevent cancer, falsely claiming that products were endorsed by Oprah Winfrey and Rachael Ray, and making unauthorized charges to consumers’ credit cards for “free” or “risk free” trial offers)

• FTC v. Stella Labs, LLC, No. 2:09-CV-01262-WJM-CCC (D.N.J. Nov. 3, 2011) (stipulated judgment) ($22.5 million judgment against defendants that sold ingredient purporting to be hoodia to others that marketed weight loss products)

• FTC v. Reebok International Ltd., No. 1:11-CV-02046-DCN (N.D. Ohio Sept. 28, 2011) (stipulated judgment) ($25 million redress for deceptive claims regarding the ability of Reebok EasyTone and RunTone shoes to provide extra toning and strengthening of leg and buttock muscles)

• Beiersdorf, Inc., 152 F.T.C. 414 (2011) (consent order) ($900,000 redress for deceptive claims that Nivea My Silhouette! skin cream can significantly reduce users’ body size)

• FTC v. Bronson Partners, LLC, 654 F.3d 359 (2d Cir. 2011) (affirming $1.9 million redress for deceptive claims for Chinese Diet Tea and Bio-Slim Patch)

• United States v. QVC, Inc., No. 04-CV-1276 (E.D. Pa. Mar. 19, 2009) (consent decree) ($6 million redress for deceptive claims for For Women Only weight loss pills, Lite Bites weight loss bars and shakes, and Bee-Alive Royal Jelly energy supplements, and $1.5 civil penalty for deceptive claims for Lipofactor Cellulite Target Lotion, in violation of 2000 FTC order)


• FTC v. Spear Systems, Inc., No. 07C-5597 (N.D. Ill. July 15, 2008) (stipulated judgment against certain defendants) ($29,000 disgorgement from international marketers who used illegal spam to drive traffic to their websites where they sold hoodia products deceptively advertised to cause rapid, substantial weight loss)
• FTC v. Sili Neutraceuticals, LLC, No. 07C 4541 (N.D. Ill. Feb. 4, 2008) (permanent injunction) ($2.5 million redress for using illegal email to disseminate deceptive claims for hoodia weight-loss products and human growth hormone anti-aging products)

• FTC v. Centro Natural Services, Inc., No. SACV06-989 JVS (RNBx) (C.D. Cal. Jan. 30, 2008) (stipulated order) ($2.3 million suspended judgment for deceptive weight loss claims for Centro Natural de Salud Obesity Treatment)


• United States v. Bayer Corp., No. 07-01(HAA) (D.N.J. Jan. 4, 2007) (consent decree) ($3.2 million civil penalty for deceptive weight loss claims for One-A-Day WeightSmart, disseminated in violation of an earlier FTC order)

• FTC v. Chinery, No. 05-3460 (GEB) (D.N.J. Jan. 4, 2007) (stipulated order) (at least $8 million redress for deceptive weight loss claims for Xenadrine EFX, deceptive testimonials, and failure to disclose material connection between advertiser and endorsers); Cytodyne, LLC, 140 F.T.C. 191 (2005) (consent order) ($100,000 redress for deceptive claims for Xenadrine EFX)

• FTC v. Window Rock Enterprises, Inc., No.: CV04-8190 DSF (JTLx) (C.D. Cal. Jan. 4, 2007 and Sept. 21, 2005) (stipulated orders) ($12 million in cash and assets for deceptive claims that CortiSlim and CortiStress can cause weight loss and reduce the risk of, or prevent, serious health conditions)

• TrimSpa, Inc., 143 F.T.C. 269 (2007) (consent order) ($1.5 million redress for deceptive claims for that one of TrimSpa’s ingredients, *hoodia gordonii*, enables users to lose weight by suppressing the appetite)

• Basic Research, D-9318 (May 11, 2006) (consent order) ($3 million redress for deceptive representations for Leptoprin, Anorex, Dermalin, and other purported weight loss products and PediaLean, a purported weight loss product for children)

• FTC v. Kingstown Associates, Ltd., No.: 03-CV-910A (W.D.N.Y. Sept. 15, 2005) (stipulated order) ($150,000 redress for deceptive claims for Hydro-Gel Slim Patch and Slenderstrip and order banning UK defendants from advertising or selling supplement, food, drug, or weight loss products)
• FTC v. FiberThin LLC, (S.D. Cal. June 14, 2005) (stipulated order) ($1.5 million redress and $41 million suspended judgment for deceptive weight loss and metabolism enhancement claims for FiberThin, Propolene, Excelerene, and MetaboUp)


• FTC v. VisionTel Communications LLC, No. 1:04CV01412 (D.D.C. Aug. 26, 2004) (stipulated judgment) ($750,000 redress for deceptive claims for Chito Trim and Turbo Tone diet products and two supplements advertised to treat sexual dysfunction)


FTC v. Beauty Visions Worldwide, No. 03 CV 0910 (SC) (W.D.N.Y. Oct. 12, 2004) (stipulated order) (partially suspended $1.4 million judgment for fulfillment house’s role in marketing Hydro-Gel Slim Patch and Slenderstrip, seaweed-based patches advertised to cause weight loss without diet or exercise)

FTC v. Savvier, Inc., No. LACV 03-8159 FMC (C.D. Cal. Sept. 1, 2004) (stipulated judgment) ($2.6 million redress for deceptive weight loss representations for BodyFlex products, including claim that users will lose 4 to 14 inches in the first seven days)


United States v. Estate of Michael Levey, No. CV-03-4670 GAF (AJWx) (C.D. Cal. July 1, 2003) ($2.2 million redress for deceptive safety and efficacy claims for ephedra-based weight loss products)

FTC v. USA Pharmacal Sales, Inc., (M.D. Fla. July 1, 2003) (stipulated judgment) ($175,000 redress for deceptive safety and efficacy claims for ephedra-based weight loss products)


• Weider Nutrition International, Inc., C-3983 (Nov. 17, 2000) (consent order) ($400,000 redress for deceptive claims for PhenCal, advertised as safe and effective alternative to drugs Phen-Fen)


• Herbal Worldwide Holding Corp., 126 F.T.C. 356 (1998) (consent order) (challenging deceptive diet claims for product containing chitin, psyllium, glucomannan, and apple pectin)


• FTC v. SlimAmerica, Inc., No. 97-6072-Civ (S.D. Fla. 1999) (permanent injunction) ($8.3 million redress from marketer of purported weight loss products)


• Jenny Craig, Inc., 125 F.T.C. 333 (1998) (consent order) (challenging deceptive claims for weight loss program)

• **Weight Watchers International, Inc.,** 124 F.T.C. 610 (1997) (consent order) (challenging deceptive claims for weight loss program)

• **Nutrition 21,** 124 F.T.C. 1 (1997) (consent order) (challenging deceptive weight loss claims for products containing chromium picolinate)

• **NordicTrack, Inc.,** 121 F.T.C. 907 (1996) (consent order) (challenging deceptive weight loss study claims for exercise device)

• **Schering Corp.,** 118 F.T.C. 1030 (1994) (consent order) (challenging deceptive weight loss and fiber content claims for Fiber-Trim tablet)

• **Nutra/System, Inc.,** 116 F.T.C. 1408 (1993) (consent order) (challenging deceptive claims for weight loss program)

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IX. **ENVIRONMENTAL AND ENERGY-RELATED ADVERTISING**

A. **Guides for the Use of Environmental Marketing Claims,** 16 C.F.R. § 260. After workshops and public comment, the FTC issued Environmental Marketing Guides in 1992, revising them in 1996, 1998, and 2012. The Guides offer interpretations of how FTC caselaw applies to green marketing claims. Through definitions and examples, the Guides address the use of terms like biodegradable, recyclable, recycled, and ozone-friendly, as well as general environmental benefit claims like environmentally safe or environmentally friendly. They also establish that disclosures must be clear and prominent.

B. **Warning Letters.** On February 3, 2010, the FTC sent warning letters to 78 companies that advertised their products as bamboo when, in fact, they were made of rayon, a manmade fiber created from cellulose found in plants and trees and processed with chemicals that release air pollution. In 2014 and 2015, the FTC sent warning letters to marketers of “oxodegradable” plastic waste bags that their claims may be deceptive under the Green Guides. FTC staff sent warning letters on September 14, 2015, to five groups that offer environmental certifications or seals and 32 businesses that display them, raising concerns about possibly deceptive claims.
C. Representative “environmentally friendly,” certification, or related cases:


- Nonprofit Management LLC, 151 F.T.C. 144 (2011) (consent order) (challenging the marketing of false “Tested Green” certifications that involved no environmental testing and were purportedly “endorsed” by two firms, which the company owned)

- Sami Designs, LLC, d/b/a Jonäno, C-4279; CSE, Inc., d/b/a MAD MOD, C-4280; Pure Bamboo, LLC, C-4278 (Aug. 11, 2009); and The M Group, Inc., d/b/a Bamboosa, D-9340 (consent orders) (charging that companies deceptively advertised rayon products as bamboo and deceptively claimed products were manufactured using an environmentally friendly process, retained natural antimicrobial properties of bamboo, and were biodegradable)

D. Representative degradability cases:


- Nice-Pak Products, Inc., C-4556 (May 18, 2015) (consent order) (challenging deceptive claims that moist toilet tissue was flushable and safe for sewer and septic tanks)

- Down to Earth Designs, Inc. d/b/a gDiapers, C-4443 (Jan. 17. 2014) (consent order) (challenging deceptive claims about diapers’ biodegradability, compostability, and other environmentally friendly attributes)


• Dyna-E International Corp., D-9336 (Aug. 26, 2009); Kmart Corp., C-4263 (June 9, 2009); and Tender Corp., C-4261 (June 9, 2009) (consent orders) (challenging deceptive claims that towels, paper plates, and wipes were biodegradable when a substantial majority of solid waste is disposed of by methods that don’t allow products to completely break down)

• Archer Daniels Midland Co., 117 F.T.C. 403 (1994) (consent order) (challenging deceptive biodegradable and landfill benefit claims for plastic products containing corn starch additive)

• Mobil Oil Corp., 116 F.T.C. 113 (1993) (consent order) (challenging deceptive biodegradable and landfill benefit claims for Hefty trash bags)

E. Representative “free of” or “zero” cases:

• Moonlight Slumber, LLC, C-4634 (Sept. 28, 2017) (consent order) (challenging deceptive claims that baby mattresses were organic and free of volatile organic compounds)

• Benjamin Moore & Co., Inc., C-4646; Imperial Paints, C-4647; ICP Construction, Inc., C-4648; and YOLO Colorhouse, C-4648 (July 11, 2017) (consent orders) (challenging deceptive claims that paints were emission- and VOC-free and safe for babies and other sensitive populations)

• Relief-Mart, Inc., 156 F.T.C. 284 (2013); EcoBaby Organics, Inc., 156 F.T.C. 334 (2013); and Essentia Natural Memory Foam Company, 156 F.T.C. 360 (2013) (consent orders) (challenging deceptive claims that mattresses are free of VOCs)


F. Representative recycled content or recyclability cases:

• Engineered Plastic Systems, LLC, C-4485 (Sept. 11, 2014) (consent order) (challenging deceptive recycled content claims for plastic lumber products)

• American Plastic Lumber, Inc., C-4478 (June 19, 2014) (consent order) (challenging deceptive recycled content claims for plastic lumber products)

• N.E.W. Plastics Corp., C-4449 (Feb. 18, 2014) (consent order) (challenging deceptive claims about recycled content and recyclability of two brands of plastic lumber)
• FTC v. AJM Packaging Corp., No. 1:13-CV-1510 (D.D.C. Oct. 29, 2013) (stipulated order) ($450,000 civil penalty for violating FTC order barring deceptive recyclability claims)

• LePage’s, Inc., 118 F.T.C. 31 (1994) (consent order) (challenging deceptive recyclability claims for tape’s plastic dispenser and paperboard card where few facilities exist to recycle either material)

• Keyes Fibre Co., 118 F.T.C. 150 (1994) (consent order) (challenging deceptive biodegradability and recyclability claims for Chinet plates where few facilities exist to recycle food-contaminated waste)

G. Representative cases challenging claims regarding ozone/CFCs

• Creative Aerosol Corp., 119 F.T.C. 13 (1995) (consent order) (challenging deceptive "Environmentally Safe Contains No Fluorocarbons” claims for aerosol soaps containing VOCs and ozone-depleting chemicals)

• Redmond Products, Inc., 117 F.T.C. 71 (1994) (consent order) (challenging deceptive green claims for Aussie hair products that contained VOCs that can contribute to smog formation)

H. Representative cases challenging “all natural” claims

• California Naturel Inc., D-9370 (Dec. 12, 2016) (Commission Opinion) (ruling that company’s “all natural” claim was deceptive because 8% of its sunscreen was made of dimethicone, a synthetic ingredient)

• Trans-India Products, Inc., C-4582 (2016); Erickson Marketing Group Inc., C-4583 (2016); ABS Consumer Products, LLC, C-4584 (2016); Beyond Coastal, C-4585 (2016) (consent orders) (challenging deceptive “all natural” or “100% natural” claims for personal care products containing synthetic ingredients)

I. Representative cases challenging environmental health or safety claims:


• **Safe Brands Corp.,** 121 F.T.C. 379 (1996) (consent order) (challenging deceptive claims that Sierra antifreeze was safe if ingested, environmentally safe, and safer for the environment than conventional antifreeze)

• **Orkin Exterminating Co.,** 117 F.T.C. 747 (1994) (consent order) (challenging deceptive claims that company’s lawn pesticides are “practically non-toxic” and pose no significant risk to human health or environment)

• **Mr. Coffee, Inc.,** 117 F.T.C. 156 (1994) (consent order) (challenging deceptive claims paper filters were manufactured by a chlorine-free process that was not harmful to the environment)

• **The Vons Companies,** 113 F.T.C. 779 (1990) (consent order) (challenging deceptive claims for pesticide-free produce sold in grocery stores)

**J.** Representative cases challenging energy savings claims or violations of energy-related regulations:

• **FTC v. Lights of America, Inc.,** No. SACV10-1333 JVS (MLGx) (C.D. Cal. Feb. 20, 2014) (final judgment) ($21 million judgment for exaggerated claims about the light output and life expectancy of defendant’s LED bulbs)


• **Long Fence & Home, LLLP,** C-4352; **Serious Energy, Inc.,** C-4359; **Gorell Enterprises, Inc.,** C-4360; **THV Holdings LLC,** C-4361; and **Winchester Industries,** C-4362 (Feb. 22, 2012) (consent orders) (challenge deceptive energy-saving and cost-saving claims for replacement windows)

• **FTC v. Dutchman Enterprises,** No. 09-141 (FSH) (D.N.J. Dec. 20, 2011) (stipulated order for permanent injunction) (challenging as deceptive company’s claims that device can boost gas mileage by 50% and “turn any vehicle into a hybrid”)

• **Homeeverything.com,** C-4304; **Appliancebestbuys.com,** D-9347; **Abt Electronics, Inc.,** C-4302; **P.C. Richard & Son, Inc.,** C-4303; **Universal Appliances, Kitchens, and Baths, Inc.,** C-4319 (consent orders) (Nov. 1, 2010) ($400,000 in total civil penalties against retailers for failure to post EnergyGuide information on websites)

• **Dura Lube, Inc.,** D-9292 (May 5, 2000) (consent order) (challenging deceptive claims that engine treatment could reduce wear, prolong engine life, reduce emissions, and increase gas mileage by up to 35%)

• **Castrol North America Inc.,** 128 F.T.C. 682 (1999), and **Shell Chemical Co.,** 128 F.T.C. 749 (1999) (consent orders) (challenging deceptive power and acceleration claims for Syntec fuel additives manufactured by Shell and marketed by Castrol)

• **Ashland, Inc.,** 125 F.T.C. 20 (1998) (consent order) (challenging misleading claims about Valvoline TM8 Engine Treatment’s ability to reduce engine wear and improve fuel economy)

• **Exxon Corp.,** 124 F.T.C. 249 (1997) (consent order) (challenging misleading claims about gasoline’s ability to clean engines and reduce maintenance costs)

• **United States v. STP Corp.,** No. 78 Civ. 559 (S.D.N.Y. Dec. 1, 1995) (stipulated order) ($888,000 civil penalty for violation of order prohibiting deceptive claims for motor oil additives)

• **Unocal Corp.,** 117 F.T.C. 500 (1994) (consent order) (challenging unsubstantiated performance claims for higher octane fuels)

• **Osram Sylvania, Inc.,** 116 F.T.C. 1297 (1993) (consent order) (challenging deceptive claim that Energy Saver light bulbs will save energy, conserve natural resources, and reduce electricity costs when company failed to disclose product provided less light than bulbs they are designed to replace)

• **General Electric Co.,** 116 F.T.C. 95 (1992) (consent order) (challenging deceptive claim that Energy Choice light bulbs will save energy, reduce pollution, and reduce electricity costs when company failed to disclose that product provided less light than bulbs they are designed to replace)

X. **TOBACCO**

A. The Cigarette Act originally gave the FTC administrative responsibility for rotational plans for health warnings on packaging and advertising. The 2009 Family Smoking Prevention and Tobacco Control Act, 21 U.S.C. §387, gives FDA specific jurisdiction to regulate tobacco products, including advertising, marketing, and packaging. In addition, the Act set out a new regulatory scheme for health warnings, giving the HHS Secretary authority to revise the warnings. The Act transferred responsibility for the review and approval of health warning plans from the FTC to FDA, and in June 2010 FDA took over responsibility for smokeless tobacco health warnings. However, for cigarettes, the Act ties the effective date of that transfer to the issuance of new health warning labels by FDA. FDA issued new warnings in June 2011, but those warnings were challenged on First Amendment grounds.

C. Representative tobacco cases:

- **E-liquid warning letters.** On May 1, 2018, the FTC and FDA sent warning letters to manufacturers, distributors, and retailers of e-liquids used in e-cigarettes that used packaging that looked like candy, juice boxes, and other food popular with young children. According to the letters, ingesting as little as a teaspoon of the liquid could be fatal to toddlers.

- **Stoker, Inc.,** 131 F.T.C. 1139 (2001) (alleging that company violated the Smokeless Tobacco Act by failing to place health warnings in conspicuous and legible type and in a conspicuous and prominent place on smokeless tobacco packaging)


- **Santa Fe Natural Tobacco Company, Inc., C-3952 (June 16, 2000) (consent order) (challenging claim that Natural American Spirit cigarettes are safer than other cigarettes because they contain no additives)

- **Alternative Cigarettes, Inc., C-3956 (June 16, 2000) (consent order) (challenging claim that Pure, Glory, Herbal Gold, and Magic cigarettes are safer than other cigarettes because they contain no additives)

- **R.J. Reynolds Tobacco Co., 128 F.T.C. 262 (1999) (consent order) (challenging deceptive claims for Winston “no additives” cigarettes and requiring disclosures that “No additives in our tobacco does NOT mean a safer cigarette”)

- **American Tobacco Co., 119 F.T.C. 3 (1995) (consent order) (challenging deceptive claim that “10 packs of Carlton have less tar than one pack” of other brands)

- **Pinkerton Tobacco Co., 115 F.T.C. 60 (1992) (consent order) (challenging as violations of television advertising ban the display of Redman Tobacco brand name and selling message on signs, vehicles, uniforms, etc., at company-sponsored televised events)

- **R.J. Reynolds Tobacco Co., 113 F.T.C. 344 (1990) (consent order) (challenging deceptive claims regarding findings of scientific study on health effects of smoking)
XI. ALCOHOL

A. Reports to Congress: In September 1999, the FTC issued *Self-Regulation in the Alcohol Industry: A Review of Industry Efforts to Avoid Promoting Alcohol to Underage Consumers*. Based on data submitted by eight marketers pursuant to Section 6(b) of the FTC Act, the FTC recommended that the industry: 1) create independent review boards to consider complaints from consumers and competitors; 2) raise the current standard that permits advertising placement in media where just over 50% of the audience is 21 or older; and 3) adopt a series of best practices to curb on-campus and spring break sponsorships, block underage access to websites, disallow placement on television shows with large underage audiences, and restrict paid product placements to R-rated or NC-17 movies. In September 2003, the FTC issued *Alcohol Marketing and Advertising: An FTC Report to Congress*. In response to inquiries about flavored malt beverages, the FTC concluded that marketers have generally complied with 2002 voluntary alcohol codes regarding ad placement. The FTC said it would continue to monitor new placement standards requiring that adults constitute 70% of the audience for advertising and the effectiveness of third-party and other review programs. The FTC issued a June 2008 report examining industry efforts to reduce the likelihood that alcohol advertising targets those under 21 and announcing a new system for monitoring industry compliance with self-regulatory programs. In April 2012, the FTC announced it was requiring 14 advertisers to provide data for a fourth study on the effectiveness of voluntary industry guidelines for reducing advertising and marketing to underage audiences. For the first time, the FTC requested information on Internet and digital marketing and data collection practices. Released in March 2014, that study reported 93% compliance with placement guidelines and included additional recommendations to the industry.

B. Education and Outreach. The FTC supports the [www.dontserveteens.gov](http://www.dontserveteens.gov) initiative, in cooperation with Department of Treasury’s Alcohol and Tobacco Tax and Trade Bureau, other government agencies, consumer groups, and industry associations.

C. Representative alcohol cases:

- **Phusion Projects, LLC, C-4382 (Feb. 12, 2013) (consent order)** (challenging false claims that a 23.5-ounce, 11 or 12% alcohol by volume can of Four Loko contains alcohol equivalent to one or two 12-ounce beers and requiring relabeling and repackaging)

- **Warning letters to sellers of caffeinated alcohol drinks.** On Nov. 17, 2010, the FTC sent warning letters to United Brands Co., seller of Joose and Max; Phusion Products LLC, seller of Four Loko and Four Maxed; Charge Beverages Corporation, seller of Core High Gravity, Core Spiked, and El Jefe; and New Century Brewing Company, seller of Moonshot, warning that the marketing of caffeinated alcohol drinks may constitute an unfair or deceptive practice.
• **Constellation Brands, Inc.**, C-4266 (June 10, 2009) (consent order) (challenging deceptive claims for Wide Eye, a caffeinated alcohol product)

• **Allied Domecq Spirits and Wine Americas, Inc. d/b/a Hiram Walker**, 127 F.T.C. 368 (1999) (consent order) (challenging misrepresentation of Kahlua White Russian pre-mixed cocktail as a low-alcohol beverage)

• **Beck’s North America, Inc.**, 127 F.T.C. 379 (1999) (consent order) (challenging depiction in Beck’s beer ads of potentially dangerous and illegal conduct)

• **Canandaigua Wine Co.**, 114 F.T.C. 349 (1991) (consent order) (alleging that advertising and packaging of Cisco misrepresented the product as a wine cooler or other low-alcohol, single-serving drink, when in fact a single bottle of Cisco had the same quantity of alcohol as five one-ounce servings of 80 proof vodka)

XII. **TELEMARKETING, 900 NUMBERS, AND TELECOMMUNICATIONS**

A. Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994, 15 U.S.C.§ 6101: Pursuant to this law, the FTC promulgated and amended the *Telemarketing Sales Rule*, 16 C.F.R. § 310. To protect consumers from deceptive and abusive telemarketing practices, the Rule:

1. Requires telemarketers promptly to disclose to consumers the fact that it is a sales call, the identity of the seller, the nature of the product offered, and if it is a prize promotion, the fact that no purchase is necessary to win, as well as to make certain disclosures before asking consumers for any credit card or bank account information or before they make arrangements for a courier to pick up payment.

2. Contains broad prohibitions against misrepresentations regarding any of the information required to be disclosed and regarding any material aspect of the performance, efficacy, or nature of the goods or services.

3. Prohibits telemarketers from debiting checking account without the consumer’s express, verifiable authorization, and from making misleading statements to induce consumers to pay for goods or services.

4. Bars anyone from giving substantial assistance to a telemarketer when the person knows or consciously avoids knowing that the telemarketer is engaged in conduct that would violate certain provisions of the rule.

5. Prohibits telemarketers from calling before 8 a.m. and after 9 p.m., and from calling consumers who have said they do not want to be called.

6. Bars telemarketing calls that deliver prerecorded messages, unless a consumer previously has agreed to accept such calls from the seller.
7. Provides that violations of the rule may result in civil penalties of up to $11,000. The rule is enforceable by the FTC, and also by the 50 state attorneys general, who can get orders that apply nationwide against fraudulent telemarketers.

After notice and public comment, the FTC amended the Telemarketing Sales Rule on November 18, 2015, to – among other things – ban four payment methods favored by scammers.

B. **Law Enforcement:** The FTC has undertaken a vigorous program of law enforcement against telemarketers who violate the TSR, Section 5, and other provisions. The agency has specifically challenged the role of parties under the “assisting and facilitating” provision of the Telemarketing Sales Rule, 16 C.F.R. § 310.3(b). Representative cases:

- **United States v. Sunkey Publishing,** No. 3:18-CV-01444-HNJ (N.D. Ala. Sept. 6, 2018) (alleging that lead generator violated the Telemarketing Sales Rule and the FTC Act by placing hundreds of thousands of calls to phone numbers on the National Do Not Call Registry and by using URLs like army.com and navyenlist.com to mimic the look of genuine military recruiting sites, using false statements to get consumers’ personal information, and then selling it to for-profit education companies)

- **United States v. InfoCision, Inc.,** No. 5:18-CV-64 (N.D. Ohio Jan. 10, 2018) ($250,000 civil penalty for millions of calls that telemarketer placed on behalf of charitable organizations falsely stating it was not calling to solicit contributions)


- **FTC, Kansas, Minnesota, North Carolina, and Illinois v. Meggie Chapman,** 714 F. 3d 1211 (10th Cir. 2013) (upholding $1.6 million redress for assisting and facilitating scheme that deceived consumers by falsely promising “guaranteed” federal grants)

- **FTC v. INC21.com,** No. 3:10-CV-00022-WHA (N.D. Cal.) (Sept. 30, 2010) (order) ($38 million to settle claims that companies used offshore telemarketers and local exchange telephone companies to place unauthorized charges on telephone bills of thousands of small businesses and consumers)

- **FTC v. Helping Hands of Hope, Inc.,** No. CV080908 PHX-JAT (D. Ariz. Apr. 8, 2010) (stipulated order) ($26 million suspended judgment for telemarketer’s practice of deceiving consumers into buying household items priced substantially higher than retail by falsely promising the proceeds would benefit charities)
• **Operation Tele-PHONEY.** On May 20, 2008, the FTC and 30 international, federal, state, and local agencies announced a 180-case sweep against deceptive telemarketing operations.

C. **Do Not Call:** On December 18, 2002, the FTC amended the TSR to add the National Do Not Call Registry, 16 C.F.R. § 310 (2003). The Registry’s constitutionality was upheld in Mainstream Marketing Services v. FTC, 358 F.3d 1228 (10th Cir. 2004). On September 1, 2009, an amendment to the Rule took effect, banning most robocalls, prerecorded commercial telemarketing calls placed without consumers’ express written consent.

1. The Rule and subsequent amendments requires telemarketers to scrub lists of consumers who do not wish to receive such calls, and impose civil penalties for violations; imposes restrictions on call abandonment; requires telemarketers to transmit Caller ID information; pursuant to the USA PATRIOT Act, requires telemarketers calling to solicit charitable contributions to disclose promptly the name of the organization making the request and that the purpose of the call is to ask for a charitable contribution; bans unauthorized billing and prohibits telemarketers from processing any billing information for payment without the express informed consent of the customer or donor; and bans the use of prerecorded messages except in very narrow circumstances.

2. Representative Do Not Call cases:

   - **United States v. Dish Network,** 309-CV-03073-JES-CHE (June 6, 2017) (permanent injunction) ($280 million civil penalty in federal-state action finding Dish Network violated TSR by initiating, or causing others to initiate, calls to numbers on Do Not Call Registry)

   - **United States v. Feature Films for Families, Inc.** (D. Utah June 2, 2016) (jury verdict) (finding that defendants engaged in unlawful telemarketing, including making more than 117 million calls to consumers in violation of the Telemarketing Sales Rule)

   - **FTC v. Wordsmart Corp.** No 14-CV-2348-AJB-RBB (S.D. Cal. Oct. 9, 2014) (stipulated order) (partially suspended $18.7 million judgment for Do Not Call violations and deceptive claims about product’s ability to improve children’s grades and test scores)

   - **United States v. Versatile Marketing Solutions,** No. 1:14-CV-10612-PBS (D. Mass. Mar. 12, 2014) (stipulated order) (partially suspended $3.4 million penalty for Do Not Call violations by home security company that bought names and numbers from lead generators)

• United States v. Electric Mobility Corp. and Michael J. Flowers, No. 1:11-CV-02218-RMB (D.N.J. Apr. 21, 2011) (stipulated order) ($100,000 civil penalty for using numbers gathered from sweepstakes entry forms to contact numbers on the Do Not Call Registry)


• United States v. DirecTV, Inc., No. 09-02605 PA (FMOx) (C.D. Cal. Apr. 16, 2009) (stipulated judgment) ($2.31 million civil penalty for calling numbers on the Do Not Call Registry and placing or causing an affiliate to place pre-recorded outbound calls, in violation of the Telemarketing Sales Rule)


• United States v. Westgate Resorts, Ltd., No. 6:09-CV104-ORL-19-GLK (M.D. Fla. Jan. 27, 2009) (stipulated judgment) ($900,000 civil penalty for timeshare seller’s calls to numbers on Do Not Call Registry after buying numbers from lead generator that collected information without clearly disclosing that consumers would receive telemarketing calls)

• United States v. All in One Vacation Club, No. 6:09-CV-103-ORL-31DAB (M.D. Fla. Jan. 27, 2009) (stipulated judgment) ($275,000 civil penalty for calls to numbers of the Do Not Call Registry placed after consumers filled out sweepstakes forms that included fine-print “waiver” that defendants claimed gave them the right to call)

• United States v. Scorpio Systems, No. 06-1928 (MLC) (D.N.J. May 6, 2008) (stipulated order) ($530,000 civil penalty for telemarketer’s violation of Do Not Call Rule by using bogus Caller ID information)

• United States v. Bookspan, No. 06 786 (E.D.N.Y. Feb. 23, 2006) (stipulated judgment) ($680,000 civil penalty to settle charges that Book-of-the-Month Club Partnership called over 100,000 consumers on Do Not Call Registry and continued calling customers who specifically asked not to be called)


• United States v. FMFG, Inc., No.: 3:05-CV-00711 (D. Nev. May 27, 2007) (judgment and order) (challenging bed company’s sales calls to consumers on the Do Not Call Registry under the pretext of conducting a sleep survey)

• United States v. DirecTV, Inc., No. SACV05 1211 (C.D. Cal. Dec. 13, 2005) ($5.3 million civil penalty for Do Not Call violations by satellite TV company and companies it hired to do telemarketing)

• United States v. Braglia Marketing Group, No. CV-S-04-1209-DHW-PAL (D. Nev. Feb 15, 2005) (stipulated order) ($3500 civil penalty and suspended judgment of $526,000 for Do Not Call violations)

• United States v. Flagship Resort Development Corp., No. CV-S-04-1209-DHW-PAL (D. Nev. Feb 15, 2005) (stipulated judgments) ($500,000 civil penalty for Do Not Call violations)

3. Representative robocall cases:

• United States v. KFJ Marketing, 2:16-CV-01643 (C.D. Fla. Nov. 8, 2017) (stipulated order) ($155,000 civil penalty against alleging lead generator that placed 1.3 million illegal robocalls to pitch solar panel installation)
• United States v. Lilly Management and Marketing, LLC d/b/a USA Vacation Station, No. 6:16-CV-435-ORL-37-DAB (M.D. Fla. Mar. 17, 2016) (stipulated order) (partially suspended $1.2 million civil penalty for placing millions of illegal robocalls to pitch vacation packages)

• FTC and State AGs v. Caribbean Cruise Line, Inc., 0:15-CV-60423 (S.D. Fla. Mar. 4, 2015) (stipulated order for permanent injunction) (partially suspended judgment of more than $13 million for deceptive “survey” robocalls to illegally pitch cruises)

• FTC v. Worldwide Info Services, Inc., No. 6:14-CV-8-ORL-28DAB (M.D. Fla. Nov. 13, 2014) (permanent injunction) (challenging illegal use of robocalls to pitch deceptive “free” medical alert systems to older consumers)

• The Cuban Exchange, No. 1:12-CV-5890 (E.D.N.Y. Sept. 9, 2014) (default judgment) (challenging robocall operation that impersonated the FTC in an attempt to trick consumers into turning over bank account data and other sensitive information)

• United States v. Skyy Consulting, Inc., also d/b/a CallFire, No. 13-CV-2136 (N.D. Cal. May 14, 2013) (stipulated order) ($75,000 civil penalty for assisted and facilitated clients in placing illegal robocalls via voice-over-Internet broadcasting)


• FTC v. Paul Navestad and Cash Grant Institute, No. 09-CV-6329 (W.D.N.Y. Apr. 2, 2012) (decision and order) ($30 million in civil penalties and $1.1 million disgorgement for illegal robocalls and deceptive government grant claims)


• United States v. Americall Group, No. 1:11-CV-08895 (N.D. Ill. Dec. 16, 2011) (stipulated order) ($500,000 civil penalty for telemarketer’s interference with consumers’ entity-specific Do Not Call requests and transmission of deceptive Caller ID information)

• FTC v. JPM Accelerated Services Inc., No. 09-CV-2021 (M.D. Fla. Dec. 6, 2010) (stipulated judgment) (challenging robocalls falsely promising to reduce consumers’ credit card interest rates)

• United States v. The Talbots, Inc., No. 10-CV-10698 (D. Mass. Apr. 27, 2010), and United States v. SmartReply, Inc., No. CV 10-03087 (C.D. Cal. Apr. 27, 2010) (stipulated judgments) ($161,000 total civil penalties against clothing retailer and telemarketer for robocalls that failed to give consumers proper notice of their right to opt out of receiving telemarketing calls)

• FTC v. Transcontinental Warranty, Inc., No. 09-CV-2927 (N.D. Ill. Sept. 1, 2009) ($24 million suspended judgment for placing millions of deceptive robocalls to sell consumers vehicle service contracts under the guise that they were extensions of original vehicle warranties)

• United States v. The Broadcast Team, No. 6:05-CV-01920-PCF-JGG (M.D. Fla. Feb. 2, 2007) ($1 million civil penalty for telemarketer’s improper use of prerecorded messages, in violation of Do Not Call)

D. Telephone Disclosure and Dispute Resolution Act of 1992, 15 U.S.C. § 5701. Pursuant to this statute, the FTC promulgated the 900 Number Rule, 16 C.F.R. § 308, requiring specific disclosures for 900 numbers, such as the cost of the call and that individuals under 18 must have parental permission to call; and banning advertising directed to children under 12. Representative cases:

• FTC v. 800 Connect, Inc., No. 03-60150 (S.D. Fla. Feb. 3, 2003) (stipulated judgment) ($735,000 redress for unauthorized charges for directory information services after callers misdialed toll-free numbers for companies like FedEx or Sovereign Bank)

• FTC v. Access Resource Services, Inc., No. 02-60226-CIV (S.D. Fla. Nov. 4, 2002) (stipulated judgment) ($500 million in debt forgiveness and $5 million in disgorgement from operators of Miss Cleo psychic lines for violations of Pay-Per-Call Rule)
E. **Joint FTC-FCC Policy Statement on the Advertising of Dial-Around and Other Long-Distance Services to Consumers:** On November 4, 1999, the FTC and FCC co-sponsored a Joint Forum on Advertising and Marketing of Dial-Around and Other Long-Distance Services to Consumers. The agencies issued a joint policy statement on March 1, 2000, offering guidance on the application of truth-in-advertising principles to advertising for long-distance services.

XIII. **INTERNET COMMERCE, COMPUTERS, DEVICES, AND MOBILE MARKETING**


B. Representative cases challenging deceptive practices related to advertising and marketing of computers, devices, software, and related products and services:

- **FTC v. Office Depot, Inc. and Support.com, Inc., No. 9:19-CV-80431 (S.D. Fla. Mar. 27, 2019)** (stipulated order) ($35 million total financial remedy to settle charges that companies tricked customers into spending millions of dollars on computer repair services by deceptively claiming their software had found malware symptoms on consumers’ computers)

- **Lenovo, Inc., C-4636 (Sept. 5, 2017)** (consent order) (alleging that computer manufacturers preloaded advertising software on some laptops that compromised security protections)

- **Network Solutions, LLC, 159 F.T.C. 1859 (2015)** (consent order) (alleging company failed to clearly and conspicuously disclose materials limitations on advertised “30 Day Money Back Guarantee” for web services)

- **Sony Computer Entertainment America LLC, 159 F.T.C. 1128 (2014)** (consent order) (challenging misrepresentations about capabilities of PS Vita handheld gaming device)

- **MPHJ Technology Investments, 159 F.T.C. 1004 (2014)** (consent order) (challenging deceptive claims by patent assertion entity)
• FTC v. PCCare247, No. 12CIV7189 (May 17, 2013), and FTC v. Marczak, No. 12CIV7192 (May 17, 2013) (stipulated judgments); FTC v. Pecon Software, No. 12CIV7186; FTC v. Zeal IT Pvt Solutions, No. 12CIV7188; FTC v. Lakshmi Infosoul Services, No. 12CIV7191; and FTC v. Finmaestros, No. 12CIV7195 (S.D.N.Y. July 24, 2014) (default judgments and permanent injunctions) (challenging tech support scams in which telemarketers masqueraded as computer companies and offered to remotely “fix” problems for a fee)

• FTC v. Innovative Marketing, Inc., No. RDB-08CV3233 (D. Md. Oct. 2, 2012) (stipulated order) ($163 million judgment and $8.2 million redress related to scareware scheme in which company falsely claimed scans had detected viruses, spyware, and illegal pornography on consumers’ computers and then sold them products purported to fix the problem). See also FTC v. Ross, 743 F.3d 886 (4th Cir. 2014) (upholding personal liability of more than $163 million for role in scareware scheme).

• America Online, Inc., 137 F.T.C. 117 (2004) (consent order) (challenging company’s practice of continuing to bill internet service subscribers after they asked to cancel their subscriptions)

• Bonzi Software, Inc., C-4126 (consent order) (Oct. 13, 2004) (challenging deceptive representations that InternetALERT software significantly reduced the risk of Internet attacks and unauthorized access into computers)


• FTC v. Network Solutions, Inc., Civ. No. 03 1907 (D.D.C. Sept. 12, 2003) (stipulated order) (alleging that company that provides domain name registration services to consumers unlawfully tricked consumers into transferring their Internet domain name registrations to the company)

• Palm, Inc., 133 F.T.C. 715 (2002) (consent order) (challenging ads for personal digital assistants that represented that products came with built-in wireless access and e-mail while revealing in a four-point disclosure “Application software and hardware add-ons may be optional and sold separately. Applications may not be available on all Palm handhelds”)

• FTC v. Netpliance, Inc., No. A-01-CA 420SS (W.D. Tex. July 2, 2001) (consent decree) (challenging deceptive claims about performance capabilities of internet access device, requiring clear and conspicuous disclosure of additional fees and long-distance charges, imposing $100,000 civil penalty for Mail Order Rule violations, and ordering company to refund amounts illegally charged to consumers’ credit cards)
• Gateway Corp., 131 F.T.C. 1208 (2001) (consent order) (challenging deceptive ads for free or flat-fee internet services that disclosed in a footnote that many consumers would incur additional telephone charges)

• Juno Online Services, Inc., 131 F.T.C. 1249 (2001) (consent order) (challenging deceptive representations about cost to consumers of company’s “free” and fee-based dial-up Internet access services, including failure to honor cancellations during purported free trial period)

• Hewlett-Packard Co., 131 F.T.C. 1086 (2001), and Microsoft Corp., 131 F.T.C. 1113 (2001) (consent orders) (challenging deceptive claims that personal digital assistance came with built-in wireless access and email while revealing in fine print “Modem required. Sold separately.”)

• Sharp Electronics Corp., 131 F.T.C. 560 (2001) (consent order) (challenging deceptive upgradability claims for handheld personal computers and requiring company to provide low-cost upgrade)

• WebTV Networks, Inc., C-3988 (Dec. 12, 2000) (consent order) (challenging deceptive claims about capabilities of WebTV and requiring clear disclosure of long distance charges that some consumers incur, reimbursement to subscribers for phone charges)

• BUY.COM, Inc., C-3978, Value America, Inc., C-3976, and Office Depot, Inc., C-3977 (Sept. 8, 2000) (consent orders) (challenging promotions for low-cost computers that failed to disclose restrictions on the offers, including that consumers had to sign a contract for three years of service from ISP)

• Tiger Direct, Inc., 128 F.T.C. 517 (1999) (consent order) (alleging that mail order seller of computers misrepresented terms of warranties)

• Apple Computer, Inc., 128 F.T.C. 190 (1999) (consent order) (challenging practice of charging computer purchasers for technical support despite advertising that services were free)

• Dell Computer Corp., 128 F.T.C. 151 (1999) (consent order) (challenging under Section 5 and the Consumer Leasing Act television, print and Internet ads for consumer leases that placed material cost information in inconspicuous fine print)

• Micron Electronics, Inc., 128 F.T.C. 137 (1999) (consent order) (alleging Section 5 and Consumer Leasing Act violations for TV, print and Internet ads for consumer leases that placed material cost information in fine print)

• Gateway 2000, Inc., 126 F.T.C. 888 (1998) (consent order) ($290,000 redress for deceptive claims regarding company’s money-back guarantee policy and on-site warranty services)
• America Online, Inc., 125 F.T.C. 403 (1998); Prodigy Services Corp., 125 F.T.C. 430 (1998); and CompuServe, Inc., 125 F.T.C. 451 (1998) (consent orders) (challenging deceptive representations about terms and conditions of free trial offers for online services)

• Apple Computer, Inc., 124 F.T.C. 184 (1997) (consent order) (challenging claims that PCs were presently upgradeable to PowerPC technology)

• Hayes Microcomputer Products, Inc., 118 F.T.C. 1159 (1994) (consent order) (challenging claims that use of competitors’ modems creates a substantial risk of data transmission failure)

C. Representative cases involving online advertising and marketing:

• FTC v. iBackPack of Texas, LLC, No. 3:19-CV-00160 (S.D. Tex. May 6, 2019) (complaint filed) (alleging that defendant made deceptive claims on crowdfunding platforms about raising money for the development of a high-tech backpack, while using the funds for personal expenses)

• FTC v. Reservation Counter, No. 2:17-cv-01304-RJS D. Utah Dec. 22, 2017) (alleging third-party hotel room resellers misled consumers to believe they were reserving rooms directly with the hotel, and failed to adequately tell consumers that credit cards would be charged immediately)

• FTC v. iWorks, Inc., No. 2:10-CV-02203 (D. Nev. Aug. 29, 2016) (stipulated order) (partially suspended $281 million judgment to settle charges that defendants illegally lured consumers into “trial” memberships for bogus government-grant and money-making promotions, and charged them monthly fees without authorization)

• FTC v. Erik Chevalier d/b/a The Forking Path, No. 3:15-CV-1029-AC (D. Or. June 11, 2015) (stipulated order) (in FTC’s first crowdfunding case, alleging that project creator raised money through Kickstarter, but used funds for personal expenses)

• FTC and State of Connecticut v. TicketNetwork, Inc., Ryadd, Inc., and SecureBoxOffice, LLC, No. 3:14-CV-1046 (D. Conn. July 23, 2014) (stipulated order) (alleging ads and websites misled consumers into thinking they were buying tickets at face value from event venue when they were often paying higher prices from resellers’ sites)

• FTC v. Swish Marketing, Inc., No. C09-03814 (N.D. Cal. July 21, 2011) (final judgment) ($4.8 million redress for misleading practice of inducing payday loan applicants into paying for an unrelated debit card through the use of a deceptive pre-checked box on an online loan application)
- **FTC v. Javian Karnani and Balls of Kryptonite, LLC, No. 09-CV-5276 (C.D. Cal. June 9, 2011) (stipulated order) ($500,000 suspended judgment for U.S. company’s practices of deceiving consumers into thinking they were buying electronic from a U.K. company and misleading them about warranty rights and right to return or exchange goods under U.K. law)

- **FTC v. Google Money Tree, No. 09-CV-01112 (D. Nev. Oct. 10, 2010) (stipulated judgment against certain defendants) ($3.5 million to settle charges that online marketers falsely claimed ties to Google, sold bogus work-at-home schemes, and charged hidden monthly fees)

- **FTC v. Ticketmaster L.L.C. and TicketsNow.com, Inc., No. 10-CV-01093 (N.D. Ill. Feb. 18, 2010) (stipulated judgment) (alleging that Ticketmaster and affiliates used deceptive bait-and-switch tactics by telling customers attempting to get tickets for Bruce Springsteen concerts that no tickets were available and then steering them to TicketsNow, where tickets were sold at substantially more than face value)

- **FTC v. Pricewert LLC, No. 09-CV-2407(N.D. Cal. May 19, 2010) (order) (shutting down ISP that recruited, hosted, and actively participated in the distribution of spyware, viruses, spam, child pornography, and other harmful electronic content)

- **FTC v. Digital Enterprises, Inc. d/b/a movieland.com, No: CV06-4923 CAS (AJWx) (C.D. Cal. Sept. 13, 2007) (stipulated order) ($500,000 redress for company’s practice of falsely claiming that consumers owed money for downloading movies and then barraging consumers with pop-ups demanding payment)

- **FTC v. J.K. Publications, Inc., No. CV-99-0044 ABC (AJWx) (C.D. Cal. Sept. 4, 2000) ($37.5 million judgment against company that bought lists of credit card numbers from California bank and fraudulently charged consumers – many of whom didn’t own computers – for visits to adult websites they had not made)

- **FTC and New York v. Crescent Publishing Group, No. 00- CV-6315 (S.D.N.Y. Nov. 5, 2001) (stipulated judgment) ($30 million redress against operators of adult websites for advertising free tour of websites while billing consumers’ credit cards for unauthorized monthly fees)

- **FTC v. Rennert, No. CV-S-00-0861-JBR (D. Nev. July 6, 2000) (stipulated order) (challenging deceptive claims for a purported online pharmacy)

- **FTC v. Lane Labs-USA, Inc., No. 00 CV 3174 (D.N.J. June 28, 2000) (stipulated order) (challenging deceptive use of embedded terms like “non-toxic cancer therapy” and “cancer treatment” in metatags for site featuring unsubstantiated claims for BeneFin, a shark cartilage product). See also FTC v. Lane Labs-USA, Inc., 624 F.3d 575 (3d Cir. 2010).
• Natural Heritage Enterprises, C-3941 (May 23, 2000) (consent order) (challenging deceptive use of metatags, mouseover text, and hyperlinks in ads representing that essiac tea could treat cancer, diabetes, and HIV/AIDS)


• FTC v. iMall, Inc., (C.D. Cal. Apr. 12, 1999) (stipulated judgment) ($4 million redress and imposing lifetime ban on participation in Internet-related business venture for promoters of deceptive Internet business opportunities)

• FTC v. Audiotex Connection, C97-0726 (E.D.N.Y. Nov. 4, 1997) ($2.7 million credit for unauthorized charges stemming from modem hijacking scheme in which defendants switched consumers from local ISP to international telephone lines)

• FTC v. Fortuna Alliance, LLC, No. C96-0799 (W.D. Wash. Oct. 30, 1997) (contempt action for failure to pay $2 million redress pursuant to settlement stemming from Internet pyramid scheme)

• FTC v. Hare, No. 98-8194-CIV (S.D. Fla. Sept. 8, 1998) (stipulated permanent injunction) (challenging practices of marketer who advertised nonexistent merchandise through online auction houses and imposing lifetime ban on online commerce)

• FTC v. Corzine, No. CIV-S-94-1446 (E.D. Cal. Sept. 12, 1994) (stipulated permanent injunction) (first FTC law enforcement action involving deceptive claims conveyed via the Internet)

D. Representative cases concerning mobile apps, mobile marketing, mobile bills, smartphones, etc.:

• FTC and AT&T Mobility LLC, 883 F.3d 848 (9th Cir. 2018) (en banc) (ruling that FTC Act’s common carrier exemption is activity-based and thus trial court correctly denied defendant’s motion to dismiss FTC’s deceptive advertising action)

• FTC and New Jersey v. Equiliv Investments, (D.N.J. June 29, 2015) (stipulated order) (challenged Prized reward app’s false claim to be free of malware when app loaded malicious software on consumers’ phones to mine virtual currency)

• FTC v. New Consumer Solutions LLC, No. 1:15-cv-01614 (N.D. Ill. Feb 25, 2015) (stipulated order) (challenging deceptive claim that Mole Detector app could detect symptoms of melanoma)
• Health Discovery Corporation, C-4516 (consent order) (Feb. 25, 2015) (challenging deceptive claim that MelApp mobile app could detect symptoms of melanoma)

• FTC v. Straight Talk Wireless (TracFone Wireless, Inc.), No. 3:15-cv-00392 (N.D. Cal. Jan. 25, 2015) ($40 million redress for deceptive “unlimited” data claims while company throttled customers who used certain amounts of data)


• FTC v. AT&T Mobility, LLC, No. 1:14-CV-3227-HLM (N.D. Ga. Oct. 8, 2014) (stipulated order) ($80 million redress to settle charges related to mobile cramming, unlawfully billing consumers for unauthorized third-party charges)

• FTC v. CPATank, Inc., No. 1:14-CV-01239 (N.D. Ill. Feb. 28, 2014) (stipulated judgment) ($200,000 judgment for sending unwanted text message spam that deceptively advertised “free” gift card promotion)

• FTC v. SubscriberBASE Holdings, Inc., No. 1:13-CV-01527 (N.D. Ill. Feb. 18, 2014) (stipulated order) ($2.5 million redress and orders against 12 defendants for sending unwanted text message spam that deceptively advertised “free” gift cards)

• Apple, Inc., C-4444 (Jan. 15, 2014) (consent order) (minimum of $32.5 million to settle allegations that company charged for children’s in-app purchases without account holders’ authorization)


• FTC v. Jesta Digital, LLC, No. 1:13-CV-01272 (D.D.C. Aug. 21, 2013) ($1.2 million to settle charges that company Jesta crammed unwanted charges onto consumers’ cell phone bills)

• Filiquarian Publishing, LLC, C-4401 (consent order) (Jan. 10, 2013) (alleging marketer of mobile app that offered tools for screening employees violated Fair Credit Reporting Act)

• FTC v. Flora, No. SACV11-00299-AG-(JEMx) (C.D. Cal. Sept. 29, 2011) (stipulated permanent injunction) (challenging marketer’s practice of sending out 5.5 million unsolicited text messages pitching deceptive mortgage modification site)

• Dermapps, Koby Brown, and Gregory Pearson, 152 F.T.C. 466 (2011), and Andrew N. Finkel, 152 F.T.C. 490 (2011) (consent orders) ($15,000 total redress from marketers of two mobile apps that claimed to emit lights to treat acne)


E. Spam: The FTC enforces the CAN-SPAM Rule, 16 C.F.R. § 316, promulgated pursuant to the CAN-SPAM Act of 2003, and has challenged practices as violations of Section 5. On September 16, 2004, the FTC published A CAN-SPAM Informant Reward System, a Report to Congress considering whether a reward system could be designed to improve the effectiveness of CAN-SPAM enforcement. On October 11, 2004, 19 agencies from 15 countries announced the Action Plan on Spam Enforcement. The FTC and National Institute of Standards and Technology hosted an Email Authentication Summit on November 9, 2004, to explore technology that could reduce spam. According to a November 28, 2005, FTC staff report, Email Address Harvesting and the Effectiveness of Anti-Spam Filters, ISP filters block as much as 95% of unsolicited e-mail. On April 23, 2007, the FTC convened a workshop, Proof Positive: New Directions in ID Authentication, to explore methods to reduce identity theft through authentication. Representative spam cases:

• FTC v. Flora, No. SACV11-00299-AG-(JEMx) (C.D. Cal. Sept. 29, 2011) (stipulated permanent injunction) (challenging marketer’s practice of sending out 5.5 million text messages and illegal spam pitching deceptive mortgage modification site)

• FTC v. Atkinson, No. 08CV5666 (N.D. Ill. Nov. 30, 2009) ($15 million default judgment for role in international operation selling sex pills, prescription drugs, and diet pills via spam sent with false headers and without an opt-out link or physical postal address)
• **FTC v. Spear Systems, Inc., No. 07C-5597 (N.D. Ill. July 2, 2009 and July 15, 2008)** (stipulated order) (in first US SAFEWEB Act case, $3.7 million judgment against some defendants and $29,000 disgorgement from others who initiating emails that contained false “from” addresses and deceptive subject lines, and failed to provide opt-out link and postal address)

• **United States v. Cyberheat, Inc., No. CIV 05-0457 (D. Ariz. Mar. 4, 2008)** (permanent injunction) ($413,000 civil penalty for adult website’s violations of CAN-SPAM Act and Section 5 for paying affiliates to drive traffic to its site through the use of illegal email)

• **United States v. Member Source Media, Inc., No.: CV-08 0642 (N.D. Cal. Jan. 30, 2008)** (stipulated judgment) ($200,000 civil penalty for deceptive claim that recipient of spam email had won free prizes)

• **FTC v. Sili Neutraceuticals, LLC, No. 07C 4541 (N.D. Ill. Feb. 4, 2008)** (permanent injunction) ($2.5 million for using illegal email to disseminate deceptive claims for hoodia weight-loss products and human growth hormone anti-aging products)

• **FTC v. Yesmail, Inc., No. 06-6611 (N.D. Cal. Nov. 6, 2006)** ($50,717 civil penalty for violation of CAN-SPAM Act when company’s anti-spam software filtered out certain “reply to” unsubscribe requests from recipients, which resulted in company’s failure to honor unsubscribe requests)

• **FTC v. Cleverlink Trading Limited, No. 05C 2889 (N.D. Ill. Sept. 14, 2006)** (stipulated judgment) ($400,000 disgorgement for sending “date lonely wives” spam that contained misleading headers and subject lines and didn’t include required opt-out mechanism, valid address, and disclosure that message was sexually explicit, in violation of the CAN-SPAM Act)

• **United States v. Kodak Imaging Network, Inc., No. C-06-3117 (N.D. Cal. May 11, 2006)** ($26,331 civil penalty for sending commercial email that failed to contain opt-out mechanism, failed to disclose that consumers have the right to opt out of receiving further mailings, and failed to include a valid physical postal address, in violation of the CAN-SPAM Act)

• **United States v. Jumpstart Technologies, No. C-06-2079 (MHP) (N.D. Cal. Mar. 23, 2006)** ($900,000 civil penalty for disguising commercial e-mails as personal messages and for misleading consumers about the terms and conditions of its FreeFlixTix promotion, in violation of the CAN-SPAM Act)

• **FTC v. Matthew Olson and Jennifer Leroy, No.C05-1979 (JCC) (W.D. Wash. Apr. 17, 2006)** (stipulated judgment); **FTC v. Brian McMullen, No. 05C 6911 (N.D. Ill. Sept. 14, 2006)** (stipulated order); and **FTC v. Zachary Kinion, No. 05C 6737 (N.D. Ill. Sept. 14, 2006)** (stipulated order) (charging that defendants hijacked consumers’ computers and used them to send spam with false “from” information and misleading subject lines)
• **FTC v. Global Web Promotions Pty Ltd.,** No.: 04C 3022 (N.D. Ill. Sept. 20, 2005) ($2.2 million redress for deceptive claims for purported human growth hormone product sold via spam)

• **FTC v. Global Net Solutions, Inc.,** No. CV-S-05-0002-PMP-LRL (D. Nev. Aug. 5, 2005) (permanent injunction) ($621,000 penalty and imposition of monitoring program for violating CAN-SPAM Act and FTC’s Adult Labeling Rule by failing to label sexually explicit content; using false header and subject information; failing to include required opt-out; failing to identify email as advertising; and failing to provide a valid postal address)

• **FTC v. Phoenix Avatar, LLC,** No. 04C 2897 (N.D. Ill. Mar. 31, 2005) (stipulated judgment) (in FTC’s first CAN-SPAM case, $230,000 suspended judgment for illegal spam advertising bogus diet patches)

• **FTC v. GM Funding, Inc.,** No. SACV 02-1026 DOC (MLGx) (C.D. Calif. Nov. 20, 2003) (stipulated judgment) (challenging spoofing – the use of forged e-mail headers – as a violation of Section 5)


• **Operation Netforce:** On April 2, 2002, the FTC, 8 state law enforcers and 4 Canadian agencies brought 63 actions targeting deceptive spam and online fraud. The agencies sent more than 500 warning letters to senders of deceptive spam. Partners also sent letters to 75 spammers warning them that deceptive “unsubscribe” or “remove me” claims are illegal.

F. **Spyware and Adware.** On April 19, 2004, the FTC convened a public workshop to consider the consumer protection and privacy implications of the use of spyware, adware, and related technologies. On March 7, 2005, the FTC issued a staff report, *Monitoring Software on Your PC: Spyware, Adware, and Other Software,* summarizing the issues and drawing some conclusions from information presented at the workshop. Representative cases:

• **FTC v. CyberSpy Software, LLC,** No. 08-CV-01872 (M.D. Fla. June 2, 2010) (stipulated order) (barring sellers of the RemoteSpy keylogger from advertising that the spyware can be disguised and installed on someone else’s computer without the owner’s knowledge)

• **FTC v. Pricewert LLC,** No. 09-CV-2407(N.D. Cal. May 19, 2010) (order) (shutting down ISP that recruited, hosted, and participated in distribution of spyware, viruses, spam, child pornography, and other harmful content)
• **DirectRevenue LLC**, 143 F.T.C. 732 (2007) (consent order) ($1.5 million disgorgement for company’s unfair and deceptive practice of downloading adware onto consumers’ computers without clear and conspicuous disclosure and obstructing its removal)

• **Sony BMG Music Entertainment**, 143 F.T.C. 777 (2007) (consent order) (challenging company’s practice of selling CDs without telling consumers they contained software limiting devices on which the music could be played, restricted number of copies that could be made, and containing technology monitoring consumers’ listening habits to send them marketing messages)

• **Zango, Inc.**, 143 F.T.C. 313 (2006) (consent order) ($3 million disgorgement to settle charges that company formerly known as 180solutions, Inc., used unfair and deceptive methods to download adware and obstruct consumers from removing it)

• **FTC v. ERG Ventures**, No. CV-00-578-LRH-VPC (D. Nev. Oct. 1, 2007) (stipulated order) ($330,000 redress for downloading spyware programs onto computers without consumers’ consent, degrading computers’ performance, tracking Internet activity, and sending disruptive ads)

• **FTC v. Enternet Media**, No. CV05-7777CAS (AJWx) (C.D. Cal. Sept. 6, 2006) (stipulated order) ($2 million redress for practice of installing spyware and adware on consumers’ computers by promising free lyric files, browser upgrades, and ring tones and affiliates’ promise of free music)

• **FTC v. Seismic Entertainment Productions, Inc.**, No. 04-CV-0377-JD (D.N.H. May 4, 2006) (stipulated order) ($4 million redress to settle charges that spyware company used a purported anti-spyware program to hijack computers, change their settings, barrage them with pop-up ads, and install adware and other software programs that monitor consumers’ web surfing)


• **Advertising.com, Inc.**, C-4147 (consent order) (Sept. 16, 2005) (challenging company’s distribution of free software advertised to protect consumers against hacker attacks, without clearly disclosing that adware was bundled with software)

• **FTC v. Maxtheater, Inc., No. 05-CV-0069-LRS (E.D. Wash. Dec. 5, 2005)** (stipulated order) ($76,000 redress for practice of offering spyware detection scans that falsely detected spyware in an effort to sell consumers ineffective anti-spyware products)

**G. Peer-to-Peer File Sharing Technology.** On December 15-16, 2004, the FTC convened a public workshop to explore consumer protection and competition issues associated with the distribution and use of peer-to-peer (P2P) file-sharing and followed up with a June 23, 2005, staff report. Representative cases:

• **Franklin’s Budget Car Sales, Inc., d/b/a Franklin Toyota/Scion, C-4371 (June 7, 2012)** (alleging that P2P software on company’s network put sensitive personal information at risk)

• **EPN, Inc., d/b/a Checknet, Inc., C-4370 (June 7, 2012)** (alleging that P2P software on company’s network put sensitive personal information at risk)

• **FTC v. Frostwire LLC, No. 1:11-CV-23643 (S.D. Fla. Oct. 11, 2011)** (stipulated order) (alleging that P2P file-sharing app developer’s product caused consumers to unwittingly expose sensitive information stored on mobile devices to disclosure and misled users about which downloaded files would be shared)

• **FTC v. MP3downloadcity.com, No. CV-05-7013 CAS (FMOx) (C.D. Cal. May 25, 2006)** (stipulated judgment) ($15,000 redress for deceptive claims that service would allow users of peer-to-peer file-sharing programs to transfer copyrighted materials without violating the law)

**XIV. CONSUMER PRIVACY AND DATA SECURITY**


B. **PrivacyCon.** On January 14, 2016, the FTC convened PrivacyCon, a conference of white-hat researchers, academics, industry representatives, consumer advocates, and law enforcers to discuss consumer privacy and data security. The FTC hosted the second PrivacyCon on January 12, 2017, and announced the third event for February 28, 2017.

C. **Behavioral Advertising, Online Profiling, and Tracking.** On March 13, 2001,

D. **Health Privacy.** On August 17, 2009, the FTC issued the Health Breach Notification Rule, 16 C.F.R. § 318, requiring companies that provide online repositories that people can use to keep track of their health information and related businesses to notify consumers when the security of their health information has been breached.

E. **Internet of Things.** On November 19, 2013, the FTC held a workshop to address consumer privacy and security ramifications of increased connectivity of household devices, issued a report on January 27, 2015, *The Internet of Things: Privacy and Security in a Connected World*, and has taken law enforcement action to challenge practices that allegedly violate the FTC Act.

F. **Mobile Privacy.** On February 1, 2013, the FTC issued a staff report, *Mobile Privacy Disclosures: Building Trust through Transparency*.

G. **Activities of data brokers.** On December 18, 2012, the FTC announced a study to examine the collection and use of consumer data by data brokers, including orders to nine companies for information on industry practices. On May 7, 2013, FTC staff sent letters to ten data brokers warning that their practices could violate the FCRA after a test-shopping operation indicated the companies were willing to sell consumer information without honoring FCRA requirements. The FTC issued a report, *Data Brokers: A Call for Transparency and Accountability*, on May 27, 2014, recommending that Congress consider legislation to make data broker practices more visible to consumers and to give consumers greater control over the personal information about them collected and shared by data brokers. The FTC sponsored a workshop, *Big Data: A Tool for Inclusion or Exclusion?*, to explore the use of big data and its impact on consumers, including low-income and underserved consumers, and followed up with a report on January 6, 2016.


I. **RFID Technology.** On June 24, 2004, the FTC convened a workshop to explore the consumer implications of radio frequency identification technology and followed up with a report, *Radio Frequency Identification: Applications and Implications for Consumers*. On September 23, 2008, the FTC sponsored an international workshop on the emerging applications of RFID technology.
J. *Privacy Online: Fair Information Practices in the Electronic Marketplace.* In May 2000, the FTC issued a third Report to Congress about online privacy, announcing the results of a survey showing that only 20% of the busiest commercial sites implement all four fair information practices. The FTC recommended that Congress enact legislation to ensure a minimum level of privacy protection for consumers and to establish basic standards of practice for the collection of information online.

K. *Report to Congress on Privacy Online:* On June 4, 1998, the FTC reported the results of privacy policies of more than 1400 websites, raised concerns about adequacy of self-regulatory efforts, and called for legislation to address concerns about children’s privacy online. The Report identified four core principles of fair information practices: Notice, Choice, Access, and Security.

L. Representative privacy and data security cases:

- **James V. Grago, Jr., C-4678 (Apr. 24, 2019) (consent order)** (alleging operators of online rewards site used inadequate security that allowed hackers to gain access to consumers’ sensitive information through company’s network)

- **Uber Technologies, Inc., C-4662 (Oct. 26, 2018) (consent order)** (alleging that ride service violated Section 5 by failing to monitor employee access to consumers’ personal information and by failing to reasonably secure sensitive consumer data stored in the cloud). See also Uber Technologies, Inc., File No. 152-3054 (proposed consent order issued for public comment Apr. 12, 2018) (withdrawing proposed settlement and issuing revised proposed settlement based on company’s alleged failure to disclose additional data breach that occurred during the pendency of FTC’s initial investigation)

- **ReadyTech Corp., C-4659 (consent order published for public comment July 2, 2018)** (alleging that company falsely claimed participation in EU-US Privacy Shield Framework)

- **LabMD, Inc. v. FTC, 894 F.3d 1221 (11th Cir. 2018)** (vacating Commission ruling in data security action)

- **BLU Products, C-4657 (Apr. 30, 2018) (consent order)** (alleging mobile phone maker allowed a China-based service provider to collect personal information about consumers without their knowledge or consent despite promises that data would be secure and private)

- **Tru Communication, Inc., C-4628; Md7, LLC, C-4629; and Decusoft, LLC, C-4630 (Sept. 8, 2017) (consent orders)** (alleging in separate complaints that companies falsely claimed participation in EU-US Privacy Shield Framework)
• **Lenovo, Inc., C-4636 (Sept. 5, 2017)** (consent order) (alleging that computer manufacturers preloaded advertising software on some laptops that compromised security protections)

• **TaxSlayer, LLC., C-4626 (Aug. 29, 2017)** (consent order) (alleging that online tax preparation company violated Gramm-Leach-Bliley Act’s Privacy Rule and Safeguards Rule)

• **FTC v. VIZIO, Inc., No. 2:17-CV-00758 (D.N.J. Feb. 6, 2017)** (stipulated order) ($2.2 million to settle FTC and New Jersey charges that manufacturer installed software to collect viewing data on 11 million consumers’ televisions without consumers’ knowledge or consent)

• **FTC v. Upromise, Inc., No. 1:17-CV-10442 (D. Mass. Mar. 17, 2017)** ($500,000 civil penalty for membership reward service’s violation of 2012 FTC order requiring company to make disclosures about its data collection and use and to obtain third-party assessments of its data collection toolbar.

• **Turn Inc., C-4612 (Dec. 20, 2016)** (consent order) (alleging that company deceived consumers by tracking them online and through their mobile apps, even after consumers opted out of tracking)

• **FTC v. Ashley Madison, No. 1:16-CV-02438 (D.D.C. Dec. 14, 2016)** (partially suspended $8.75 million judgment to settle FTC and state charges stemming from data breach that exposed 36 million users’ profile information)

• **United States v. InMobi Pte. Ltd., No. 3:16-CV-03474 (N.D. Cal. June 22, 2016)** (stipulated order) ($950,000 civil penalty for deceptively tracking the locations of hundreds of millions of consumers – including children – without consent, in violation of the FTC Act and COPPA)

• **Practice Fusion, Inc., C-4591 (June 8, 2016)** (consent order) (alleging that company deceived consumers about privacy of doctor reviews and inadequately disclosed that patient survey responses would be posted on a public website)

• **Very Incognito Technologies, C-4580 (May 4, 2016)** (consent order) (challenging company’s false claim that it was in compliance with Asia-Pacific Economic Cooperation Cross-Border Privacy Rules)

• **ASUSTeK Computer Inc., C-4587 (Feb. 26, 2016)** (consent order) (challenging security flaws in routers and insecure “cloud” services that rendered company’s claims and practices deceptive and unfair)
• FTC v. LeapLab, LLC, No. 2:14-CV-02750-NVW (D. Ariz. Feb. 18, 2016) (stipulated order) (suspended $5.7 million judgment and unsuspended $4.1 million default judgment for data brokers’ sale of consumers’ personal information to scammers who debited millions from their accounts)

• FTC v. LifeLock, Inc., No. 2:10-CV-00530-MHM (D. Ariz. Jan. 5, 2016) (amended order) ($100 million to settle contempt charges that LifeLock violated terms of 2010 court order requiring company to secure consumers’ personal information and prohibiting deceptive advertising)

• Henry Schein Practice Solutions, Inc., C-4575 (consent order) ($250,000 to settle charges that marketers of dental office management software falsely advertised level of encryption it provided to protect patient data)

• Oracle Corporation, C-4571 (Dec. 29, 2015) (consent order) (challenging deceptive claims about security updates to Java SE)

• FTC v. Wyndham Worldwide Corporation, 799 F.3d 236 (3d Cir. 2015) (upholding FTC’s jurisdiction to challenge certain security practices as unfair or deceptive, in violation of the FTC Act). See also FTC v. Wyndham Worldwide Corporation, No. 2:13-CV-01887-ES-JAD (D.N.J. Dec. 9, 2015) (settling charges that company’s practices unfairly exposed consumers’ payment card information to hackers in three separate breaches)

• Nomi Technologies, Inc., C-4538 (Apr. 23, 2015) (consent order) (alleging that retail tracking firm misled consumers about opt-out choices)

• Jerk.com, D-9361 (Mar. 25, 2015) (Commission Opinion) (ruling that company falsely stated that content had been created by other users when most had been harvested from Facebook and that buying a membership would allow them to change “Jerk” profile)

• Craig Brittain, C-4564 (Jan. 29, 2015) (consent order) (challenging “revenge porn” website operator’s unfair and deceptive practices and false claims related to takedown services)

• TRUSTe, 159 F.T.C. 970 (2014) (consent order) (challenging deceptive claims by privacy certification about its recertification practices and that it is a non-profit)

• Snapchat, Inc., C-4501 (May 14, 2014) (consent order) (challenging misleading claims about app’s ability to delete messages permanently, amount of personal data app collected, and security measures taken to protect that data from unauthorized disclosure)

• FTC v. Infotrack Information Services, No. 1:14-CV-02054 (N.D. Ill. Apr. 9, 2014) (consent order) ($1 million civil penalty for FCRA violations by data broker for providing reports to users without taking reasonable steps to make sure they were accurate, and without making sure users had permissible reason)

• FTC v. Instant Checkmate, No. 3:14-CV-00675-H-JMA (S.D. Cal. Apr. 9, 2014) (consent order) ($525,000 FCRA civil penalty for data broker’s providing reports to users without taking reasonable steps to make sure they were accurate, and without making sure users had permissible reason)

• Fandango, LLC, C-4481 (Mar. 28, 2014) (consent order) (alleging that movie ticket company misrepresented the security of its mobile app and failed to secure the transmission of personal information)

• Credit Karma, Inc., C-4480 (Mar. 28, 2014) (consent order) (alleging that credit information company misrepresented the security of its mobile app and failed to secure the transmission of personal information)


• GMR Transcription Services, Inc., C-4482 (Jan. 31, 2014) (consent order) (alleging that inadequate data security measures of medical transcription company unfairly exposed consumers’ personal medical information)

• Accretive Health, Inc., C-4432 (consent order) (Dec. 31, 2013) (alleging that inadequate data security measures of medical billing services unfairly exposed sensitive consumer data to risk of theft or misuse)

• Goldenshores Technologies, LLC, C-4446 (Dec. 5, 2013) (consent order) (alleging that flashlight app developer deceived consumers about how their geolocation information would be shared with advertising networks and other third parties)
• Aaron’s, Inc., C-4442 (Oct. 22, 2013) (consent order) (challenging rent-to-own franchisor’s role in using undisclosed webcams and location tracking software to monitor users of rented computers)

• TRENDnet, Inc., C-4426 (Sept. 4, 2013) (consent order) (alleging that the lax security practices of a marketer of video cameras designed to allow consumers to monitor their homes remotely resulted in unauthorized access to consumers’ video feeds)

• HTC America, Inc., 155 F.T.C. 1617 (2013) (consent order) (alleging that mobile device manufacturer failed to take reasonable steps to secure smartphones when it introduced security flaws that placed sensitive consumer information at risk)

• United States v. Path, Inc., No. C-13-0448 (N.D. Cal. Feb. 1, 2013) (alleging that social networking app made deceptive privacy claims and ordering $800,000 civil penalty for violations of the Children’s Online Privacy Protection Rule)

• CBR Systems, Inc., 155 F.T.C. 841 (2013) (consent order) (alleging that cord blood company’s inadequate security practices contributed to a breach that exposed Social Security, credit, and debit card numbers of nearly 300,000 consumers)

• Filiquarian Publishing, LLC, 155 F.T.C. 859 (2013) (consent order) (alleging that marketer of mobile app that offered tools for screening prospective employees violated the Fair Credit Reporting Act)

• Epic Marketplace, Inc., and Epic Media Group, LLC, C-4389 (Dec. 5, 2012) (consent order) (alleging that online advertising company used history sniffing to illegally gather data about consumers)


• **Compete, Inc.**, D-4384 (Oct. 22, 2012) (consent order) (challenging web analytics company’s failure to honor privacy promises and use of tracking software that gathered personal data without disclosing the extent of what it was collecting)

• **Google Inc.**, No. 5:12-CV-04177-HRL (N.D. Cal. Aug. 9, 2012) (stipulated order) ($22.5 million civil penalty to settle charges that company violated 2011 FTC order by misrepresenting privacy assurances to users of Apple’s Safari browser)

• **Franklin’s Budget Car Sales, Inc., d/b/a Franklin Toyota/Scion**, C-4371 (June 7, 2012) (alleging that P2P software on company’s network put sensitive personal information at risk)

• **EPN, Inc., d/b/a Checknet, Inc.**, C-4370 (June 7, 2012) (alleging that P2P software on company’s network put sensitive personal data at risk)

• **Myspace LLC**, C-4369 (May 8, 2012) (consent order) (alleging social networking site misled users about sharing personal data with advertisers, in violation of statements made in the company’s privacy policy)

• **Upromise, Inc.**, C-4351 (Jan. 5, 2012) (consent order) (alleging college savings membership service’s web browser toolbar collected personal information without adequately disclosing extent of data it collected)

• **Facebook, Inc.**, C-4365 (Nov. 29, 2011) (consent order) (alleging that company engaged in deceptive and unfair practices by violating privacy promises and by failing to disclose the effect changes in privacy practices had on users’ privacy settings)

• **ScanScout, Inc.**, 152 F.T.C. 1019 (2011) (consent order) (challenging deceptive claims that consumers could opt out of receiving targeted ads by changing their web browser settings to block cookies when, in fact, company used Flash cookies, which browser settings couldn’t block)


• **United States v. Teletrack, Inc.,** No. 1:11-CV-2060 (N.D. Ga. June 27, 2011) ($1.8 million civil penalty for selling credit reports to marketers, in violation of the Fair Credit Reporting Act) (stipulated judgment)

• **Ceridian Corp.**, 151 F.T.C. 514 (2011) (consent order) (alleging that HR services company failed adequately to protect network from reasonably foreseeable attacks and stored personal information in clear text indefinitely without business need)
• Lookout Services, Inc., 151 F.T.C. 532 (2011) (consent order) (alleging company that marketed product for employer compliance with immigration laws didn’t honor promise to keep data reasonably secure, resulting in unauthorized access to sensitive information)

• Google Inc., 152 F.T.C. 435 (2011) (consent order) (alleging that company engaged in deceptive practices and violated its privacy promises when it launched Google Buzz social network)

• Chitika, Inc., 151 F.T.C. 514 (2011) (consent order) (challenging company’s practice of tracking consumers’ online activities even after they had chosen to opt out of online tracking)

• SettlementOne Credit Corporation, 152 F.T.C. 344 (2011); ACRAnet, Inc., 152 F.T.C. 367 (2011); and Fajilan and Associates, Inc., d/b/a Statewide Credit Services, 152 F.T.C. 389 (2011) (consent orders) (alleging that companies that resold credit reports didn’t take reasonable steps to protect consumers’ personal information, thus allowing hackers to access the data)

• FTC v. EchoMetrix, Inc., No.: CV10-5516 (E.D.N.Y. Nov. 30, 2010) (stipulated order) (alleging that seller of web monitoring software failed to adequately inform parents using its product that information collected about their children would be disclosed to third-party marketers)

• US Search, Inc., 151 F.T.C. 184 (2010) (consent order) (challenging deceptive claims that online data broker could for a fee “lock” consumers’ records so others couldn’t see or buy them)

• Rite Aid Corp., C-4308 (July 27, 2010) (consent order) (challenging as a deceptive and unfair trade practice the discarding of trash that contained consumers’ personal data, including pharmacy labels and job applications)

• Twitter, Inc., 151 F.T.C. 162 (2010) (consent order) (alleging that social networking service deceived consumers and put their privacy at risk by failing to safeguard personal information, resulting in unauthorized administrative control by hackers)

• Dave & Buster’s, Inc., C-4291 (consent order) (June 8, 2010) (alleging that restaurant chain left consumers’ credit and debit card information vulnerable to hackers, resulting in fraudulent charges)

• FTC v. ControlScan, Inc., No. 1:10-CV-00532-JEC (N.D. Ga. Feb. 25, 2010) (alleging that company that issued privacy and security certifications for online retailers misled consumers about how often it monitored sites and steps it took to verify their practices)


• United States v. ChoicePoint Inc., No.1-06-CV-198 (N.D. Ga. Oct. 19, 2009) (stipulated judgment) ($275,000 judgment for failing to implement a comprehensive information security program protecting consumers’ sensitive information, as required by 2006 court order, resulting in a data breach that compromised the personal information of 13,750 people)

• World Innovators, Inc., C-4282; ExpatEdge Partners, LLC, C-4269; Onyx Graphics, C-4270; Directors Desk LLC, C-4281; Progressive Gaitways LLC, C-4271; and Collectify LLC, C-4272 (Oct. 6, 2009) (consent orders) (alleging that companies falsely claimed they were abiding by U.S.-EU Safe Harbor Framework)

• Sears Holdings Management Corp., C-4264 (June 4, 2009) (consent order) (challenging practice of inviting consumers’ to download software without adequately disclosing it would monitor nearly all behavior on that computer)

• James B. Nutter & Co., C-4258 (May 5, 2009) (consent order) (alleging that mortgage company violated Safeguards Rule by failing to provide reasonable and appropriate security for sensitive consumer information, and Privacy Rule by failing to provide notices or providing inaccurate notices)

• United States v. Rental Research Services, Inc., (D. Minn. Mar. 5, 2009) (consent order) (alleging that company that sells reports to landlords about potential renters failed to implement procedures to verify new customers and thus sold sensitive data to ID thieves, in violation of Fair Credit Reporting Act and FTC Act)

• CVS Caremark Corp., C-4259 (Feb. 18, 2009) (consent order) (alleging that pharmacy chain failed to implement reasonable procedures for securely disposing of personal information, did not adequately train employees, did not use reasonable measures to assess compliance, and did not employ a reasonable process for discovering and remedying risks to personal information)

• Compgeeks.com, C-4252 (Feb. 5, 2009) (consent order) (alleging that company routinely stored sensitive data in unencrypted text on its network and did not adequately assess that applications and network were vulnerable to reasonably foreseeable risks, such as SQL injection attacks)
• Premier Capital Lending, Inc., C-4241 (Nov. 6, 2008) (consent order) (alleging that company failed to provide reasonable security to protect sensitive customer data when it allowed a third-party home seller to access data that a hacker then used to illegally access consumers’ credit reports)

• FTC v. Action Research Group, No. 6:07-CV-0227-ORL-22JGG (M.D. Fla. May 28, 2008) (stipulated order) ($600,000 in disgorgement for “pretexting” scheme – obtaining consumers’ phone records under false pretenses and without their knowledge or consent and selling the records to third parties)

• TJX Companies, C-4227 (consent order) (Mar. 27, 2008) (alleging that company created unnecessary risk by storing and transmitting personal information in plain text, failing to use readily available security to limit wireless access, and failing to use strong passwords, firewalls, and security patches)

• Reed Elsevier Inc., C-4226 (consent order) (Mar. 27, 2008) (alleging that companies created unnecessary risk to personal data by failing to require periodic changes of user credentials, failing to suspend credentials after unsuccessful login tries, allowing customers to store credentials in vulnerable format, and failing to implement low-cost defenses to foreseeable attacks)

• United States v. ValueClick, Inc., No. CV08-01711 MMM (Rzx) (C.D. Cal. Mar. 17, 2008) (stipulated judgment) (challenging company’s deceptive claim in its privacy policies that it encrypted customer information when it either failed to encrypt or used an insecure, non-standard form of encryption)

• Goal Financial, 145 F.T.C. 142 (2008) (consent order) (alleging student loan company’s failure to take reasonable security measures to protect sensitive customer data violated Safeguards Rule, Privacy Rule, and Section 5)

• FTC v. Accusearch, Inc., No. 06-CV-0105 (D. Wyo. Jan. 28, 2008) (court decision ordering $200,000 disgorgement from information broker who advertised and sold confidential consumer telephone records to third parties without the consumers’ knowledge or consent)

• Life is good, Inc., 145 F.T.C. 192 (2008) (consent order) (alleging retailer unnecessarily risked security of consumers’ credit card information by storing it indefinitely in clear text on its network, failing to implement low-cost readily available defenses to foreseeable attacks, and failing to employ reasonable measures to detect unauthorized access)

• United States v. American United Mortgage Co., No. 07C 7064 (N.D. Ill. Dec. 18, 2007) (stipulated judgment) ($50,000 civil penalty for mortgage company’s practice of leaving loan documents with consumers’ sensitive information in and around unsecured dumpster)
• FTC v. Information Search, Inc., No. 1:06-CV-01099-AMD (D. Md. Feb. 22, 2007) (stipulated order) (alleging that defendants and additional defendants in separate actions filed elsewhere obtained and sold consumers’ confidential telephone records in violation of federal law)

• Guidance Software, 143 F.T.C. 528 (2006) (consent order) (alleging that company’s failure to take reasonable security measures to protect sensitive customer data contradicted the security promises made on its website)


• Card Systems Solutions, Inc., 142 F.T.C. 1019 (2006) (consent order) (challenging as unfair trade practice companies’ failure to take appropriate security measures to protect the sensitive information of tens of millions of consumers, resulting in millions of dollars in fraudulent purchases)


• DSW, Inc., D-4157 (Dec. 1, 2005) (consent order) (challenging as an unfair trade practice shoe store’s failure to take appropriate security measures to protect sensitive consumer information)

• CartManager International, C-4135 (Apr. 26, 2005) (consent order) (alleging that company that provides “shopping cart” software to online merchants rented personal information about merchants’ customers to marketers, knowing that such disclosure contradicted merchants’ privacy policies)

• Superior Mortgage Corp., 140 F.T.C. 926 (2005) (consent order) (challenging violations of FTC Act and Safeguards Rule for company’s failure to provide reasonable security for sensitive customer data and false claim it encrypted data submitted online)

• BJ’s Wholesale Club, 140 F.T.C. 465 (2005) (consent order) (challenging as an unfair trade practice warehouse store’s failure to take appropriate security measures to protect sensitive consumer information)

• Petco Animal Supplies, Inc., 139 F.T.C. 102 (2005) (consent order) (challenging security flaws on company’s website that allowed access to consumers’ personal information, including credit card numbers)
• Bonzi Software, Inc., 138 F.T.C. 738 (2004) (consent order) (challenging deceptive representations that InternetALERT software significantly reduced the risk of Internet attacks and unauthorized access into computers)

• Gateway Learning Corp., 138 F.T.C. 443 (2004) (consent order) (alleging that privacy policy of marketer of Hooked On Phonics promised to protect personal information and then changed its policy and sold information without consumers’ consent)

• Tower Records/Books/Video and TowerRecords.com, 137 F.T.C. 444 (2004) (consent order) (challenging security flaws on website that allowed access to consumers’ personal information)

• Guess?, Inc., and Guess.com, Inc., 136 F.T.C. 507 (2003) (consent order) (alleging that security flaws on company’s website placed consumers’ credit card numbers at risk to hackers)

• Educational Research Center of America, Inc., 135 F.T.C. 578 (2003) (consent order) (alleging that practice of collecting personal information from students as young as ten claiming it would be used solely for education-related services and then selling it to marketers was a violation of Section 5)

• National Research Center For College and University Admissions, 135 F.T.C. 13 (2003) (consent order) (alleging that companies’ practices of collecting personal information from high school students claiming they would share it only with colleges and others providing education-related services and then selling it to marketers was a violation of Section 5)

• Microsoft Corp., 134 F.T.C. 709 (2002) (consent order) (challenging deceptive claims regarding the privacy and security of personal information collected from consumers through Microsoft’s Passport web services)

• Eli Lilly and Co., 133 F.T.C. 763 (2002) (consent order) (challenging unauthorized disclosure of sensitive personal information collected from consumers through company’s Prozac.com website)

• FTC v. Toysmart.com, No. 00-11341-RGS (D. Mass. July 21, 2000) (stipulated consent agreement) (settling request to enjoin bankrupt company from selling confidential information collected from customers after representing in its privacy policy that information would never be disclosed to third parties)

• FTC v. Rennert, No. CV-S-00-0861-JBR (D. Nev. July 6, 2000) (stipulated order) (requiring company operating an online pharmacy to post a privacy policy, including how consumers can access, review, modify, or delete their personal information, and prohibiting the defendants from selling, renting, or disclosing personal information collected from customers)
• Liberty Financial Companies, Inc., 128 F.T.C. 240 (1999) (challenging company’s practice of collecting identifiable personal information about family finances from children at its “Young Investors” website despite representing that information would be compiled anonymously)

• GeoCities, 127 F.T.C. 94 (1999) (consent order) (alleging the company misrepresented purposes for which it collected personal identifying information from children and adults on its website)

M. Children’s Privacy: Passed in 1998, the Children’s Online Privacy Protection Act, 15 U.S.C. § 6501, requires websites to obtain verifiable parental consent before collecting, using, or disclosing personal information from children. The law directed the FTC to promulgate the Children’s Online Privacy Protection Rule, including provisions for “safe harbor” programs – industry self-regulatory guidelines that, if adhered to, are deemed to comply with the Act. On February 27, 2007, the FTC issued Implementing the Children’s Online Privacy Protection Act: A Report to Congress.

1. Children’s Online Privacy Protection Act Rule: Pursuant to the Children’s Online Privacy Protection Act, the FTC issued the COPPA Rule in 2000 and revised it in 2012, outlining procedures for websites to use in getting parental consent before collecting, using, or disclosing personal information from children. 16 C.F.R. § 312. Covered sites must provide parents notice of information practices, get verifiable parental consent before collecting a child’s personal information, give parents a choice of whether information will be disclosed to third parties, allow parents the opportunity to review their children’s personal information and have it deleted or prevent further use or collection of information, not require child to provide more information than is reasonably necessary to participate in an activity, and maintain confidentiality, security, and integrity of data collected from children.

2. COPPA Safe Harbors: On February 1, 2001, the FTC approved the Children’s Advertising Review Unit of the Council of Better Business Bureaus as the first safe harbor program under the terms of COPPA. The FTC has approved additional safe harbors since then.

3. Children and Mobile Apps: On February 16, 2012, the FTC issued a report, Mobile Apps for Kids: Current Privacy Disclosures Are Disappointing, announcing the results of a survey indicating that neither app stores nor app developers provide parents with the information they need to determine what data is being collected from their children, how it is being shared, or who will have access to it. A December 2012 follow-up report, Mobile Apps for Kids: Current Privacy Disclosures Are Disappointing, observed little progress. Staff issued further data in 2015.

4. Representative cases:
• United States v. Unixiz, Inc., No. 5:19-CV-02222-NC (N.D. Cal. Apr. 24, 2019) (stipulated order) ($35,000 civil penalty from owner of i-Dressup.com for violating parental notification and data security provisions of COPPA)


• United States v. VTech Electronics Limited, No. 1:18-CV-00114 (N.D. Ill. Jan. 8, 2018) (stipulated order) ($650,000 civil penalty for violating COPPA and FTC Act by collecting personal information from children without direct notice and parental consent, and by failing to take reasonable steps to secure data)

• United States v. InMobi Pte. Ltd., No. 3:16-CV-03474 (N.D. Cal. June 22, 2016) (stipulated order) ($950,000 civil penalty for deceptively tracking locations of millions of consumers, including children, without consent, in violation of COPPA and FTC Act)

• United States v. LAI Systems, LLC, No. 2:15-CV-09691 (C.D. Cal. Dec. 17, 2015) (stipulated order) ($60,000 civil penalty for COPPA violations arising from app developer allowing advertisers to use persistent identifiers to serve ads to children)

• United States v. Retro Dreamer, No. 5:15-CV-02569 (C.D. Cal. Dec. 17, 2015) (stipulated order) ($300,000 civil penalty for COPPA violations arising from app developer allowing advertisers to use persistent identifiers to serve ads to children)

• United States v. Yelp Inc., No. 3:14-CV-04163 (N.D. Cal. Sept 17, 2014) ($450,000 civil penalty for COPPA violations resulting when company’s mobile app allowed registration by users who indicated when registering that they were under 13)

• United States v. TinyCo, Inc., No. 3:14-CV-04164 (N.D. Cal. Sept 17, 2014) ($300,000 civil penalty for COPPA violations)


• United States v. RockYou, Inc., No. CV-12-1487 (N.D. Cal. Mar. 27, 2012) (consent decree) ($250,000 civil penalty for COPPA violations)


• United States v. W3 Innovations d/b/a Broken Thumbs Apps, No. CV-11-03958-PSG (N.D. Cal. Aug. 15, 2011) (in FTC’s first case involving mobile app, $50,000 civil penalty for collecting and disclosing personal information from children under 13 without parents’ prior consent, in violation of COPPA)

• United States v. Playdom, Inc., No. SACV11-00724 (C.D. Cal. May 12, 2011) ($3 million civil penalty against operator of online virtual worlds for illegally collecting and disclosing personal information from hundreds of thousands of children under 13 without parents’ prior consent, in violation of COPPA)

• FTC v. EchoMetrix, Inc., No.: CV10-5516 (E.D.N.Y. Nov. 30, 2010) (stipulated order) (alleging that seller of web monitoring software didn’t adequately inform parents that data collected about their children would be disclosed to marketers)

• United States v. Iconix Brand Group, No. 09 Civ. 8864 (MGC) (S.D.N.Y. Oct. 20, 2009) ($250,000 civil penalty from marketer of Candie’s, Bongo, and Mudd apparel for violations of COPPA, including practices that allowed children to share personal data and photos online)

• United States v. Sony BMG Music, No. 08 CV 10730 (S.D.N.Y. Dec. 11, 2008) ($1 million civil penalty for collecting personal data from 30,000 registrants under 13 and allowing them to create fan pages, post comments on message boards, and engage in private messaging)

• United States v. Industrious Kid, Inc., No. CV-08-0639 (N.D. Cal. Jan. 30, 2008) (consent decree) ($130,000 civil penalty for COPPA violations by social networking website targeting kids and tweens)

• United States v. Xanga.com, Inc., No. 06-CIV-6853(SHS) (S.D.N.Y. Sept. 7, 2006) ($1 million civil penalty for allowing visitors to create more than 1.7 million accounts on social networking site although they provided a birth date indicating they were under 13)
• United States v. UMG Recordings, Inc., No. CV-04-1050 JFW (Ex) (C.D. Cal. Feb. 17, 2004) (consent decree) ($400,000 civil penalty for music company’s knowing collection of personal information from children online without first obtaining parental consent and for engaging in the same activities on a website directed to children)


• United States v. Mrs. Fields Famous Brands, Inc., No. 2:03CV205-JTG (D. Utah Feb. 26, 2003) (consent decree) ($100,000 civil penalty for company’s collection of personal information from more than 84,000 children, without first obtaining parental consent)

• United States v. The Ohio Art Co., (N.D. Ohio Apr. 22, 2002) (consent decree) ($35,000 civil penalty for company’s violation of COPPA by collecting personal information from children on its Etch-a-Sketch website without obtaining parental consent)

• United States v. American Pop Corn Co., No. C02-4008DEO (N.D. Iowa Feb. 14, 2002) ($10,000 civil penalty for company’s violation of COPPA by collecting personal information from children on its Jolly Time Popcorn website without obtaining parental consent)

• United States v. Lisa Frank, Inc., No. 01-1516-A (E.D. Va. Oct. 2, 2001) (consent decree) ($30,000 civil penalty for violation of COPPA by collecting personally identifying information from children under 13 years without parental consent and requiring operators to delete personally identifying information collected from children online since the Rule’s effective date)

XV. SELF-REGULATORY INITIATIVES


B. Advertising Clearance: FTC staff has encouraged media to adopt effective in-house procedures for screening out facially deceptive ads before they run. In 1995, the FTC co-sponsored a national conference, Preventing Fraudulent Advertising: A Shared Responsibility, to encourage effective self-regulation by print and broadcast media. In addition, the Commission issued Screening Advertisements: A Guide for Media, a brochure on developing effective in-house ad clearance procedures, published with the United States Postal Inspection Service and the Direct Marketing Association.

C. Marketing Practices of the Weight Loss Industry: The FTC sponsored a workshop in November 2002 to consider initiatives to combat deception in weight loss advertising, including effective screening by broadcasters and publishers. In December 2003, the FTC issued Red Flags: A Reference Guide for Media on Bogus Weight Loss Claim Detection, a brochure to assist publishers and broadcasters screen out patently false ads before they are disseminated. According to Weight-Loss Advertising Survey: A Report From the Staff of the Federal Trade Commission, the percentage of ads for weight loss products that contain representations the FTC considers to be patently false – “red flag” claims – dropped from almost 50% in 2001 to 15% in 2004. In January 2014, the FTC updated its advice and released Gut Check: A Reference Guide for Media on Spotting False Weight Loss Claims.

D. Marketing Practices of the Entertainment Industry: In June 1999, the President and members of Congress asked the FTC to conduct a study to determine whether members of the entertainment industry market violent adult-rated material to children. On September 11, 2000, the FTC issued Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries and convened a national workshop. Between 2001 and 2009, the FTC issued six follow-up reports. The FTC also has conducted periodic mystery shopper studies to evaluate self-regulatory efforts in the marketplace. According to the first survey, conducted in 2003, 69% of the teenage shoppers were able to buy
M-rated games; 83% were able to buy explicit-labeled recordings; 81% were successful in purchasing R-rated movies on DVD; and 36% were successful in purchasing tickets for admission to an R-rated film at movie theaters. The 2008 survey reported that 20% of underage teenage shoppers were able to buy M-rated videogames and 50% were able to buy R-rated and unrated DVDs and music CDs with parental advisory labels. The 2013 survey showed improvement in some sectors in limiting the sale of entertainment products labeled under industry self-regulatory programs as inappropriate for children. Representative cases:

- Take-Two Interactive Software, Inc. and Rockstar Games, Inc., 142 F.T.C. 1 (2006) (consent orders) (alleging that marketers of Grand Theft Auto: San Andreas failed to disclose that game contained potentially viewable material that was sexually explicit, resulting in its subsequent re-rating by the Entertainment Software Ratings Board from “Mature” to “Adults Only”)

E. Marketing Practices of the Alcohol Industry. See Section XI infra.
Disclosures

How to Make Effective Disclosures in Digital Advertising
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Overview

In the online marketplace, consumers can transact business without the constraints of time or distance. One can log on to the Internet day or night and purchase almost anything one desires, and advances in mobile technology allow advertisers to reach consumers nearly anywhere they go. But cyberspace is not without boundaries, and deception is unlawful no matter what the medium. The FTC has enforced and will continue enforcing its consumer protection laws to ensure that products and services are described truthfully online, and that consumers understand what they are paying for. These activities benefit consumers as well as sellers, who expect and deserve the opportunity to compete in a marketplace free of deception and unfair practices.

The general principles of advertising law apply online, but new issues arise almost as fast as technology develops — most recently, new issues have arisen concerning space-constrained screens and social media platforms. This FTC staff guidance document describes the information businesses should consider as they develop ads for online media to ensure that they comply with the law. Briefly,

1. The same consumer protection laws that apply to commercial activities in other media apply online, including activities in the mobile marketplace. The FTC Act’s prohibition on “unfair or deceptive acts or practices” encompasses online advertising, marketing, and sales. In addition, many Commission rules and guides are not limited to any particular medium used to disseminate claims or advertising, and therefore, apply to the wide spectrum of online activities.

2. When practical, advertisers should incorporate relevant limitations and qualifying information into the underlying claim, rather than having a separate disclosure qualifying the claim.

3. Required disclosures must be clear and conspicuous. In evaluating whether a disclosure is likely to be clear and conspicuous, advertisers should consider its placement in the ad and its proximity to the relevant claim. The closer the disclosure is to the claim to which it relates, the better. Additional considerations include: the prominence of the disclosure; whether it is unavoidable; whether other parts of the ad distract attention from the disclosure; whether the disclosure needs to be repeated at different places on a website; whether disclosures in audio messages are presented in an adequate volume and cadence; whether visual disclosures
appear for a sufficient duration; and whether the language of the disclosure is understandable to the intended audience.

4. To make a disclosure clear and conspicuous, advertisers should:
   - Place the disclosure as close as possible to the triggering claim.
   - Take account of the various devices and platforms consumers may use to view advertising and any corresponding disclosure. If an ad is viewable on a particular device or platform, any necessary disclosures should be sufficient to prevent the ad from being misleading when viewed on that device or platform.
   - When a space-constrained ad requires a disclosure, incorporate the disclosure into the ad whenever possible. However, when it is not possible to make a disclosure in a space-constrained ad, it may, under some circumstances, be acceptable to make the disclosure clearly and conspicuously on the page to which the ad links.
   - When using a hyperlink to lead to a disclosure,
     - make the link obvious;
     - label the hyperlink appropriately to convey the importance, nature, and relevance of the information it leads to;
     - use hyperlink styles consistently, so consumers know when a link is available;
     - place the hyperlink as close as possible to the relevant information it qualifies and make it noticeable;
     - take consumers directly to the disclosure on the click-through page;
     - assess the effectiveness of the hyperlink by monitoring click-through rates and other information about consumer use and make changes accordingly.
   - Preferably, design advertisements so that “scrolling” is not necessary in order to find a disclosure. When scrolling is necessary, use text or visual cues to encourage consumers to scroll to view the disclosure.
   - Keep abreast of empirical research about where consumers do and do not look on a screen.
   - Recognize and respond to any technological limitations or unique characteristics of a communication method when making disclosures.
   - Display disclosures before consumers make a decision to buy — e.g., before they “add to shopping cart.” Also recognize that disclosures may have to be
repeated before purchase to ensure that they are adequately presented to consumers.

- Repeat disclosures, as needed, on lengthy websites and in connection with repeated claims. Disclosures may also have to be repeated if consumers have multiple routes through a website.

- If a product or service promoted online is intended to be (or can be) purchased from “brick and mortar” stores or from online retailers other than the advertiser itself, then any disclosure necessary to prevent deception or unfair injury should be presented in the ad itself — that is, before consumers head to a store or some other online retailer.

- Necessary disclosures should not be relegated to “terms of use” and similar contractual agreements.

- Prominently display disclosures so they are noticeable to consumers, and evaluate the size, color, and graphic treatment of the disclosure in relation to other parts of the webpage.

- Review the entire ad to assess whether the disclosure is effective in light of other elements — text, graphics, hyperlinks, or sound — that might distract consumers’ attention from the disclosure.

- Use audio disclosures when making audio claims, and present them in a volume and cadence so that consumers can hear and understand them.

- Display visual disclosures for a duration sufficient for consumers to notice, read, and understand them.

- Use plain language and syntax so that consumers understand the disclosures.

5. 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. This means that if a particular platform does not provide an opportunity to make clear and conspicuous disclosures, then that platform should not be used to disseminate advertisements that require disclosures.

Negative consumer experiences can result in lost consumer goodwill and erode consumer confidence. Clear, conspicuous, and meaningful disclosures benefit advertisers and consumers.
I. Introduction

Day in and day out, businesses advertise and sell their products and services online.¹ The online universe presents a rewarding and fast-paced experience for consumers, but also raises interesting — and occasionally complex — questions about the applicability of laws that were developed long before “dot com,” “smartphone,” and “social media” became household terms.

In May 2000, following a public comment period and a public workshop held to discuss the applicability of FTC rules and guides to online activities, FTC staff issued Dot Com Disclosures. That guidance document examined how the Commission’s consumer protection statutes, rules, and guides apply to online advertising and sales and discussed FTC requirements that disclosures be presented clearly and conspicuously, in the context of online advertising.

In May 2011, FTC staff began seeking input to modify and update the guidance document to reflect the dramatic changes in the online world in the preceding eleven years. After three public comment periods and a public workshop, this revised staff guidance document was issued in March 2013.²

This document provides FTC staff guidance concerning the making of clear and conspicuous online disclosures that are necessary pursuant to the laws the FTC enforces. It does not, however, purport to cover every issue associated with online advertising disclosures, nor is it intended to provide a safe harbor from potential liability. It is intended only to provide guidance concerning practices that may increase the likelihood that a disclosure is clear and conspicuous. Whether a particular ad is deceptive, unfair, or otherwise violative of a Commission rule will depend on the specific facts at hand. The ultimate test is not the size of the font or the location of the disclosure, although they are important considerations; the ultimate test is whether the information intended to be disclosed is actually conveyed to consumers.

1. In this document, the term “online” includes advertising and marketing via the Internet and other electronic networks. It is device neutral and encompasses advertising and marketing on mobile devices, such as smartphones and tablets.

2. This staff guidance document only addresses disclosures required pursuant to laws that the FTC enforces. It does not address disclosures that may be required pursuant to local, state (e.g., many sweepstake requirements), or other federal laws or regulations (e.g., regulations issued by the Consumer Financial Protection Bureau or the Food and Drug Administration).
There is no litmus test for determining whether a disclosure is clear and conspicuous, and in some instances, there may be more than one method that seems reasonable. In such cases, the best practice would be to select the method more likely to effectively communicate the information in question.

II. The Applicability of FTC Law to Online Advertising

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. The Commission has brought countless law enforcement actions to stop fraud and deception online and works to educate businesses about their legal obligations and consumers about their rights.

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 apply to online

3. The Commission’s authority covers virtually every sector of the economy, except for certain excluded industries, such as common carrier activities and the business of insurance, airlines, and banks.

4. The Commission issues rules pursuant to Section 5 of the FTC Act when it has reason to believe that certain unfair or deceptive acts or practices are prevalent in an industry. 15 U.S.C. § 57a(a)(1)(B). In addition, the Commission promulgates rules pursuant to specific statutes, which are designed to further particular policy goals.

5. Guides are “administrative interpretations of laws administered by the Commission.” 16 C.F.R. § 1.5. Although guides do not have the force and effect of law, if a person or company fails to comply with a guide, the Commission might bring an enforcement action alleging an unfair or deceptive practice in violation of the FTC Act.
advertising, as well as to other media. Therefore, the plain language of many rules and guides applies to claims made online. For example, the Mail or Telephone Order Merchandise


7. A rule or guide applies to online activities if its scope is not limited by how claims are communicated to consumers, how advertising is disseminated, or where commercial activities occur. The Commission has a program in place to systematically review its rules and guides to evaluate their continued need and to make any necessary changes. As needed, the Commission has and will continue to amend or clarify the scope of any particular rule or guide in more detail during its regularly scheduled review. For example, the Energy Labeling Rule was updated to clarify that “catalog” includes “material disseminated over the Internet” and to allow certain disclosures to be made available using the Internet. See 72 Fed. Reg. 49,948, 49,957, 49,961 (Aug. 29, 2007).

The first Dot Com Disclosures guidance document contained a section discussing how certain FTC rules and guides apply to online activities. Since that time, the Commission has addressed many of these issues in rulemakings or its periodic rule and guide reviews, and the information is widely understood given the ubiquitous nature and use of online technology. Nevertheless, the principles articulated in the original Dot Com Disclosures remain the same. For the most part, rules and guides that use terms such as “written,” “writing,” and “printed” apply online, and email may be used to comply with certain requirements to provide or send required notices or documents to consumers as long as consumers understand or expect to receive such information by email. For example, warranties communicated through visual text online are no different than paper versions and the same rules apply. The requirement to make warranties available at the point of purchase can be accomplished easily online by, for example, using a clearly-labeled hyperlink, in close proximity to the description of the warranted product, such as “get warranty information here” to lead to the full text of the warranty, and presenting the warranty in a way that it can be preserved either by downloading or printing so consumers can refer to it after purchase. Disclosure of Written Consumer Product Warranty Terms and Conditions, 16 C.F.R. § 701.3 and Pre-Sale Availability of Written Warranty Terms, 16 C.F.R. § 702.3. Another example involves the Telemarketing Sales Rule. Advertisers who send email and text messages that invite consumers to telephone the sender in order to make a purchase are subject to the Telemarketing Sales Rule, unless they qualify for the direct mail exemption under 16 C.F.R. 310.6(b)(6) by clearly and conspicuously making certain specified disclosures in the original solicitation.
rule, which addresses the sale of merchandise that is ordered by mail, telephone, facsimile or computer, applies to those sales regardless of “the method used to solicit the order.”

Solicitations made in print, on the telephone, radio, TV, or online naturally fall within the rule’s scope. In addition, the Guides Concerning the Use of Endorsements and Testimonials in Advertising (“Endorsement Guides”) apply to “any advertising message . . . that consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser . . . .” The Guides refer to advertising without limiting the media in which it is disseminated and, therefore, encompass online ads.

III. Clear and Conspicuous Disclosures in Online Advertisements

When it comes to online ads, the basic principles of advertising law apply:

1. Advertising must be truthful and not misleading;
2. Advertisers must have evidence to back up their claims (“substantiation”); and
3. Advertisements cannot be unfair.

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8. 16 C.F.R. § 435.2(a).
9. 16 C.F.R. § 255.0(b).
10. Indeed, when the Endorsement Guides were reviewed in 2009, examples involving blogs were included, to make clear that the FTC Act applies to this then-new form of social media marketing.
11. As explained in the FTC’s Deception Policy Statement, an ad is deceptive if it contains a statement — or omits information — that is likely to mislead consumers acting reasonably under the circumstances and is “material” or important to a consumer’s decision to buy or use the product. See FTC Policy Statement on Deception, appended to Cliffdale Associates, Inc., 103 F.T.C. 110, 174 (“Deception Policy Statement”), also available at www.ftc.gov/bcp/policystmt/ad-decept.htm. A statement also may be deceptive if the advertiser does not have a reasonable basis to support the claim. See FTC Policy Statement on Advertising Substantiation, appended to Thompson Medical Co., 104 F.T.C. 648, 839 (1984), aff’d, 791 F.2d 189 (D.C. Cir. 1986), also available at www.ftc.gov/bcp/guides/ad3subst.htm.
12. Before disseminating an ad, advertisers must have appropriate support for all express and implied objective claims that the ad conveys to reasonable consumers. When an ad lends itself to more than one reasonable interpretation, there must be substantiation for each interpretation. The type of evidence needed to substantiate a claim may depend on the product, the claims, and what experts in the relevant field believe is necessary. If an ad specifies a certain level of support for a claim — “tests show x” — the advertiser must have at least that level of support.
13. According to the FTC Act, 15 U.S.C. § 45(n), and the FTC’s Unfairness Policy Statement, an advertisement or business practice is unfair if it causes or is likely to cause substantial consumer injury that consumers could not reasonably avoid and that is not outweighed by the benefit to consumers or competition. See FTC Policy Statement on Unfairness, appended to International Harvester Co., 104 F.T.C. 949, 1070 (1984), also available at www.ftc.gov/bcp/policystmt/ad-unfair.htm.
Unique features in online ads — including advertising delivered via social media platforms or on mobile devices — may affect how an ad and any required disclosures are evaluated.

A. Background on Disclosures

Advertisers are responsible for ensuring that all express and implied claims that an ad conveys to reasonable consumers are truthful and substantiated. When identifying these claims, advertisers should not focus only on individual phrases or statements, but should consider the ad as a whole, including the text, product name, and depictions. If an ad makes express or implied claims that are likely to be misleading without certain qualifying information, the information must be disclosed.

A disclosure can only qualify or limit a claim to avoid a misleading impression. It cannot cure a false claim. If a disclosure provides information that contradicts a material claim, the disclosure will not be sufficient to prevent the ad from being deceptive. In that situation, the claim itself must be modified.

Many Commission rules and guides spell out the information that must be disclosed in connection with certain claims. In many cases, these disclosures prevent a claim from being misleading or deceptive. Other rules and guides require disclosures to ensure that consumers receive material information to assist them in making better-informed decisions, or to implement statutes furthering public policy goals. In all of these instances, if a disclosure is required, it must be clear and conspicuous.

14. Copy tests or other evidence of how consumers actually interpret an ad can be valuable. In many cases, however, the implications of the ad are clear enough to determine the existence of the claim by examining the ad alone, without extrinsic evidence.

15. For example, if an endorsement is not representative of the performance that consumers can generally expect to achieve with a product, advertisers must disclose the generally expected performance in the depicted circumstances. Endorsement Guides, 16 C.F.R. § 255.2.

16. For example, any solicitation for the purchase of consumer products with a warranty must disclose the text of the warranty offer or how consumers can obtain it for free. Pre-Sale Availability of Written Warranty Terms, 16 C.F.R. § 702.3.

17. For example, the required energy disclosures in the Energy Labeling Rule, 16 C.F.R. § 305, further the public policy goal of promoting energy conservation by providing consumers with clear comparative information.
B. The Clear and Conspicuous Requirement

Disclosures that are required to prevent an advertisement from being deceptive, unfair, or otherwise violative of a Commission rule, must be presented “clearly and conspicuously.”\(^{18}\) Whether a disclosure meets this standard is measured by its performance — that is, how consumers actually perceive and understand the disclosure within the context of the entire ad. The key is the overall net impression of the ad — that is, whether the claims consumers take from the ad are truthful and substantiated.\(^{19}\) If a disclosure is not seen or comprehended, it will not change the net impression consumers take from the ad and therefore cannot qualify the claim to avoid a misleading impression.

In reviewing their ads, advertisers should adopt the perspective of a reasonable consumer.\(^{20}\) They also should assume that consumers don’t read an entire website or online screen, just as they don’t read every word on a printed page.\(^{21}\) Disclosures should be placed as close as possible to the claim they qualify. Advertisers should keep in mind that having to scroll increases the risk that consumers will miss a disclosure.

In addition, it is important for advertisers to draw attention to the disclosure. Consumers may not be looking for — or expecting to find — disclosures. Advertisers are responsible for ensuring that their messages are truthful and not deceptive. Accordingly, disclosures must be communicated effectively so that consumers are likely to notice and understand them in connection with the representations that the disclosures modify. Simply making the disclosure available somewhere in the ad, where some consumers might find it, does not meet the clear and conspicuous standard.

If a disclosure is necessary to prevent an advertisement from being deceptive, unfair, or otherwise violative of a Commission rule, and if it is not possible to make the disclosure clear and conspicuous, then either the claim should be modified so the disclosure is not necessary or the ad should not be disseminated. Moreover, if a particular platform does not provide an

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18. Some rules and guides, as well as some FTC cases, use the phrase “clearly and prominently” instead of “clearly and conspicuously.” As used in FTC rules, guides, and cases, these two phrases are synonymous. They may have different meanings under other statutes.
19. Deception Policy Statement at 175-76.
20. Deception Policy Statement at 178. The Deception Policy Statement also says that “[w]hen representations or sales practices are targeted to a specific audience, such as children, the elderly, or the terminally ill, the Commission determines the effect of the practice on a reasonable member of that group.” Id. at 179 (footnote omitted).
opportunity to make clear and conspicuous disclosures, it should not be used to disseminate advertisements that require such disclosures. 22

C. What Are Clear and Conspicuous Disclosures?

There is no set formula for a clear and conspicuous disclosure; it depends on the information that must be provided and the nature of the advertisement. Some disclosures are quite short, while others are more detailed. Some ads use only text, while others use graphics, video, or audio, or combinations thereof. Advertisers have the flexibility to be creative in designing their ads, as long as necessary information is communicated effectively and the overall message conveyed to consumers is not misleading.

To evaluate whether a particular disclosure is clear and conspicuous, consider:

- the placement of the disclosure in the advertisement and its proximity to the claim it is qualifying;
- the prominence of the disclosure;
- whether the disclosure is unavoidable;
- the extent to which items in other parts of the advertisement might distract attention from the disclosure;
- whether the disclosure needs to be repeated several times in order to be effectively communicated, or because consumers may enter the site at different locations or travel through the site on paths that cause them to miss the disclosure;
- whether disclosures in audio messages are presented in an adequate volume and cadence and visual disclosures appear for a sufficient duration; and
- whether the language of the disclosure is understandable to the intended audience.

If there are indications that a significant proportion of reasonable consumers are not noticing or comprehending a necessary disclosure, the disclosure should be improved.

The following discussion uses these traditional factors to evaluate whether disclosures are likely to be clear and conspicuous in the context of online ads. Hyperlinks labeled as

22. This approach mirrors one articulated by the Commission in 1970, when it said that if disclosures in television ads could not be understood, then ads containing representations requiring those disclosures should not be aired. See Commission Enforcement Policy Statement in Regard to Clear and Conspicuous Disclosures in Television Advertising (Oct. 21, 1970).
Examples in the text link to mock ads in the appendix. Each mock ad presents a scenario to illustrate one or more particular factors. Advertisers must consider all of the factors, however, and evaluate an actual disclosure in the context of the ad as a whole.

1. Proximity and Placement

A disclosure is more effective if it is placed near the claim it qualifies or other relevant information. Proximity increases the likelihood that consumers will see the disclosure and relate it to the relevant claim or product. For print ads, an advertiser might measure proximity in terms of whether the disclosure is placed adjacent to the claim, or whether it is separated from the claim by text or graphics. The same approach can be used for online ads. Websites, and mobile applications, however, are interactive and have a certain depth — with multiple pages or screens linked together and pop-up screens, for example — that may affect how proximity is evaluated. Mobile devices also present additional issues because a disclosure that would appear on the same screen of a standard desktop computer might, instead, require significant vertical and horizontal scrolling on a mobile screen. In evaluating placement, advertisers should also take into consideration empirical research about where consumers do and do not look on a screen.

a. Evaluating Proximity

A disclosure is more likely to be effective if consumers view the disclosure and the claim that raises the need for disclosure (often referred to as a “triggering claim”) together on the same screen. Example 1 Even if a disclosure is not tied to a particular word or phrase, it is more likely that consumers will notice it if it is placed next to the information, product, or service to which it relates.

Often, disclosures consist of a word or phrase that may be easily incorporated into the text, along with the claim. Doing so increases the likelihood that consumers will see the disclosure and relate it to the relevant claim.

In some circumstances, it may be difficult to ensure that a disclosure appears on the “same screen” as a claim or product information. Some disclosures are long and thus difficult to place next to the claims they qualify. In addition, computers, tablets, smartphones, and other connected devices have varying screen sizes that display ads and websites differently. In these situations, an advertiser might place a disclosure where consumers might have to scroll to reach it. Requiring consumers to scroll in order to view a disclosure may be
problematic, however, because consumers who don’t scroll enough (and in the right direction) may miss important qualifying information and be misled.

When advertisers are putting disclosures in a place where consumers might have to scroll in order to view them, they should use text or visual cues to encourage consumers to scroll and avoid formats that discourage scrolling.

Text prompts can indicate that more information is available. An explicit instruction like “see below for important information on restocking fees” will alert consumers to scroll and look for the information. The text prompt should be tied to the disclosure to which it refers. General or vague statements, such as “details below,” provide no indication about the subject matter or importance of the information that consumers will find and are not adequate cues.

The visual design of the page also could help alert consumers to the availability of more information. For example, text that clearly continues below the screen, whether spread over an entire page or in a column, would indicate that the reader needs to scroll for additional information. Advertisers should consider how the page is displayed when viewed on different devices.

Scroll bars along the edges of a screen are not a sufficiently effective visual cue. Although the scroll bars may indicate to some consumers that they have not reached the bottom or sides of a page, many consumers may not look at the scroll bar and some consumers access the Internet with devices that don’t display a scroll bar.

The design of some pages might indicate that there is no more information following and, therefore, no need to continue scrolling. If the text ends before the bottom of the screen or readers see an expanse of blank space, they may stop scrolling and miss the disclosure. Example 2 They will also likely stop scrolling when they see the information and types of links that normally signify the bottom of a webpage, e.g., “contact us,” “terms and conditions,” “privacy policy,” and “copyright.” In addition, if there is a lot of unrelated information — either words or graphics — separating a claim and a disclosure, even a consumer who is prompted to scroll might miss the disclosure or not relate it to a distant claim they’ve already read.

If scrolling is necessary to view a disclosure, then, ideally, the disclosure should be unavoidable — consumers should not be able to proceed further with a transaction, e.g., click forward, without scrolling through the disclosure. Making a disclosure unavoidable increases the likelihood that consumers will see it.
Because of their small screens, smartphones (and some tablets) potentially require horizontal, as well as vertical, scrolling. Placing a disclosure in a different column of a webpage from the claim it modifies could make it unlikely that consumers who have to zoom in to read the claim on a small screen will scroll right or left to a different column and read the disclosure. **Example 3** Optimizing a website for mobile devices will eliminate the need for consumers to scroll right or left, although it will not necessarily address the need for vertical scrolling.

### b. Hyperlinking to a Disclosure

Hyperlinks allow additional information to be placed on a webpage entirely separate from the relevant claim. Hyperlinks can provide a useful means to access disclosures that are not integral to the triggering claim, provided certain conditions (discussed below) are met. Hyperlinked disclosures may be particularly useful if the disclosure is lengthy or if it needs to be repeated (because of multiple triggering claims, for example).

However, in many situations, hyperlinks are not necessary to convey disclosures. If a disclosure consists of a word or phrase that may be easily incorporated into the text, along with the claim, this placement increases the likelihood that consumers will see the disclosure and relate it to the relevant claim.

Disclosures that are an integral part of a claim or inseparable from it should not be communicated through a hyperlink. Instead, they should be placed on the same page and immediately next to the claim, and be sufficiently prominent so that the claim and the disclosure are read at the same time, without referring the consumer somewhere else to obtain this important information. This is particularly true for cost information or certain health and safety disclosures. **Example 4** Indeed, required disclosures about serious health and safety issues are unlikely to be effective when accessible only through a hyperlink. Similarly, if a product’s basic cost (e.g., the cost of the item before taxes, shipping and handling, and any other fees are added on) is advertised on one page, but there are significant additional fees the consumer would not expect to incur in order to purchase the product or use it on an ongoing basis, the existence and nature of those additional fees should be disclosed on the same page and immediately adjacent to the cost claim, and with appropriate prominence.

However, if the details about the additional fees are too complex to describe adjacent to the price claim, those details may be provided by using a hyperlink. **Example 5** The hyperlink should be clearly labeled to communicate the specific nature of the information to which it
leads, e.g., “Service plan required. Get service plan prices.” The hyperlink should appear adjacent to the price. Moreover, because consumers should not have to click on hyperlinks to understand the full amount they will pay, all cost information — including any such additional fees — should be presented to them clearly and conspicuously prior to purchase.

The key considerations for evaluating the effectiveness of all hyperlinks are:

- the labeling or description of the hyperlink;
- consistency in the use of hyperlink styles;
- the placement and prominence of the hyperlink on the webpage or screen; and
- the handling of the disclosure on the click-through page or screen.

**Choosing the right label for the hyperlink.** A hyperlink that leads to a disclosure should be labeled clearly and conspicuously. The hyperlink’s label — the text or graphic assigned to it — affects whether consumers actually click on it and see and read the disclosure.

- **Make it obvious.** Consumers should be able to tell that they can click on a hyperlink to get more information. Simply underlining text may be insufficient to inform consumers that the text is a hyperlink. Using multiple methods of identifying hyperlinks, such as both a different color from other text and underscoring, makes it more likely that hyperlinks will be recognized.

- **Label the link to convey the importance, nature, and relevance of the information to which it leads.** Example 6 The hyperlink should give consumers a reason to click on it. That is, the label should make clear that the link is related to a particular advertising claim or product and indicate the nature of the information to be found by clicking on it. The hyperlink label should use clear, understandable text. Although the label itself does not need to contain the complete disclosure, it may be necessary to incorporate part of the disclosure to indicate the type and importance of the information to which the link leads. On the other hand, in those cases where seeing a hyperlinked disclosure is unavoidable if a consumer is going to take any action with respect to a product or service — e.g., the product or service can only be purchased online and the consumer must click on that link to proceed to a transaction — the label of the hyperlink may be less important.

- **Don’t hide the ball.** Some text links provide no indication about why a claim is qualified or the nature of the disclosure. Example 7 In many cases, simply
hyperlinking a single word or phrase in the text of an ad is not likely to be effective. Although some consumers may understand that additional information is available, they may have different ideas about the nature of the information and its significance.

Hyperlinks that simply say “disclaimer,” “more information,” “details,” “terms and conditions,” or “fine print” do not convey the importance, nature, and relevance of the information to which they lead and are likely to be inadequate. Even labels such as “important information” or “important limitations” may be inadequate. Examples 8 & 9 Unfortunately, there is no one-size-fits-all word or phrase that can be used as a hyperlink label, but more specificity will generally be better.

- **Don’t be subtle.** Symbols or icons by themselves are not likely to be effective as hyperlink labels leading to disclosures that are necessary to prevent deception.23 Example 10 A symbol or icon might not provide sufficient clues about why a claim is qualified or the nature of the disclosure.24 It is possible that consumers may view a symbol as just another graphic on the page. Even if a website explains that a particular symbol or icon is a hyperlink to important information, consumers might miss the explanation, depending on where they enter the site and how they navigate through it.

- **Account for technological differences and limitations.** Consider whether and how your linking technique will work on the various programs and devices that could be used to view your advertisement.25

Using hyperlink styles consistently increases the likelihood that consumers will know when a link is available. Although the text or graphics used to signal a hyperlink may differ across websites and applications, treating hyperlinks inconsistently within a single site or application can increase the chances that consumers will miss — or not click on — a


24. Symbols and icons also are used in different ways online, which could confuse consumers as to where the related disclosure can be found. Some online symbols and icons are hyperlinks that click through to a separate page; some are meant to communicate disclosure information themselves; and others are static, referring to a disclosure at the bottom of the page.

25. For example, “mouse-overs” may not work on mobile devices that have no cursor to hover over a link.
disclosure hyperlink. For example, if hyperlinks usually are underlined in a site, chances are consumers wouldn’t recognize italicized text as being a link, and could miss the disclosure.

**Placing the link near relevant information and making it noticeable.** The hyperlink should be proximate to the claim that triggers the disclosure so consumers can notice it easily and relate it to the claim. **Examples 11 & 12** Typically, this means that the hyperlink is adjacent to the triggering term or other relevant information. Consumers may miss disclosure hyperlinks that are separated from the relevant claim by text, graphics, blank space, or intervening hyperlinks, especially on devices with small screens. Format, color, or other graphics treatment also can help to ensure that consumers notice the link. (See below for more information on prominence.)

**Getting to the disclosure on the click-through should be easy.** The click-through page or screen — that is, the page or screen the hyperlink leads to — must contain the complete disclosure and that disclosure must be displayed prominently. Distracting visual factors, extraneous information, and opportunities to “click” elsewhere before viewing the disclosure can obscure an otherwise adequate disclaimer.

- **Get consumers to the message quickly.** The hyperlink should take consumers directly to the disclosure. They shouldn’t have to search a click-through page or go to other places for the information. In addition, the disclosure should be easy to understand.

- **Pay attention to indicia that hyperlinked disclosures are not effective.** Although advertisers are not required to use them, some available tools may indicate to advertisers that their disclosures accessed through hyperlinks are not effective. For example, advertisers can monitor click-through rates, *i.e.*, how often consumers click on a hyperlink and view the click-through information. Advertisers also can evaluate the amount of time visitors spend on a certain page, which may indicate whether consumers are reading the disclosure.

- **Don’t ignore your data.** If hyperlinks are not followed, another method of conveying the required information would be necessary.

c. Using High Tech Methods for Proximity and Placement

Disclosures may be displayed on websites or in applications in many ways. For example, a disclosure may be placed in a frame that remains constant even as the consumer scrolls down the page or navigates through another part of the site or application. A disclosure
also might be displayed in a window that pops up or on interstitial pages that appear while another webpage is loading. New techniques for displaying information are being developed all the time. But there are special considerations for evaluating whether a technique is appropriate for providing required disclosures.

- **Don’t ignore technological limitations.** Some browsers or devices may not support certain techniques for displaying disclosures or may display them in a manner that makes them difficult to read. For example, a disclosure that requires Adobe Flash Player will not be displayed on certain mobile devices.

- **Don’t use blockable pop-up disclosures.** Advertisers should not disclose necessary information through the use of pop-ups that could be prevented from appearing by pop-up blocking software.

- **Be aware of other issues with pop-up disclosures.** Even the use of unblockable pop-ups to disclose necessary information may be problematic. Some consumers may not read information in pop-up windows or interstitials because they immediately close the pop-ups or move to the next page in pursuit of completing their intended tasks, or because they don’t associate information in a pop-up window or on an interstitial page to a claim or product they haven’t encountered yet. However, advertisers can take steps to avoid such problems, e.g., by requiring the consumer to take some affirmative action to proceed past the pop-up or interstitial (for example, by requiring consumers to choose between “yes” and “no” buttons without use of preselected buttons before continuing). Research may be useful to help advertisers determine whether a particular technique is an effective method of communicating information to consumers.

### d. Displaying Disclosures Prior to Purchase

Disclosures must be effectively communicated to consumers before they make a purchase or incur a financial obligation. In general, disclosures are more likely to be effective if they are provided in the context of the ad, when the consumer is considering the purchase. Different considerations apply, however, in different situations. Where advertising and selling are combined on a website or mobile application — that is, the consumer will be completing the transaction online — disclosures should be provided before the consumer makes the decision to buy, e.g., before clicking on an “order now” button or a link that says “add to shopping cart.” [Example 13]
• **Don’t focus only on the order screen.** Some disclosures must be made in conjunction with the relevant claim or product. Consumers may not relate a disclosure on the order screen to information they viewed much earlier. It also is possible that after surfing a company’s website, some consumers may decide to purchase the product from the company’s brick and mortar store. Those consumers would miss any disclosures placed only on the ordering screen. So that these consumers do not miss a necessary disclosure, it may have to be on the same page as the claim it qualifies.

When a product advertised online can be purchased from brick and mortar stores or from online retailers other than the advertiser itself, necessary disclosures should be made in the ad before consumers go to other outlets to make their purchase. **Example 14** An in-store disclosure or one placed on an unrelated online retailer’s website is unlikely to cure an otherwise deceptive advertisement.

e. Evaluating Proximity in Space-Constrained Ads

Many space-constrained ads displayed today are teasers. Because of their small size and/or short length, space-constrained ads, such as banner ads and tweets, generally do not provide very much information about a product or service. Often, consumers must click through to the website to get more information and learn the terms of an offer. If a space-constrained ad contains a claim that requires qualification, the advertiser disseminating it is not exempt from disclosure requirements.

• **Disclose required information in the space-constrained ad itself or clearly and conspicuously on the website to which it links.** In some cases, a required disclosure can easily be incorporated into a space-constrained ad. **Example 15** In other instances, the disclosures may be too detailed to be disclosed effectively in the ad itself. These disclosures may sometimes be communicated effectively to consumers if they are made clearly and conspicuously on the website to which the ad links. In determining whether the disclosure should be placed in the space-constrained ad itself or on the website to which the ad links, advertisers should consider how important the information is to prevent deception, how much information needs to be disclosed, the burden of disclosing it in the ad itself, how much information the consumer may absorb from the ad, and how effective the disclosure would be if it were made on the website. If a product promoted in a space-constrained ad can be bought in a brick and mortar store, consumers who do
not click through to a linked website would miss any disclosure that was not in the space-constrained ad itself. If the disclosure needs to be in the ad itself but it does not fit, the ad should be modified so it does not require such a disclosure or, if that is not possible, that space-constrained ad should not be used.

- **Use creativity to incorporate or flag required information.** Scrolling text or rotating panels in a banner ad can present an abbreviated version of a required disclosure that indicates additional important information and a more complete disclosure are available on the click-through page.

- **Use disclosures in each ad.** If a disclosure is required in a space-constrained ad, such as a tweet, the disclosure should be in each and every ad that would require a disclosure if that ad were viewed in isolation. Do not assume that consumers will see and associate multiple space-constrained advertisements. [Example 16](#)

- **Short-form disclosures might or might not adequately inform consumers of the essence of a required disclosure.** For example, “Ad:” at the beginning of a tweet or similar short-form message should inform consumers that the message is an advertisement, and the word “Sponsored” likely informs consumers that the message was sponsored by an advertiser. Other abbreviations or icons may or may not be adequate, depending on whether they are presented clearly and conspicuously, and whether consumers understand their meaning so they are not misled. [Example 17](#) Misleading a significant minority of reasonable consumers is a violation of the FTC Act. [27](#)

- **Maintaining disclosures with republication.** Advertisers should employ best practices to make it less likely that disclosures will be deleted from space-constrained ads when they are republished by others. Some disclosures can be placed at the beginning of a short-form message. Alternatively, if a disclosure is placed at the end of a message, the original message can be written with enough free space that the disclosure is not lost if the message is republished with a comment by others.

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26. Empirical evidence may be necessary to demonstrate that certain abbreviations or icons are effective, at least until such time that their usage is sufficiently widespread to provide confidence that consumers see them and understand what they mean. As of the date of publication of this document, such evidence was not available.

27. Deception Policy Statement at 177 n.20.
• **Disclosures on the click-through.** In some instances — e.g., when a teaser ad does not actually identify the product being advertised, so the consumer must click through to learn its identity, or when the advertised product is sold only through the advertiser’s own website and the consumer must click through in order to take any action — a space-constrained ad can direct consumers to a website for more information if a detailed disclosure is necessary but will not fit in the space-constrained ad. The full disclosure must then be clearly and conspicuously displayed on the website.

• **Providing required disclosures in interactive ads.** If consumers can purchase a product within an interactive ad, all required disclosures should be included in the ad itself.

2. **Prominence**

   It is the advertiser’s responsibility to draw attention to the required disclosures.

   **Display disclosures prominently so they are noticeable to consumers.** The size, color, and graphics of the disclosure affect its prominence.

   - **Size Matters.** Disclosures that are at least as large as the claim to which they relate are more likely to be effective.

   - **Color Counts.** A disclosure in a color that contrasts with the background emphasizes the text of the disclosure and makes it more noticeable. Information in a color that blends in with the background of the ad is likely to be missed. **Example 18**

   - **Graphics Help.** Although using graphics to display a disclosure is not required, they may make the disclosure more prominent.

   **Evaluate the size, color, and graphics of the disclosure in relation to other parts of the website, email or text message, or application.**\(^{28}\) The size of a disclosure should be compared to the type size of the claim and other text on the screen. If a claim uses a particular color or graphic treatment, the disclosure can be formatted the same way to help ensure that consumers who see the claim are also able to see the disclosure and relate it back to the claim.

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\(^{28}\) Websites may display differently, depending on the program and device used. Advertisers should consider different display options to ensure that qualifying information is displayed clearly and conspicuously. Evaluating the prominence of the disclosure in relation to the rest of the ad, as it may appear on various devices, helps ensure that consumers are able to view the disclosure.
it modifies. In addition, the graphic treatment of the disclosure may be evaluated in relation to how graphics are used to convey other items in the ad.

**Account for viewing on different devices.** Most webpages viewable on desktop devices may also be viewable on smartphones. Therefore, unless a website defaults to a mobile-optimized (or similarly responsive) version, advertisers should design the website so that any necessary disclosures are clear and conspicuous, regardless of the device on which they are displayed. **Example 19** Among many other considerations, if a disclosure is too small to read on a mobile device and the text of the disclosure cannot be enlarged, it is not a clear and conspicuous disclosure. If a disclosure is presented in a long line of text that does not wrap around and fit on a screen, it is unlikely to be adequate.

**Don’t bury it.** The prominence of the disclosure also may be affected by other factors. A disclosure that is buried in a long paragraph of unrelated text will not be effective. The unrelated text detracts from the message and makes it unlikely that a consumer would notice the disclosure or recognize its importance. Even though the unrelated information may be useful, advertisers must ensure that the disclosure is communicated effectively. For example, it is highly unlikely that consumers will read disclosures buried in “terms of use” and similar lengthy agreements. Even if such agreements may be sufficient for contractual or other purposes, disclosures that are necessary to prevent deception or unfairness should not be relegated to them. Similarly, simply because consumers click that they “agree” to a term or condition, does not make the disclosure clear and conspicuous.

**A disclosure that addresses a subject other than the primary subject of the ad.** Consumers who are trying to complete a task and obtain a specific product or service may not pay adequate attention to a disclosure that does not relate to the task at hand. This can be problematic if, for example, an advertiser is selling a product or service together with a negative option trial for a different product or service. In these circumstances, even a relatively prominent disclosure about the negative option trial could be missed by consumers because this additional product or service is not their primary focus. One way to increase the likelihood that consumers have actually read and understood a disclosure in such circumstances is to require consumers to affirmatively acknowledge having seen the disclosure by choosing between multiple answer options, none of which is preselected. Any such affirmative

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29. Website operators can identify visitors who are using mobile devices to visit their websites and display a version of the site that has been designed or "optimized" to enable those consumers to view the site more easily.
acknowledgement should be displayed early in the decision-making process, e.g., before the primary item is actually added to a shopping cart.  **Example 20**

3. Distracting Factors in Ads

The clear and conspicuous analysis does not focus only on the disclosure itself. It also is important to consider the entire ad. Elements like graphics, sound, text, links that lead to other screens or sites, or “add to cart” buttons may result in consumers not noticing, reading, or listening to the disclosure.  **Example 21**

- **Don’t let other parts of an ad get in the way.** On television, moving visuals behind a text message make the text hard to read and may distract consumers’ attention from the message. Using graphics online raises similar concerns: flashing images or animated graphics may reduce the prominence of a disclosure. Graphics on a webpage alone may not undermine the effectiveness of a disclosure. It is important, however, to consider all the elements in the ad, not just the text of the disclosure.  **Example 22**

4. Repetition

It may be necessary to disclose information more than once to convey a non-deceptive message. Repeating a disclosure makes it more likely that a consumer will notice and understand it, and will also increase the likelihood that it will be seen by consumers who may be entering the website at different points. Still, the disclosure need not be repeated so often that consumers would ignore it or it would clutter the ad.

- **Repeat disclosures on lengthy sites and applications, as needed.** Consumers can access and navigate websites or applications in different ways. Many consumers may access a site through its home page, but others might enter in the middle, perhaps by linking to that page from a search engine or another website. Consumers also might not click on every page of the site and might not choose to scroll to the bottom of each page. And many may not read every word on every page of a website. As a result, advertisers should consider whether consumers who see only a portion of their ad are likely to be misled because they will either miss a necessary disclosure or not understand its relationship to the claim it modifies.

- **Repeat disclosures with repeated claims, as needed.** If claims requiring qualification are repeated throughout an ad, it may be necessary to repeat the
disclosure, too. In some situations, the disclosure itself is so integral to the claim that it must always accompany the claim to prevent deception. In other instances, a clearly-labeled hyperlink could be repeated on each page where the claim appears, so that the full disclosure would be placed on only one page of the site.

5. Multimedia Messages and Campaigns

Online ads may contain or consist of audio messages, videos, animated segments, or augmented reality experiences (interactive computer-generated experiences) with claims that require qualification. As with radio and television ads, the disclosure should accompany the claim. In evaluating whether disclosures in these multimedia portions of online ads are clear and conspicuous, advertisers should evaluate all of the factors discussed in this guidance document, as well as these special considerations:

- **For audio claims, use audio disclosures.** The disclosure should be in a volume and cadence sufficient for a reasonable consumer to hear and understand it. The volume of the disclosure can be evaluated in relation to the rest of the message, and in particular, the claim. Of course, consumers who do not have speakers, appropriate software, or devices with audio capabilities or who have their sound turned off will not hear either the claim or the disclosure.

- **For written claims, use written disclosures.** Disclosures triggered by a claim or other information in an ad’s written text should be made in writing, and not be placed solely in an audio or video clip. Consumers who do not have speakers, appropriate software, or devices with audio capabilities or who have their sound turned off will not hear an audio disclosure; similarly, consumers might not be able to view a video clip on some devices or simply might not choose to watch it.

- **Display visual disclosures for a sufficient duration.** Visual disclosures presented in video clips or other dynamic portions of online ads should appear for a duration sufficient for consumers to notice, read, and understand them. As with brief video superscripts in television ads, fleeting online disclosures are not likely to be effective.

Advertisers should also recognize that consumers today may be viewing their messages through multiple media (e.g., watching television, surfing the web on a computer, viewing space constrained messages on a smartphone, etc.). This multiple media access does not
alter the requirement that required disclosures be made clearly and conspicuously in each advertisement that would require a disclosure if viewed in isolation.

6. Understandable Language

For disclosures to be effective, consumers must be able to understand them. Advertisers should use clear language and syntax and avoid legalese or technical jargon. Disclosures should be as simple and straightforward as possible. Icons and abbreviations are not adequate to prevent a claim from being misleading if a significant minority of consumers do not understand their meaning. Incorporating extraneous material into the disclosure also may diminish communication of the message to consumers.

IV. Conclusion

Although online commerce (including mobile and social media marketing) is booming, deception can dampen consumer confidence in the online marketplace. To ensure that products and services are described truthfully online and that consumers get what they pay for, the FTC will continue to enforce its consumer protection laws. Most of the general principles of advertising law apply to online ads, but new issues arise almost as fast as technology develops. The FTC will continue to evaluate online advertising, using traditional criteria, while recognizing the challenges that may be presented by future innovation. Businesses, as well, should consider these criteria when developing online ads and ensuring they comply with the law.

30. See supra note 23.
Appendix: Examples
Example 1

The disclosure “imitation” needs to accompany the triggering term “pearl,” so that consumers are not misled about the type of pearls being sold. The disclosure would not be as effective if it was separated from the word “pearl” or placed on a different page. The FTC’s Guides for the Jewelry, Precious Metals, and Pewter Industries, 16 C.F.R. § 23.19, recognize this and advise that the disclosure “imitation” immediately precede the word pearl. In this situation, there is no reason to evaluate proximity differently in online ads than other types of ads.
Example 2

This ad must disclose that the diamond weights are not exact and that a 3/4 carat diamond may weigh between .72 and .78 carats. Here, though, because of the blank space between the textual description of the product and the disclosure, even consumers who scroll down to the end of the text (see second screen) will probably think that there is no more information to view and are likely to miss the disclosure.
Example 3

Advertisers should take into consideration the variety of devices and platforms that consumers can use to view their ads and ensure that necessary disclosures are clear and conspicuous on any device or platform that is capable of displaying their message.

In this example, consumers might not expect a monthly service fee for cameras used to monitor their homes over the Internet, so a disclosure is necessary to prevent the ad from being misleading. Placing the disclosure in a different column than the camera price it qualifies, as in this example, rather than directly under the price information, makes it less likely that consumers viewing this webpage on a desktop computer would notice the disclosure here.

Webpage on a desktop
Example 3 (cont’d)

Consumers viewing this webpage on a smartphone or other device with a small screen, however, would likely find it too small to read (see mobile screen without zooming, below), requiring them to zoom in on the part or parts that they wish to read.

They are likely to zoom in on the center column (see zoomed-in mobile screen, below), which contains the main information on the page and might not scroll left to see the disclosure in the left column. As a result, consumers who use a smartphone to view this website, which has not been optimized for mobile devices, might easily miss the monthly monitoring fee disclosure.

Mobile screen (no zooming)  Mobile screen (zoomed-in)
Example 4

Hyperlinks should not be used to communicate disclosures that are an integral part of a claim or inseparable from it, including important health and safety information. In this example, the hyperlink “Important Health Information” leads to a disclosure, “Frost-a-tron may not keep perishable food items cold enough to prevent the growth of bacteria when the temperature is over 80ºF, such as in a hot car. Use in these conditions could lead to food-borne illness.” The fact that the cooler might not keep food cold enough to prevent the growth of dangerous bacteria should not be hidden behind a hyperlink, even one labeled “Important Health Information.” This is especially true when the cooler is promoted for keeping perishable food fresh and cold on road trips. Moreover, any disclosure that is integral to the primary claim should be immediately adjacent to that claim.
Example 5

Although hyperlinks generally should not be used to disclose information integral to the claim — such as the existence and nature of additional fees consumers might not expect — a hyperlink can be used to disclose the details if they are too complex to describe next to the basic price information. Here the hyperlink leads to the disclosure, “Monitoring plan price: $15.95 per month with one camera, $9.95 per month/per camera with two cameras, $7.95 per month/per camera with three or more cameras. Save 10% with a 12-month commitment, 20% with a 24-month commitment. Additional 5% discount for seniors and families of active duty military personnel.”

This information about the monitoring plan’s prices is likely is too complex to appear adjacent to the price per camera claim, and thus can be placed behind a properly labeled hyperlink. The statement “Service plan required” and the hyperlink are next to the price per camera; and together, the statement and the hyperlink’s label communicate to consumers the specific nature and importance of the information to which the hyperlink leads.

Moreover, all cost information, including any such fees, should be presented clearly and conspicuously to consumers prior to purchase.
Example 6

Because the advertiser’s assertion that “Satisfaction is guaranteed” implies that dissatisfied consumers can get a full refund of the purchase price, the advertiser should clearly and conspicuously disclose any restocking fees.

The hyperlink “Restocking fee applies to all returns.” leads to the disclosure, “If you return the Frost-a-tron within 30 days there is a restocking fee of $19.95. After 30 days and before 90 days, the restocking fee is $29.95. After 90 days, the restocking fee is $49.95. Shipping and handling fees are non-refundable. No COD on returns.” The details in this return policy are likely too complex to disclose next to the guarantee. The label of the hyperlink adequately conveys the nature and relevance of the information to which it leads.
Example 7

This ad must disclose that the diamond weights are not exact and that a 3/4 carat diamond may weigh between .72 and .78 carats. Even if the hyperlink “3/4 Ct.” clicks through to a page that lists the weight range for every size diamond sold by the advertiser, this disclosure is not clear and conspicuous.

Underlining “3/4 Ct.” may or may not indicate to consumers that this is a hyperlink. Even if consumers recognize it as a hyperlink, the label here does not communicate the relevance of the information to which that link leads — in this case, to a disclosure that diamond weights are not exact, that the diamonds sold by this merchant may vary in weight, and that the advertised ¾ carat diamonds might each actually weight less than 0.75 carats. Consumers might expect to find additional general information about “carats” or diamond weights generally, but not necessarily information that qualifies the claim that they are purchasing diamonds of a specific weight.
Example 8

Because the advertiser’s assertion that “Satisfaction is guaranteed” implies that dissatisfied consumers can get a full refund of the purchase price, the advertiser should disclose any restocking fees. The hyperlink “Disclaimer” leads to the disclosure, “If you return the Frost-a-tron within 30 days there is a restocking fee of $19.95. After 30 days and before 90 days, the restocking fee is $29.95. After 90 days, the restocking fee is $49.95. Shipping and handling fees are non-refundable. No COD on returns.”

The hyperlink label “Disclaimer” does not adequately convey that the information to which this hyperlink leads concerns significant restocking fees applied to all product returns; nor would hyperlinks labeled “Disclosure,” “Details,” or even “Return Information.”

In contrast, the hyperlink in Example 6, “Restocking fee applies to all returns,” does convey the nature and importance of the information in question.
Example 9

This ad must disclose that the diamond weights are not exact and that a 3/4 carat diamond may weigh between .72 and .78 carats. Even if the hyperlink clicks through to a page that lists the weight range for every size diamond sold by the advertiser, this disclosure is not clear and conspicuous because the hyperlink’s label does not indicate the importance of the information to which the link leads so that consumers understand why they should click on it. Although the label does indicate that more information about the earrings is available if the consumer clicks through, it does not indicate that it is related to the weight of the diamonds being advertised. Consumers could expect, for example, that this link takes them to shipping and ordering information, rather than information about the diamond weights.
Example 10

Julie Brown’s endorsement is followed by a symbol consisting of the letters “FS” in a circle that is intended to disclose that she received a free sample (in this case, a free camera) in exchange for providing her endorsement.

Icons, abbreviations, and symbols such as this are not adequate to prevent a claim from being misleading if they do not provide sufficient clues about why a claim is qualified or about the nature of the disclosure, or if consumers simply do not understand their meaning. The fact that the icon or symbol also functions as a hyperlink to an explanation of its meaning would not be sufficient to make the disclosure clear and conspicuous.
Example 11

Hyperlinks should be adjacent to the claims to which they relate, in order to increase the likelihood that consumers will see them and understand their relevance.

In this example, the hyperlink about restocking fees is right next to the claim that triggers the need for this qualifying information — that satisfaction is guaranteed.
Example 12

Hyperlinks should be adjacent to the claim to which they relate, in order to increase the likelihood that consumers will see them and understand their relevance.

In this example, the substantial gap between the end of the webpage’s main text and the hyperlink makes it unlikely that consumers will notice the hyperlink. In addition, as noted in Example 9, the hyperlink is inadequately labeled.
Example 13

If the purchase or use of the advertised product entails significant additional charges beyond the basic price of the product and consumers reasonably might not expect those charges, they should be disclosed prominently on the same page as, and immediately adjacent to, statements of the product’s basic cost.

In this example, disclosure of the existence and amount of a monthly monitoring fee only on the check-out page (see next page) would likely be deemed insufficiently clear and conspicuous; this fee should be clearly stated next to the price of the cameras on the preceding website pages that provide that price information.
Example 13 (continued)

However, disclosure on the check-out page of the sales tax the consumer owes on this purchase, as well as reasonable shipping and handling charges, would not be problematic, because consumers expect these charges.
Example 14

This space-constrained message requires two disclosures: (1) that JuliStarz is a paid endorser for Fat-away; and (2) the amount of weight that consumers who use Fat-away can generally expect to lose in the depicted circumstances, which is much less than the 30 pounds Juli says she lost in 6 weeks. See Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 CFR Part 255.

Even if the link in the message led directly to those disclosures on the Fat-away website, those disclosures would not be adequate if consumers could purchase Fat-away at a brick and mortar store or from a third-party online retailer (a retailer that is not affiliated with the advertiser). In either case, they might not click through to the Fat-away website, and thus would not see these disclosures.
Example 15

In some cases, required disclosures can easily be incorporated into a space-constrained ad. This space-constrained message requires two disclosures: (1) that JuliStarz is a paid endorser for Fat-away; and (2) the amount of weight that consumers who use Fat-away can generally expect to lose in the depicted circumstances, which is much less than the 30 pounds Juli says she lost in 6 weeks. This space-constrained ad signals that Juli is a paid endorser by beginning with “Ad:” which only takes up four characters. It also succinctly discloses, “Typical loss: 1lb/wk.”
Example 16

The initial space-constrained message requires two disclosures: (1) that Juli is a paid endorser for Fat-away; and (2) the amount of weight that consumers who use Fat-away can generally expect to lose in the depicted circumstances, which is much less than the 30 pounds Juli says she lost in 6 weeks. Putting that information in a subsequent message is problematic, because unrelated messages may arrive in the interim. By the time Juli’s disclosures arrive, consumers might no longer be reading these messages, or they simply might not realize that those disclosures pertain to the original message.
Example 17

These space-constrained messages all require the following disclosures: (1) that JuliStarz is a paid endorser for Fat-away; and (2) the amount of weight that consumers who use Fat-away can generally expect to lose in the depicted circumstances which is much less than the 30 pounds Juli says she lost in 6 weeks. Although each of these messages includes an abbreviation or link that leads to disclosure of the relevant information, each of them may be inadequate to prevent consumers from being misled.

Consumers might not understand that “#spon” means that the message was sponsored by an advertiser. If a significant proportion of reasonable viewers would not, then the ad would be deceptive.

Putting #spon directly after the link might confuse consumers and make it less likely that they would understand that it is a disclosure.

Consumers viewing “bit.ly/f56,” which links to the advertiser’s official website for the product, might not realize the nature and relevance of the information that could be found by clicking on it. Moreover, if consumers can buy Fat-away in brick and mortar stores, at third-party online retailers, or in any way other than by clicking on the link, consumers who do not click on the link would be misled.

Similarly, consumers viewing “bit.ly/f56/disclose[6],” which leads to a third-party website with disclosures, would not necessarily understand what they will find at that website, or why they should click on that link.
Example 18

Both disclosures in this ad appear in text that contrasts poorly with the background of the page and they therefore are both easy to miss. Because the disclosures are not prominent, they are not clear and conspicuous.
Example 19

Most webpages viewable on desktop devices may also be viewable on smartphones, but, as discussed earlier, consumers may miss disclosures on mobile devices because of the need to zoom in on text and to scroll horizontally as well as vertically.

Disclosures are more likely to be clear and conspicuous on websites that are optimized for mobile devices or created using responsive design, which automatically detects the kind of device the consumer is using to access the site and arranges the content on the site so it makes sense for that device.

In this example, the website is optimized for mobile devices, and both the information about the service plan requirement and the hyperlink to the plan’s prices are immediately adjacent to the camera price they qualify.
Example 20

Because the negative option in this example (enrollment in a recipe club) addresses a different subject than the main offer (cookware), the advertiser should take special care to ensure that the disclosure of the negative option is clear and conspicuous. In this case, requiring consumers to affirmatively acknowledge the disclosure by clicking on one of the two boxes on the second page — neither of which has been preselected — before they can proceed to checkout, should achieve that goal.

(continue on next page)
Example 20 (continued)

With my purchase, I will be automatically enrolled in a 30-day free trial membership in the Fantastique Gourmet Cook's Club. At the end of the free trial, my credit card will be billed $4.95 each month for membership to the Gourmet Cook's Club. Cancellation details.

- Yes, continue to checkout
- No, remove this item from my shopping cart.

Order Subtotal: 1 (item) $220.00
Example 21

The blogger in this example obtained the paint she is reviewing for free and must disclose that fact. Although she does so at the end of her blog post, there are several hyperlinks before that disclosure that could distract readers and cause them to click away before they get to the end of the post. Given these distractions, the disclosure likely is not clear and conspicuous.
Example 22

All of the elements of an ad should be considered in assessing whether a disclosure is clear and conspicuous. In some cases, elements that the advertiser might think make an ad more eye-catching could actually distract consumers from important disclosures.

In this example, an animated spokesperson moving around and discussing the benefits of the Eye on Your Home monitoring cameras might distract consumers from the disclosure of the monthly monitoring fee.
Complying with the
MADE IN USA STANDARD
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Introduction

The Federal Trade Commission (FTC) is charged with preventing deception and unfairness in the marketplace. The FTC Act gives the Commission the power to bring law enforcement actions against false or misleading claims that a product is of U.S. origin. Traditionally, the Commission has required that a product advertised as Made in USA be “all or virtually all” made in the U.S. After a comprehensive review of Made in USA and other U.S. origin claims in product advertising and labeling, the Commission announced in December 1997 that it would retain the “all or virtually all” standard. The Commission also issued an Enforcement Policy Statement on U.S. Origin Claims to provide guidance to marketers who want to make an unqualified Made in USA claim under the “all or virtually all” standard and those who want to make a qualified Made in USA claim.

This publication provides additional guidance about how to comply with the “all or virtually all” standard. It also offers some general information about the U.S. Customs Service’s requirement that all products of foreign origin imported into the U.S. be marked with the name of the country of origin.

This publication is the Federal Trade Commission staff’s view of the law’s requirements. It is not binding on the Commission. The Enforcement Policy Statement issued by the FTC is at the end of the publication.
Basic Information About *Made In USA* Claims

Must U.S. content be disclosed on products sold in the U.S.?

U.S. content must be disclosed on automobiles and textile, wool, and fur products (*see page 15*). There's no law that requires most other products sold in the U.S. to be marked or labeled *Made in USA* or have any other disclosure about their amount of U.S. content. However, manufacturers and marketers who choose to make claims about the amount of U.S. content in their products must comply with the FTC’s *Made in USA* policy.

What products does the FTC’s *Made in USA* policy apply to?

The policy applies to all products advertised or sold in the U.S., except for those specifically subject to country-of-origin labeling by other laws (*see pages 15-17*). Other countries may have their own country-of-origin marking requirements. As a result, exporters should determine whether the country to which they are exporting imposes such requirements.

What kinds of claims does the Enforcement Policy Statement apply to?

The Enforcement Policy Statement applies to U.S. origin claims that appear on products and labeling, advertising, and other promotional materials. It also applies to all other forms of marketing, including marketing through digital or electronic mechanisms, such as Internet or e-mail.

A *Made in USA* claim can be express or implied.

**Examples** of express claims: *Made in USA*. “Our products are American-made.” “USA.”
In identifying implied claims, the Commission focuses on the overall impression of the advertising, label, or promotional material. Depending on the context, U.S. symbols or geographic references (for example, U.S. flags, outlines of U.S. maps, or references to U.S. locations of headquarters or factories) may convey a claim of U.S. origin either by themselves, or in conjunction with other phrases or images.

**Example:** A company promotes its product in an ad that features a manager describing the “true American quality” of the work produced at the company’s American factory. Although there is no express representation that the company’s product is made in the U.S., the overall — or net — impression the ad is likely to convey to consumers is that the product is of U.S. origin.

**Brand names and trademarks**

Ordinarily, the Commission will not consider a manufacturer or marketer’s use of an American brand name or trademark by itself as a U.S. origin claim. Similarly, the Commission is not likely to interpret the mere listing of a company’s U.S. address on a package label in a non-prominent way as a claim of U.S. origin.

**Example:** A product is manufactured abroad by a well-known U.S. company. The fact that the company is headquartered in the U.S. also is widely known. Company pamphlets for its foreign-made product prominently feature its brand name. Assuming that the brand name does not specifically denote U.S. origin (that is, the brand name is not “Made in America, Inc.”), using the brand name by itself does not constitute a claim of U.S. origin.
Representations about entire product lines

Manufacturers and marketers should not indicate, either expressly or implicitly, that a whole product line is of U.S. origin (“Our products are made in USA”) when only some products in the product line are made in the U.S. according to the “all or virtually all” standard.

Does the FTC pre-approve Made in USA claims?

The Commission does not pre-approve advertising or labeling claims. A company doesn’t need approval from the Commission before making a Made in USA claim. As with most other advertising claims, a manufacturer or marketer may make any claim as long as it is truthful and substantiated.

The Standard For Unqualified Made In USA Claims

What is the standard for a product to be called Made in USA without qualification?

For a product to be called Made in USA, or claimed to be of domestic origin without qualifications or limits on the claim, the product must be “all or virtually all” made in the U.S. 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.

What does “all or virtually all” mean?

“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.
What substantiation is required for a *Made in USA* claim?

When a manufacturer or marketer makes an unqualified claim that a product is *Made in USA*, it should have — and rely on — a “reasonable basis” to support the claim at the time it is made. This means a manufacturer or marketer needs competent and reliable evidence to back up the claim that its product is “all or virtually all” made in the U.S.

What factors does the Commission consider to determine whether a product is “all or virtually all” made in the U.S.?

The product’s final assembly or processing must take place in the U.S. 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 are attributable to foreign processing, but that processing represents a significant amount of the product’s overall processing. The same could be true for some foreign parts. In these cases, the foreign content (processing or parts) is more than negligible, and, as a result, unqualified claims are inappropriate.

**Example:** A company produces propane barbecue grills at a plant in Nevada. The product’s major components include the gas valve, burner and aluminum housing, each of which is made in the U.S. The grill’s knobs and tubing are imported from Mexico. An unqualified *Made in USA* claim is not likely to be deceptive because the knobs and tubing make up a negligible portion of the product’s total manufacturing costs and are insignificant parts of the final product.
Example: A table lamp is assembled in the U.S. from American-made brass, an American-made Tiffany-style lampshade, and an imported base. The base accounts for a small percent of the total cost of making the lamp. An unqualified Made in USA claim is deceptive for two reasons: The base is not far enough removed in the manufacturing process from the finished product to be of little consequence and it is a significant part of the final product.

What items should manufacturers and marketers include in analyzing the percentage of domestic content in a particular product?

Manufacturers and marketers should use the cost of goods sold or inventory costs of finished goods in their analysis. Such costs generally are limited to the total cost of all manufacturing materials, direct manufacturing labor, and manufacturing overhead.

Should manufacturers and marketers rely on information from American suppliers about the amount of domestic content in the parts, components, and other elements they buy and use for their final products?

If given in good faith, manufacturers and marketers can rely on information from suppliers about the domestic content in the parts, components, and other elements they produce. Rather than assume that the input is 100 percent U.S.-made, however, manufacturers and marketers would be wise to ask the supplier for specific information about the percentage of U.S. content before they make a U.S. origin claim.

Example: A company manufactures food processors in its U.S. plant, making most of the parts, including the housing and blade, from U.S. materials. The motor, which constitutes 50 percent of the food
processor’s total manufacturing costs, is bought from a U.S. supplier. The food processor manufacturer knows that the motor is assembled in a U.S. factory. Even though most of the parts of the food processor are of U.S. origin, the final assembly is in the U.S., and the motor is assembled in the U.S., the food processor is not considered “all or virtually all” American-made if the motor itself is made of imported parts that constitute a significant percentage of the appliance’s total manufacturing cost. Before claiming the product is Made in USA, this manufacturer should look to its motor supplier for more specific information about the motor’s origin.

**Example:** On its purchase order, a company states: “Our company requires that suppliers certify the percentage of U.S. content in products supplied to us. If you are unable or unwilling to make such certification, we will not purchase from you.” Appearing under this statement is the sentence, “We certify that our ___ have at least ___% U.S. content,” with space for the supplier to fill in the name of the product and its percentage of U.S. content. The company generally could rely on a certification like this to determine the appropriate country-of-origin designation for its product.

How far back in the manufacturing process should manufacturers and marketers look?

To determine the percentage of U.S. content, manufacturers and marketers should look back far enough in the manufacturing process to be reasonably sure that any significant foreign content has been included in their assessment of foreign costs. Foreign content incorporated early in the manufacturing process often will be less
significant to consumers than content that is a direct part of the finished product or the parts or components produced by the immediate supplier.

**Example:** The steel used to make a single component of a complex product (for example, the steel used in the case of a computer’s floppy drive) is an early input into the computer’s manufacture, and is likely to constitute a very small portion of the final product’s total cost. On the other hand, the steel in a product like a pipe or a wrench is a direct and significant input. Whether the steel in a pipe or wrench is imported would be a significant factor in evaluating whether the finished product is “all or virtually all” made in the U.S.

Are raw materials included in the evaluation of whether a product is “all or virtually all” made in the U.S.?

It depends on how much of the product’s cost the raw materials make up and how far removed from the finished product they are.

**Example:** If the gold in a gold ring is imported, an unqualified *Made in USA* claim for the ring is deceptive. That’s because of the significant value the gold is likely to represent relative to the finished product, and because the gold — an integral component — is only one step back from the finished article. By contrast, consider the plastic in the plastic case of a clock radio otherwise made in the U.S. of U.S.-made components. If the plastic case was made from imported petroleum, a *Made in USA* claim is likely to be appropriate because the petroleum is far enough removed from the finished product, and is an insignificant part of it as well.
Qualified Claims

What is a qualified *Made in USA* claim?

A qualified *Made in USA* claim describes the extent, amount or type of a product’s domestic content or processing; it indicates that the product isn’t entirely of domestic origin.

**Example:** “60% U.S. content.” “Made in USA of U.S. and imported parts.” “Couch assembled in USA from Italian Leather and Mexican Frame.”

When is a qualified *Made in USA* claim appropriate?

A qualified *Made in USA* claim is appropriate for products that include U.S. content or processing but don’t meet the criteria for making an unqualified *Made in USA* claim. Because even qualified claims may imply more domestic content than exists, manufacturers or marketers must exercise care when making these claims. That is, avoid qualified claims unless the product has a significant amount of U.S. content or U.S. processing. A qualified *Made in USA* claim, like an unqualified claim, must be truthful and substantiated.

**Example:** An exercise treadmill is assembled in the U.S. The assembly represents significant work and constitutes a “substantial transformation” (a term used by the U.S. Customs Service — see pages 13-14). All of the treadmill’s major parts, including the motor, frame, and electronic display, are imported. A few of its incidental parts, such as the handle bar covers, the plastic on/off power key, and the treadmill mat, are manufactured in the U.S. Together, these parts account for approximately three percent of the total cost of all the parts. Because the value of the U.S.-made parts is negligible compared to the value of all the parts, a claim on the treadmill that it is “Made in USA of U.S. and Imported Parts” is deceptive. A
claim like “Made in U.S. from Imported Parts” or “Assembled in U.S.A.” *(see page 13)* would not be deceptive.

**U.S. origin claims for specific processes or parts**

Claims that a particular manufacturing or other process was performed in the U.S. or that a particular part was manufactured in the U.S. 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.

Manufacturers and marketers should be cautious about using general terms, such as “produced,” “created” or “manufactured” in the U.S. Words like these are unlikely to convey a message limited to a particular process. Additional qualification probably is necessary to describe a product that is not “all or virtually all” made in the U.S.

In addition, if a product is of foreign origin (that is, it has been substantially transformed abroad), manufacturers and marketers also should make sure they satisfy Customs’ markings statute and regulations that require such products to be marked with a foreign country of origin *(see page 14)*. Further, Customs requires the foreign country of origin to be preceded by “Made in,” “Product of,” or words of similar meaning when any city or location that is not the country of origin appears on the product.

**Example:** A company designs a product in New York City and sends the blueprint to a factory in Finland for manufacturing. It labels the product “Designed in USA — Made in Finland.” Such a specific processing claim would not lead a reasonable consumer to believe that the whole product was made in the U.S. The Customs Service requires the product to be marked “Made in,” or “Product of” Finland since the product
is of Finnish origin and the claim refers to the U.S. Examples of other specific processing claims are: “Bound in U.S. — Printed in Turkey.” “Hand carved in U.S. — Wood from Philippines.” “Software written in U.S. — Disk made in India.” “Painted and fired in USA. Blanks made in (foreign country of origin).”

Example: A company advertises its product, which was invented in Seattle and manufactured in Bangladesh, as “Created in USA.” This claim is deceptive because consumers are likely to interpret the term “Created” as Made in USA — an unqualified U.S. origin claim.

Example: A computer imported from Korea is packaged in the U.S. in an American-made corrugated paperboard box containing only domestic materials and domestically produced expanded rigid polystyrene plastic packing. Stating Made in USA on the package would deceive consumers about the origin of the product inside. But the company could legitimately make a qualified claim, such as “Computer Made in Korea — Packaging Made in USA.”

Example: The Acme Camera Company assembles its cameras in the U.S. The camera lenses are manufactured in the U.S., but most of the remaining parts are imported. A magazine ad for the camera is headlined “Beware of Imported Imitations” and states “Other high-end camera makers use imported parts made with cheap foreign labor. But at Acme Camera, we want only the highest quality parts for our cameras and we believe in employing American workers. That’s why we make all of our lenses right here in the U.S.” This ad is likely to convey that more than a specific product part (the lens) is of U.S. origin. The marketer should be prepared to substantiate the broader U.S. origin claim conveyed to consumers viewing the ad.
Comparative Claims

Comparative claims should be truthful and substantiated, and presented in a way that makes the basis for comparison clear (for example, whether the comparison is to another leading brand or to a previous version of the same product). They should truthfully describe the U.S. content of the product and be based on a meaningful difference in U.S. content between the compared products.

**Example:** An ad for cellular phones states “We use more U.S. content than any other cellular phone manufacturer.” The manufacturer assembles the phones in the U.S. from American and imported components and can substantiate that the difference between the U.S. content of its phones and that of the other manufacturers’ phones is significant. This comparative claim is not deceptive.

**Example:** A product is advertised as having “twice as much U.S. content as before.” The U.S. content in the product has been increased from 2 percent in the previous version to 4 percent in the current version. This comparative claim is deceptive because the difference between the U.S. content in the current and previous version of the product are insignificant.

Assembled in USA Claims

A product that includes foreign components may be called “Assembled in USA” without qualification when its principal assembly takes place in the U.S. and the assembly is substantial. For the “assembly” claim to be valid, the product’s last “substantial transformation” *(see page 14)* also should have occurred in the U.S. That’s why a “screwdriver” assembly in the U.S. of foreign components into a final product at the end of the manufacturing process doesn’t usually qualify for the “Assembled in USA” claim.
**Example:** A lawn mower, composed of all domestic parts except for the cable sheathing, flywheel, wheel rims and air filter (15 to 20 percent foreign content) is assembled in the U.S. An “Assembled in USA” claim is appropriate.

**Example:** All the major components of a computer, including the motherboard and hard drive, are imported. The computer’s components then are put together in a simple “screwdriver” operation in the U.S., are not substantially transformed under the Customs Standard, and must be marked with a foreign country of origin. An “Assembled in U.S.” claim without further qualification is deceptive.

### The FTC and The Customs Service

**What is the U.S. Customs Service’s jurisdiction over country-of-origin claims?**

The Tariff Act gives Customs and the Secretary of the Treasury the power to administer the requirement that imported goods be marked with a foreign country of origin (for example, “Made in Japan”).

When an imported product incorporates materials and/or processing from more than one country, Customs considers the country of origin to be the last country in which a “substantial transformation” took place. Customs defines “substantial transformation” as a manufacturing process that results in a new and different product with a new name, character, and use that is different from that which existed before the change. Customs makes country-of-origin determinations using the “substantial transformation” test on a case-by-case basis. In some instances, Customs uses a “tariff shift” analysis, comparable to “substantial transformation,” to determine a product’s country of origin.
What is the interaction between the FTC and Customs regarding country-of-origin claims?

Even if Customs determines that an imported product does not need a foreign country-of-origin mark, it is not necessarily permissible to promote that product as Made in USA. The FTC considers additional factors to decide whether a product can be advertised or labeled as Made in USA.

Manufacturers and marketers should check with Customs to see if they need to mark their products with the foreign country of origin. If they don’t, they should look at the FTC’s standard to check if they can properly make a Made in USA claim.

The FTC has jurisdiction over foreign origin claims on products and in packaging that are beyond the disclosures required by Customs (for example, claims that supplement a required foreign origin marking to indicate where additional processing or finishing of a product occurred).

The FTC also has jurisdiction over foreign origin claims in advertising and other promotional materials. Unqualified U.S. origin claims in ads or other promotional materials for products that Customs requires a foreign country-of-origin mark may mislead or confuse consumers about the product’s origin. To avoid misleading consumers, marketers should clearly disclose the foreign manufacture of a product.

**Example:** A television set assembled in Korea using an American-made picture tube is shipped to the U.S. The Customs Service requires the television set to be marked “Made in Korea” because that’s where the television set was last “substantially transformed.” The company’s World Wide Web page states “Although our televisions are made abroad, they always contain U.S.-made picture tubes.” This statement is not deceptive. However, making the statement “All our
picture tubes are made in the USA” — without disclosing the foreign origin of the television’s manufacture — might imply a broader claim (for example, that the television set is largely made in the U.S.) than could be substantiated. That is, if the statement and the entire ad imply that any foreign content or processing is negligible, the advertiser must substantiate that claim or net impression. The advertiser in this scenario would not be able to substantiate the implied Made in USA claim because the product was “substantially transformed” in Korea.

Other Statutes

What are the requirements of other federal statutes relating to country-of-origin determinations?

Textile Fiber Products Identification Act and Wool Products Labeling Act — Require a Made in USA label on most clothing and other textile or wool household products if the final product is manufactured in the U.S. of fabric that is manufactured in the U.S., regardless of where materials earlier in the manufacturing process (for example, the yarn and fiber) came from. Textile products that are imported must be labeled as required by the Customs Service. A textile or wool product partially manufactured in the U.S. and partially manufactured in another country must be labeled to show both foreign and domestic processing.

On a garment with a neck, the country of origin must be disclosed on the front of a label attached to the inside center of the neck — either midway between the shoulder seams or very near another label attached to the inside center of the neck. On a garment without a neck, and on other kinds of textile products, the country of origin must appear on a conspicuous and readily accessible label on the inside or outside of the product.
Catalogs and other mail order promotional materials for textile and wool products, including those disseminated on the Internet, must disclose whether a product is made in the U.S., imported or both.

The Fur Products Labeling Act requires the country of origin of imported furs to be disclosed on all labels and in all advertising. For copies of the Textile, Wool or Fur Rules and Regulations, or the new business education guide on labeling requirements, call the FTC’s Consumer Response Center (202-382-4357). Or visit the FTC online at [www.ftc.gov](http://www.ftc.gov). Click on Consumer Protection.

American Automobile Labeling Act — Requires that each automobile manufactured on or after October 1, 1994, for sale in the U.S. bear a label disclosing where the car was assembled, the percentage of equipment that originated in the U.S. and Canada, and the country of origin of the engine and transmission. Any representation that a car marketer makes that is required by the AALA is exempt from the Commission’s policy. When a company makes claims in advertising or promotional materials that go beyond the AALA requirements, it will be held to the Commission’s standard. For more information, call the Consumer Programs Division of the National Highway Traffic Safety Administration (202-366-0846).

Buy American Act — Requires that a product be manufactured in the U.S. of more than 50 percent U.S. parts to be considered Made in USA for government procurement purposes. For more information, review the Buy American Act at 41 U.S.C. §§ 10a-10c, the Federal Acquisition Regulations at 48 C.F.R. Part 25, and the Trade Agreements Act at 19 U.S.C. §§ 2501-2582.
What To Do About Violations

What if I suspect noncompliance with the FTC’s *Made in USA* standard or other country-of-origin mislabeling?

Information about possible illegal activity helps law enforcement officials target companies whose practices warrant scrutiny. If you suspect noncompliance, you may file a complaint online with the FTC Complaint Assistant at ftc.gov/complaint or send an e-mail to MUSA@ftc.gov. If you know about import or export fraud, file a complaint with U.S. Customs and Border Protection at https://apps.cbp.gov/eallegations/. Examples of fraudulent practices involving imports include removing a required foreign origin label before the product is delivered to the ultimate purchaser (with or without the improper substitution of a *Made in USA* label) and failing to label a product with a required country of origin.

You also can contact your state Attorney General and your local Better Business Bureau to report a company. Or you can refer your complaint to the National Advertising Division (NAD) of the Council of Better Business Bureaus by calling (212) 754-1320. NAD handles complaints about the truth and accuracy of national advertising. You can reach the Council of Better Business Bureaus on the web at adweb.com/adassoc17.html.

Finally, the *Lanham Act* gives any person (such as a competitor) who is damaged by a false designation of origin the right to sue the party making the false claim. Consult a lawyer to see if this private right of action is an appropriate course of action for you.
For More Information

The FTC works for the consumer to prevent fraudulent, deceptive, and unfair business practices in the marketplace and to provide information to help consumers spot, stop, and avoid them. To file a complaint or to get free information on consumer issues, visit ftc.gov or call toll-free, 1-877-FTC-HELP (1-877-382-4357); TTY: 1-866-653-4261. The FTC enters consumer complaints into the Consumer Sentinel Network, a secure online database and investigative tool used by hundreds of civil and criminal law enforcement agencies in the U.S. and abroad.

Your Opportunity to Comment

The National Small Business Ombudsman and 10 Regional Fairness Boards collect comments from small businesses about federal compliance and enforcement activities. Each year, the Ombudsman evaluates the conduct of these activities and rates each agency’s responsiveness to small businesses. Small businesses can comment to the Ombudsman without fear of reprisal. To comment, call toll-free 1-888-REGFAIR (1-888-734-3247) or go to www.sba.gov/ombudsman.
Enforcement Policy Statement on U.S. Origin Claims

I. Introduction

The Federal Trade Commission ("FTC" or "Commission") is issuing this statement to provide guidance regarding its enforcement policy with respect to the use of Made in USA and other U.S. origin claims in advertising and labeling. The Commission has determined, as explained below, that unqualified U.S. origin claims should be substantiated by evidence that the product is all or virtually all made in the United States. This statement is intended to elaborate on principles set out in individual cases and advisory opinions previously issued over the course of many years by the Commission. This statement, furthermore, is the culmination of a comprehensive process in which the Commission has reviewed its standard for evaluating U.S. origin claims. Throughout this process, the Commission has solicited, and received, substantial public input on relevant issues. The Commission anticipates that from time to time, it may be in the public interest to solicit further public comment on these issues and to assess whether the views expressed in this statement continue to be appropriate and reflect consumer perception and opinion, and to determine whether there are areas on which the Commission could provide additional guidance.

The principles set forth in this enforcement policy statement apply to U.S. origin claims included in labeling, advertising, other promotional materials, and all other forms of marketing, including marketing through digital or electronic means such as the Internet or electronic mail. The statement, moreover, articulates the Commission’s enforcement policy with respect to U.S. origin claims for all products advertised
or sold in the United States, with the exception of those products specifically subject to the country-of-origin labeling requirements of the Textile Fiber Products Identification Act,\textsuperscript{1} the Wool Products Labeling Act,\textsuperscript{2} or the Fur Products Labeling Act.\textsuperscript{3} With respect to automobiles or other passenger motor vehicles, nothing in this enforcement policy statement is intended to affect or alter a marketer’s obligation to comply with the requirements of the American Automobile Labeling Act\textsuperscript{4} or regulations issued pursuant thereto, and any representation required by that Act to appear on automobile labeling will not be considered a deceptive act or practice for purposes of this enforcement policy statement, regardless of whether the representation appears in labeling, advertising or in other promotional material. Claims about the U.S. origin of passenger motor vehicles other than those representations required by the American Automobile Labeling Act, however, will be governed by the principles set forth in this statement.

II. Background

Both the FTC and the U.S. Customs Service have responsibilities related to the use of country-of-origin claims. While the FTC regulates claims of U.S. origin under its general authority to act against deceptive acts and practices, foreign-origin markings on products (e.g., “Made in Japan”) are regulated primarily by the U.S. Customs Service (“Customs” or “the Customs Service”) under the Tariff Act of 1930. Specifically, Section 304 of the Tariff Act, 19 U.S.C. § 1304, administered by the Secretary of the Treasury and the Customs Service, requires that all products of foreign origin imported into the United States be marked with the name of a foreign country of origin. Where an imported product incorporates materials and/or processing from more than one country, Customs considers the country of origin to be the last country in which a “substantial transformation”
took place. A substantial transformation is a manufacturing or other process that results in a new and different article of commerce, having a new name, character and use that is different from that which existed prior to the processing. Country-of-origin determinations using the substantial transformation test are made on a case-by-case basis through administrative determinations by the Customs Service.\(^5\)

The FTC also has jurisdiction over foreign origin claims in packaging insofar as they go beyond the disclosures required by the Customs Service (e.g., claims that supplement a required foreign origin marking, so as to represent where additional processing or finishing of a product occurred). In addition, the Commission has jurisdiction over foreign-origin claims in advertising, which the U.S. Customs Service does not regulate.

Where Customs determines that a good is not of foreign origin (\textit{i.e.}, the good undergoes its last substantial transformation in the United States), there is generally no requirement that it be marked with any country of origin. For most goods, neither the Customs Service nor the FTC requires that goods made partially or wholly in the United States be labeled with \textit{Made in USA} or any other indication of U.S. origin.\(^6\) The fact that a product is not required to be marked with a foreign country of origin does not mean that it is permissible to promote that product as \textit{Made in USA}. The FTC will consider additional factors, beyond those considered by the Customs Service in determining whether a product is of foreign origin, in determining whether a product may properly be represented as \textit{Made in USA}.

This statement is intended to address only those issues related to \textit{U.S.} origin claims. In developing appropriate country-of-origin labeling for their products, marketers are urged also to consult the U.S. Customs Service’s marking regulations.
III. Interpreting U.S. Origin Claims: The FTC’s Deception Analysis

The Commission’s authority to regulate U.S. origin claims derives from Section 5 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 45, which prohibits “unfair or deceptive acts or practices.” The Commission has set forth its interpretations of its Section 5 authority in its Deception Policy Statement, and its Policy Statement Regarding Advertising Substantiation Doctrine. As set out in the Deception Policy Statement, the Commission will find an advertisement or label deceptive under Section 5, and therefore unlawful, if it contains a representation or omission of fact that is likely to mislead consumers acting reasonably under the circumstances, and that representation or omission is material. In addition, objective claims carry with them the implication that they are supported by valid evidence. It is deceptive, therefore, to make a claim unless, at the time the claim is made, the marketer possesses and relies upon a reasonable basis substantiating the claim. Thus, a Made in USA claim, like any other objective advertising claim, must be truthful and substantiated.

A representation may be made by either express or implied claims. “Made in USA” and “Our products are American made” would be examples of express U.S. origin claims. In identifying implied claims, the Commission focuses on the overall net impression of an advertisement, label, or other promotional material. This requires an examination of both the representation and the overall context, including the juxtaposition of phrases and images, and the nature of the transaction. Depending on the context, U.S. symbols or geographic references, such as U.S. flags, outlines of U.S. maps, or references to U.S. locations of headquarters or factories, may, by themselves or in conjunction with other phrases or images, convey a claim of U.S. origin. For
example, assume that a company advertises its product in an advertisement that features pictures of employees at work at what is identified as the company’s U.S. factory, these pictures are superimposed on an image of a U.S. flag, and the advertisement bears the headline “American Quality.” Although there is no express representation that the company’s product is Made in USA, the net impression of the advertisement is likely to convey to consumers a claim that the product is of U.S. origin.

Whether any particular symbol or phrase, including an American flag, conveys an implied U.S. origin claim, will depend upon the circumstances in which the symbol or phrase is used. Ordinarily, however, the Commission will not consider a marketer’s use of an American brand name or trademark, without more, to constitute a U.S. origin claim, even though some consumers may believe, in some cases mistakenly, that a product made by a U.S.-based manufacturer is made in the United States. Similarly, the mere listing of a company’s U.S. address on a package label, in a nonprominent manner, such as would be required under the Fair Packaging and Labeling Act, is unlikely, without more, to constitute a Made in USA claim.

IV. Substantiating U.S. Origin Claims: The “All Or Virtually All” Standard

Based on its review of the traditional use of the term Made in USA, and the record as a whole, the Commission concludes that consumers are likely to understand an unqualified U.S. origin claim to mean that the advertised product is “all or virtually all” made in the United States. Therefore, when a marketer makes an unqualified claim that a product is Made in USA, it should, at the time the representation is made, possess and rely upon a reasonable basis that the product is in fact all or virtually all made in the United States.
A product that is all or virtually all made in the United States will ordinarily be one in which all significant parts and processing that go into the product are of U.S. origin. In other words, where a product is labeled or otherwise advertised with an unqualified Made in USA claim, it should contain only a de minimis, or negligible, amount of foreign content. Although there is no single “bright line” to establish when a product is or is not “all or virtually all” made in the United States, there are a number of factors that the Commission will look to in making this determination. To begin with, in order for a product to be considered “all or virtually all” made in the United States, the final assembly or processing of the product must take place in the United States. Beyond this minimum threshold, the Commission will consider other factors, including but not limited to the portion of the product’s total manufacturing costs that are attributable to U.S. parts and processing; and how far removed from the finished product any foreign content is.

A. Site of Final Assembly or Processing

The consumer perception evidence available to the Commission indicates that the country in which a product is put together or completed is highly significant to consumers in evaluating where the product is “made.” Thus, regardless of the extent of a product’s other U.S. parts or processing, in order to be considered all or virtually all made in the United States, it is a prerequisite that the product have been last “substantially transformed” in the United States, as that term is used by the U.S. Customs Service — i.e., the product should not be required to be marked “made in [foreign country]” under 19 U.S.C. § 1304. Furthermore, even where a product is last substantially transformed in the United States, if the product is thereafter assembled or processed (beyond de minimis finishing processes) outside the United States, the Commission is unlikely to consider that
product to be all or virtually all made in the United States. For example, were a product to be manufactured primarily in the United States (and last substantially transformed there) but sent to Canada or Mexico for final assembly, any U.S. origin claim should be qualified to disclose the assembly that took place outside the United States.

B. Proportion of U.S. Manufacturing Costs

Assuming the product is put together or otherwise completed in the United States, the Commission will also examine the percentage of the total cost of manufacturing the product that is attributable to U.S. costs (i.e., U.S. parts and processing) and to foreign costs. Where the percentage of foreign content is very low, of course, it is more likely that the Commission will consider the product all or virtually all made in the United States. Nonetheless, there is not a fixed point for all products at which they suddenly become “all or virtually all” made in the United States. Rather, the Commission will conduct this inquiry on a case-by-case basis, balancing the proportion of U.S. manufacturing costs along with the other factors discussed herein, and taking into account the nature of the product and consumers’ expectations in determining whether an enforcement action is warranted. Where, for example, a product has an extremely high amount of U.S. content, any potential deception resulting from an unqualified Made in USA claim is likely to be very limited, and therefore the costs of bringing an enforcement action challenging such a claim are likely to substantially outweigh any benefit that might accrue to consumers and competition.

C. Remoteness of Foreign Content

Finally, in evaluating whether any foreign content is significant enough to prevent a product from being
considered all or virtually all made in the United States, the Commission will look not only to the percentage of the cost of the product that the foreign content represents, but will also consider how far removed from the finished product the foreign content is. As a general rule, in determining the percentage of U.S. content in its product, a marketer should look far enough back in the manufacturing process that a reasonable marketer would expect that it had accounted for any significant foreign content. In other words, a manufacturer who buys a component from a U.S. supplier, which component is in turn made up of other parts or materials, may not simply assume that the component is 100% U.S. made, but should inquire of the supplier as to the percentage of U.S. content in the component. Foreign content that is incorporated further back in the manufacturing process, however, will often be less significant to consumers than that which constitutes a direct input into the finished product. For example, in the context of a complex product, such as a computer, it is likely to be insignificant that imported steel is used in making one part of a single component (e.g., the frame of the floppy drive). This is because the steel in such a case is likely to constitute a very small portion of the total cost of the computer, and because consumers purchasing a computer are likely, if they are concerned about the origin of the product, to be concerned with the origin of the more immediate inputs (floppy drive, hard drive, CPU, keyboard, etc.) and perhaps the parts that, in turn, make up those inputs. Consumers are less likely to have in mind materials, such as the steel, that are several steps back in the manufacturing process. By contrast, in the context of a product such as a pipe or a wrench for which steel constitutes a more direct and significant input, the fact that the steel is imported is likely to be a significant factor in evaluating whether the finished product is all or virtually all made in the United States. Thus, in some circumstances, there
may be inputs one or two steps back in the manufacturing process that are foreign and there may be other foreign inputs that are much further back in the manufacturing process. Those foreign inputs far removed from the finished product, if not significant, are unlikely to be as important to consumers and change the nature of what otherwise would be considered a domestic product.

In this analysis, raw materials are neither automatically included nor automatically excluded in the evaluation of whether a product is all or virtually all made in the United States. Instead, whether a product whose other parts and processing are of U.S. origin would not be considered all or virtually all made in the United States because the product incorporated imported raw materials depends (as would be the case with any other input) on what percentage of the cost of the product the raw materials constitute and how far removed from the finished product the raw materials are. Thus, were the gold in a gold ring, or the clay used to make a ceramic tile, imported, an unqualified Made in USA claim for the ring or tile would likely be inappropriate. This is both because of the significant value the gold and the clay are likely to represent relative to the finished product and because the gold and the clay are only one step back from the finished articles and are integral components of those articles. By contrast, were the plastic in the plastic case of a clock radio that was otherwise all or virtually all made in the United States found to have been made from imported petroleum, the petroleum is far enough removed from, and an insignificant enough input into, the finished product that it would nonetheless likely be appropriate to label the clock radio with an unqualified U.S. origin claim.
V. Qualifying U.S. Origin Claims

A. Qualified U.S. Origin Claims Generally

Where a product is not all or virtually all made in the United States, any claim of U.S. origin should be adequately qualified to avoid consumer deception about the presence or amount of foreign content. In order to be effective, any qualifications or disclosures should be sufficiently clear, prominent, and understandable to prevent deception. Clarity of language, prominence of type size and style, proximity to the claim being qualified, and an absence of contrary claims that could undercut the effectiveness of the qualification, will maximize the likelihood that the qualifications and disclosures are appropriately clear and prominent.

Within these guidelines, the form the qualified claim takes is up to the marketer. A marketer may make any qualified claim about the U.S. content of its products as long as the claim is truthful and substantiated. Qualified claims, for example, may be general, indicating simply the existence of unspecified foreign content (e.g., “Made in USA of U.S. and imported parts”) or they may be specific, indicating the amount of U.S. content (e.g., “60% U.S. content”), the parts or materials that are imported (e.g., “Made in USA from imported leather”), or the particular foreign country from which the parts come (“Made in USA from French components”).

Where a qualified claim takes the form of a general U.S. origin claim accompanied by qualifying information about foreign content (e.g., “Made in USA of U.S. and imported parts” or “Manufactured in U.S. with Indonesian materials”), the Commission believes that consumers are likely to understand such a claim to mean that, whatever foreign materials or parts the product contains, the last assembly, processing, or finishing of the product occurred in the United States. Marketers therefore should avoid using such
claims unless they can substantiate that this is the case for their products. In particular, such claims should only be made where the product was last substantially transformed in the United States. Where a product was last substantially transformed abroad, and is therefore required by the U.S. Customs Service to be labeled “Made in [foreign country],” it would be inappropriate, and confusing, to use a claim such as “Made in USA of U.S. and imported parts.”

B. Claims about Specific Processes or Parts

Regardless of whether a product as a whole is all or virtually all made in the United States, a marketer may make a claim that a particular manufacturing or other process was performed in the United States, or that a particular part was manufactured in the United States, provided that the claim is truthful and substantiated and that reasonable consumers would understand the claim to refer to a specific process or part and not to the general manufacture of the product. This category would include claims such as that a product is “designed” or “painted” or “written” in the United States or that a specific part, *e.g.*, the picture tube in a television, is made in the United States (even if the other parts of the television are not). Although such claims do not expressly disclose that the products contain foreign content, the Commission believes that they are normally likely to be specific enough so as not to convey a general claim of U.S. origin. More general terms, however, such as that a product is, for example, “produced,” or “manufactured” in the United States, are likely to require further qualification where they are used to describe a product that is not all or virtually all made in the United States. Such terms are unlikely to convey to consumers a message limited to a particular process performed, or part manufactured, in the United States. Rather, they are likely to be understood by consumers as
synonymous with *Made in USA* and therefore as unqualified U.S. origin claims.

The Commission further concludes that, in many instances, it will be appropriate for marketers to label or advertise a product as “Assembled in the United States” without further qualification. Because “assembly” potentially describes a wide range of processes, however, from simple, “screwdriver” operations at the very end of the manufacturing process to the construction of a complex, finished item from basic materials, the use of this term may, in some circumstances, be confusing or misleading to consumers. To avoid possible deception, “Assembled in USA” claims should be limited to those instances where the product has undergone its principal assembly in the United States and that assembly is substantial. In addition, a product should be last substantially transformed in the United States to properly use an “Assembled in USA” claim. This requirement ensures against potentially contradictory claims, *i.e.*, a product claiming to be “Assembled in USA” while simultaneously being marked as “Made in [foreign country].” In many instances, this requirement will also be a minimum guarantee that the U.S. assembly operations are substantial.

C. Comparative Claims

U.S. origin claims that contain a comparative statement (*e.g.*, “More U.S. content than our competitor”) may be made as long as the claims are truthful and substantiated. Where this is so, the Commission believes that comparative U.S. origin claims are unlikely to be deceptive even where an unqualified U.S. origin claim would be inappropriate. Comparative claims, however, should be presented in a manner that makes the basis for the comparison clear (*e.g.*, whether the comparison is being made to another leading brand or to a previous version of the same product). Moreover, comparative
claims should not be used in a manner that, directly or by implication, exaggerates the amount of U.S. content in the product, and should be based on a meaningful difference in U.S. content between the compared products. Thus, a comparative U.S. origin claim is likely to be deceptive if it is made for a product that does not have a significant amount of U.S. content or does not have significantly more U.S. content than the product to which it is being compared.

D. U.S. Customs Rules and Qualified and Comparative U.S. Origin Claims

It is possible, in some circumstances, for marketers to make certain qualified or comparative U.S. origin claims (including claims such as that the product contains a particular amount of U.S. content, certain claims about the U.S. origin of specific processes or parts, and certain comparative claims) even for products that are last substantially transformed abroad and which therefore must be marked with a foreign country of origin. In making such claims, however, marketers are advised to take care to follow the requirements set forth by the U.S. Customs Service and to ensure, for purposes of Section 5 of the FTC Act, that the claim does not deceptively suggest that the product is made with a greater amount of U.S. parts or processing than is in fact the case.

In looking at the interaction between the requirements for qualified and comparative U.S. origin claims and those for foreign origin marking, the analysis is slightly different for advertising and for labeling. This is a result of the fact that the Tariff Act requires foreign origin markings on articles or their containers, but does not govern claims in advertising or other promotional materials.

Thus, on a product label, where the Tariff Act requires that the product be marked with a foreign country of origin, Customs regulations permit indications of U.S. origin only
when the foreign country of origin appears in close proximity and is at least of comparable size. As a result, under Customs regulations, a product may, for example, be properly marked “Made in Switzerland, finished in U.S.” or “Made in France with U.S. parts,” but it may not simply be labeled “Finished in U.S.” or “Made with U.S. parts” if it is deemed to be of foreign origin.

In advertising or other promotional materials, the Tariff Act does not require that foreign origin be indicated. The Commission recognizes that it may be possible to make a U.S. origin claim in advertising or promotional materials that is sufficiently specific or limited that it does not require an accompanying statement of foreign manufacture in order to avoid conveying a broader and unsubstantiated meaning to consumers. Whether a nominally specific or limited claim will in fact be interpreted by consumers in a limited matter is likely to depend on the connotations of the particular representation being made (e.g., “finished” may be perceived as having a more general meaning than “painted”) and the context in which it appears. Marketers who wish to make U.S. origin claims in advertising or other promotional materials without an express disclosure of foreign manufacture for products that are required by Customs to be marked with a foreign country of origin should be aware that consumers may believe the literal U.S. origin statement is implying a broader meaning and a larger amount of U.S. content than expressly represented. Marketers are required to substantiate implied, as well express, material claims that consumers acting reasonably in the circumstances take from the representations. Therefore, the Commission encourages marketers, where a foreign-origin marking is required by Customs on the product itself, to include in any qualified or comparative U.S. origin claim a clear, conspicuous, and understandable disclosure of foreign manufacture.
Endnotes

5. For goods from NAFTA countries, determinations are codified in “tariff shift” regulations. 19 C.F.R. § 102.
6. For a limited number of goods, such as textile, wool, and fur products, there are, however, statutory requirements that the U.S. processing or manufacturing that occurred be disclosed. See, e.g., Textile Fiber Products Identification Act, 15 U.S.C. § 70(b).
9. This assumes that the brand name does not specifically denote U.S. origin, e.g., the brand name is not “Made in America, Inc.”
10. For example, a legal trademark consisting of, or incorporating, a stylized mark suggestive of a U.S. flag will not, by itself, be considered to constitute a U.S. origin claim.
12. For purposes of this Enforcement Policy Statement, “United States” refers to the several states, the District of Columbia, and the territories and possessions of the United States. In other words, an unqualified Made in USA claim may be made for a product that is all or virtually all manufactured in U.S. territories or possessions as well as in the 50 states.
13. In addition, marketers should not represent, either expressly or by implication, that a whole product line is of U.S. origin (e.g., “Our products are Made in USA”) when only some products in the product line are, in fact, made in the United States. Although not the focus of this Enforcement Policy Statement, this is a principle that has been addressed in Commission cases both within and outside the U.S. origin context. See, e.g., Hyde Athletic Industries, FTC Docket No. C-3695 (consent order December 4, 1996) (complaint alleged
that respondent represented that all of its footwear was made in the United States, when a substantial amount of its footwear was made wholly in foreign countries); *New Balance Athletic Shoes, Inc.*, FTC Docket No. 9268 (consent order December 2, 1996) (same); *Uno Restaurant Corp.*, FTC Docket No. C-3730 (consent order April 4, 1997) (complaint alleged that restaurant chain represented that its whole line of thin crust pizzas were low fat, when only two of eight pizzas met acceptable limits for low fat claims); *Häagen-Dazs Company, Inc.*, FTC Docket No. C-3582 (consent order June 7, 1995) (complaint alleged that respondent represented that its entire line of frozen yogurt was 98% fat free when only certain flavors were 98% fat free).

14. The word “parts” is used in its general sense throughout this enforcement policy statement to refer to all physical inputs into a product, including but not limited to subassemblies, components, parts, or materials.

15. It is conceivable, for example, that occasionally a product imported into the United States could have a very high proportion of its manufacturing costs be U.S. costs, but is nonetheless not considered by the U.S. Customs Service to have been last substantially transformed in the United States. In such cases, the product would be required to be marked with a foreign country of origin and an unqualified U.S. origin claim could not appropriately be made for the product.

16. In calculating manufacturing costs, manufacturers should ordinarily use as their measure the cost of goods sold or finished goods inventory cost, as those terms are used in accordance with generally accepted accounting principles. Such costs will generally include (and be limited to) the cost of manufacturing materials, direct manufacturing labor, and manufacturing overhead. Marketers should also note the admonishment below that, in determining the percentage of U.S. content, they should look far enough back in the manufacturing process that a reasonable marketer would expect that it had accounted for any significant foreign content.

17. For example, assume that a company manufactures lawn mowers in its U.S. plant, making most of the parts (housing, blade, handle, etc.) itself from U.S. materials. The engine, which constitutes 50% of the total cost of manufacturing the lawn mower, is bought from a U.S. supplier, which, the lawn mower manufacturer knows, assembles the engine in a U.S. factory. Although most of the parts and the final
assembly of the lawn mower are of U.S. origin and the engine is assembled in the United States, the lawn mower will not necessarily be considered all or virtually all made in the United States. This is because the engine itself is made up of various parts that may be imported and that may constitute a significant percentage of the total cost of manufacturing the lawn mower. Thus, before labeling its lawn mower *Made in USA*, the manufacturer should look to its engine supplier for more specific information as to the engine’s origin. For instance, were foreign parts to constitute 60% of the cost of producing the engine, then the lawn mower would contain a total of at least 30% foreign content, and an unqualified *Made in USA* label would be inappropriate.

18. For purposes of this Enforcement Policy Statement, the Commission considers raw materials to be products such as minerals, plants or animals that are processed no more than necessary for ordinary transportation.

19. In addition, because raw materials, unlike manufactured inputs, may be inherently unavailable in the United States, the Commission will also look at whether or not the raw material is indigenous to the United States, or available in commercially significant quantities. In cases where the material is not found or grown in the United States, consumers are likely to understand that a *Made in USA* claim on a product that incorporates such materials (e.g., vanilla ice cream that uses vanilla beans, which, the Commission understands, are not grown in the United States) means that all or virtually all of the product, except for those materials not available here, originated in the United States. Nonetheless, even where a raw material is nonindigenous to the United States, if that imported material constitutes the whole or essence of the finished product (e.g., the rubber in a rubber ball or the coffee beans in ground coffee), it would likely mislead consumers to label the final product with an unqualified *Made in USA* claim.

20. Nonetheless, in these examples, other, qualified claims could be used to identify truthfully the domestic processing that took place. For example, if the gold ring was designed and fabricated in the United States, the manufacturer could say that (e.g., “designed and fabricated in U.S. with 14K imported gold”). Similarly, if the ceramic tile were manufactured in the United States from imported clay, the manufacturer could indicate that as well.
21. These examples are intended to be illustrative, not exhaustive; they do not represent the only claims or disclosures that would be permissible under Section 5 of the FTC Act. As indicated, however, qualified claims, like any claim, should be truthful and substantiated and should not overstate the U.S. content of a product. For example, it would be inappropriate for a marketer to represent that a product was “Made in U.S. of U.S. and imported parts” if the overwhelming majority of the parts were imported and only a single, insignificant part was manufactured in the United States; a more appropriate claim would be “Made in U.S. of imported parts.”

22. On the other hand, that the last substantial transformation of the product takes place in the United States may not alone be sufficient to substantiate such a claim. For example, under the rulings of the U.S. Customs Service, a disposable razor is considered to have been last substantially transformed where its blade is made, even if it is thereafter assembled in another country. Thus, a disposable razor that is assembled in Mexico with a U.S.-made blade and other parts of various origins would be considered to have been last substantially transformed in the United States and would not have to bear a foreign country-of-origin marking. Nonetheless, because the final assembly of the razor occurs abroad, it would be inappropriate to label the razor “Made in U.S. of U.S. and imported parts.” It would, however, likely be appropriate to label the razor “Assembled in Mexico with U.S.-made blade,” “Blade made in United States, razor assembled in Mexico” or “Assembled in Mexico with U.S. and imported parts.”

23. 19 C.F.R. § 134.46. Specifically, this provision provides that:

In any case in which the words “United States,” or “American,” the letters “U.S.A.,” any variation of such words or letters, or the name of any city or locality in the United States, or the name of any foreign country or locality other than the country or locality in which the article was manufactured or produced appear on an imported article or its container, and those words, letters or names may mislead or deceive the ultimate purchaser as to the actual country of origin of the article, there shall appear, legibly and permanently, in close proximity to such words, letters or name, and in at least a comparable size, the name of the country of origin preceded by “Made in,” “Product of,” or other words of similar meaning.

In a Federal Register notice announcing amendments to this provision, the Customs Service indicated that, where a product has a foreign
origin, any references to the United States made in the context of a statement relating to any aspect of the production or distribution of the product (e.g., “Designed in USA,” “Made for XYZ Corporation, California, U.S.A.,” or “Distributed by ABC, Inc., Colorado, USA”) would be considered misleading to the ultimate purchaser and would require foreign country-of-origin marking in accordance with the above provision. 62 Fed. Reg. 44,211, 44,213 (1997).
Dietary Supplements:

An Advertising Guide for Industry
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INTRODUCTION

The dietary supplement industry is a dynamic one. Scientific research on the associations between supplements and health is accumulating rapidly. The number of products — and the variety of uses for which they are promoted — have increased significantly in the last few years. The role of the Federal Trade Commission, which enforces laws outlawing “unfair or deceptive acts or practices,” is to ensure that consumers get accurate information about dietary supplements so that they can make informed decisions about these products.¹

The Federal Trade Commission (FTC) and the Food and Drug Administration (FDA) work together under a long-standing liaison agreement governing the division of responsibilities between the two agencies. As applied to dietary supplements, the FDA has primary responsibility for claims on product labeling, including packaging, inserts, and other promotional materials distributed at the point of sale. The FTC has primary responsibility for claims in advertising, including print and broadcast ads, infomercials, catalogs, and similar direct marketing materials. Marketing on the Internet is subject to regulation in the same fashion as promotions through any other media. Because of their shared jurisdiction, the two agencies work closely to ensure that their enforcement efforts are consistent to the fullest extent feasible.

In 1994, the Dietary Supplements Health and Education Act (DSHEA) significantly changed the FDA’s role in regulating supplement labeling.² These claims are commonly referred to as “structure/function” claims.³ Although DSHEA does not directly apply to advertising, it has generated many questions about the FTC’s approach to dietary supplement advertising. The answer to these questions is that advertising for any product — including dietary supplements — must be truthful, not misleading, and substantiated. Given the dramatic increase in the volume and variety of dietary supplement advertising in recent years, FTC staff is issuing this guide to clarify how long-standing FTC policies and enforcement practices relate to dietary supplement advertising.

The FTC’s approach to supplement advertising is best illustrated by its Enforcement Policy Statement on Food Advertising (Food Policy Statement). Although the Food Policy Statement does not specifically refer to supplements, the principles underlying the FTC’s regulation of health claims in food advertising are relevant to the agency’s approach to health claims in supplement advertising. In general, the FTC gives great deference to an FDA determination of whether there is adequate support for a health claim. Furthermore, the FTC and the FDA will generally arrive at the same conclusion when evaluating unqualified health claims. As the Food Policy Statement notes, however, there may...
be certain limited instances when a carefully qualified health claim in advertising may be permissible under FTC law, in circumstances where it has not been authorized for labeling. However, supplement marketers are cautioned that the FTC will require both strong scientific support and careful presentation for such claims.5

Supplement marketers should ensure that anyone involved in promoting products is familiar with basic FTC advertising principles. The FTC has taken action not just against supplement manufacturers, but also, in appropriate circumstances, against ad agencies, distributors, retailers, catalog companies, infomercial producers and others involved in deceptive promotions. Therefore, all parties who participate directly or indirectly in the marketing of dietary supplements have an obligation to make sure that claims are presented truthfully and to check the adequacy of the support behind those claims.
The FTC’s truth-in-advertising law can be boiled down to two common-sense propositions:

1) advertising must be truthful and not misleading; and
2) before disseminating an ad, advertisers must have adequate substantiation for all objective product claims.6

A deceptive ad is one that contains a misrepresentation or omission that is likely to mislead consumers acting reasonably under the circumstances to their detriment. The FTC’s substantiation standard is a flexible one that depends on many factors. When evaluating claims about the efficacy and safety of foods, dietary supplements and drugs, the FTC has typically applied a substantiation standard of competent and reliable scientific evidence.

To determine whether an ad complies with FTC law, it is first necessary to identify all express and implied claims that the ad conveys to consumers. Once the claims are identified, the scientific evidence is assessed to determine whether there is adequate support for those claims. The following sections describe this two-step process with examples illustrating how principles of ad interpretation and substantiation apply in the context of dietary supplement advertising. The examples have been simplified to illustrate one or two specific points. Therefore, advertisers should use these examples as general guidance only.7

A. Identifying Claims and Interpreting Ad Meaning

1. Identifying Express and Implied Claims

The first step in evaluating the truthfulness and accuracy of advertising is to identify all express and implied claims an ad conveys to consumers. Advertisers must make sure that whatever they say expressly in an ad is accurate. Often, however, an ad conveys other claims beyond those expressly stated. Under FTC law, an advertiser is equally responsible for the accuracy of claims suggested or implied by the ad. Advertisers cannot suggest claims that they could not make directly.

When identifying claims, advertisers should not focus just on individual phrases or statements, but rather should consider the ad as a whole, assessing the “net impression” conveyed by all elements of the ad, including the text, product name, and depictions. When an ad lends itself to more than one reasonable interpretation, the advertiser is responsible for substantiating each
interpretation. Copy tests, or other evidence of how consumers actually interpret an ad, can be valuable. In many cases, however, the implications of the ad are clear enough to determine the existence of the claim by examining the ad alone, without extrinsic evidence.

**Example 1**

An advertisement claims that “university studies prove” that a mineral supplement can improve athletic performance. The advertiser has expressly stated the level of support for the claimed benefit and is therefore responsible for having “university studies” that document the advertised benefit. Furthermore, the implied reference to scientific evidence likely conveys to consumers the implied claim that the studies are methodologically sound.

**Example 2**

An advertisement for a vitamin supplement claims that 90% of cardiologists regularly take the product. In addition to the literal claim about the percentage of cardiologists who use the product, the ad likely conveys an implied claim that the product offers some benefit for the heart. Therefore, the advertiser must have adequate support for both representations.

Depending on how it is phrased, or the context in which it is presented, a statement about a product’s effect on a normal “structure or function” of the body may also convey to consumers an implied claim that the product is beneficial for the treatment of a disease. If elements of the ad imply that the product also provides a disease benefit, the advertiser must be able to substantiate the implied disease claim even if the ad contains no express reference to disease.

**Example 3**

An ad for an herbal supplement makes the claim that the product boosts the immune system to help maintain a healthy nose and throat during the winter season. The ad features the product name “Cold Away” and includes images of people sneezing and coughing. The various elements of the ad — the product name, the depictions of cold sufferers, and the reference to nose and throat health during the winter season — likely convey to consumers that the product helps prevent colds. Therefore, the advertiser must be able to substantiate
that claim. Even without the product name and images, the reference to nose and throat health during the winter season may still convey a cold prevention claim.

**Example 4**

An ad for a dietary supplement called “Arthricure” claims that the product maintains joint health and mobility into old age. The “before” picture shows an elderly woman using a walker. The “after” picture shows her dancing with her husband. The images and product name likely convey implied claims that the product is effective in the treatment of the symptoms of arthritis, and may also imply that the product can cure or mitigate the disease. The advertiser must be able to substantiate these implied claims.

2. **When to Disclose Qualifying Information**

An advertisement can also be deceptive because of what it fails to say. Section 15 of the FTC Act requires advertisers to disclose information if it is material in light of representations made or suggested by the ad, or material considering how consumers would customarily use the product. Thus, if an ad would be misleading without certain qualifying information, that information must be disclosed. For example, advertisers should disclose information relevant to the limited applicability of an advertised benefit. Similarly, advertising that makes either an express or implied safety representation should include information about any significant safety risks. Even in the absence of affirmative safety representations, advertisers may need to inform consumers of significant safety concerns relating to the use of their product.

**Example 5**

An advertisement for a multi-vitamin/mineral supplement claims that the product can eliminate a specific mineral deficiency that results in feelings of fatigue. In fact, less than 2% of the general population to which the ad is targeted suffers from this deficiency. The advertiser should disclose this fact so that consumers will understand that only the small percentage of people who suffer from the actual mineral deficiency are likely to experience any reduction in fatigue from using the product.
Example 6
An advertiser for a weight loss supplement cites a placebo-controlled, double-blind clinical study as demonstrating that the product resulted in an average weight loss of fifteen pounds over an eight-week period. The weight loss for the test group is, in fact, significantly greater than for the control subjects. However, both the control and test subjects engaged in regular exercise and followed a restricted-calorie diet as part of the study regimen. The advertisement should make clear that users of the supplement must follow the same diet and exercise regimen to achieve the claimed weight loss results.

Example 7
An advertiser claims that its herbal product is a natural pain reliever “without the side effects of over-the-counter pain relievers.” However, there is substantial evidence that the product can cause nausea in some consumers when taken regularly. Because of the reference to the side effects of other pain relievers, consumers would likely understand this ad to mean that the herbal product posed no significant adverse effects. Therefore, the advertiser should disclose information about the adverse effects of the herbal product.

Example 8
An herbal weight loss product contains an ingredient which, when consumed daily over an extended period, can result in a significant increase in blood pressure. Even in the absence of any representation about the product’s safety, the advertiser should disclose this potentially serious risk.

3. Clear and Prominent Disclosure
When the disclosure of qualifying information is necessary to prevent an ad from being deceptive, that information should be presented clearly and prominently so that it is actually noticed and understood by consumers. A fine-print disclosure at the bottom of a print ad, a
disclaimer buried in a body of text, a brief video superscript in a television ad, or a disclaimer
that is easily missed on an Internet web site, are not likely to be adequate. To ensure that
disclosures are effective, marketers should use clear language, avoid small type, place any
qualifying information close to the claim being qualified, and avoid making inconsistent
statements or distracting elements that could undercut or contradict the disclosure. Because
consumers are likely to be confused by ads that include inconsistent or contradictory
information, disclosures need to be both direct and unambiguous to be effective.

Example 9
A marketer promotes a supplement as a weight loss aid. There is adequate substantiation to indicate that the
product can contribute to weight loss when used in
conjunction with a diet and exercise regimen. The
banner headline claims “LOSE 5 POUNDS IN 10 DAYS,”
the ad copy discusses how easy it is to lose weight by
simply taking the product 3 times a day, and the ad
includes dramatic before-and-after pictures. A fine print
disclosure at the bottom of the ad, “Restricted calorie
diet and regular exercise required,” would not be
sufficiently prominent to qualify the banner headline and
the overall impression that the product alone will cause
weight loss. The ad should be revised to remove any
implication that the weight loss can be achieved by use
of the product alone. This revision, combined with a
prominent indication of the need for diet and exercise,
may be sufficient to qualify the claim. However, if the
research does not show that the product contributes
anything to the weight loss effect caused by diet and
exercise, it would be deceptive, even with a disclosure,
to promote the product for weight loss.

Qualifying information should be sufficiently simple and clear that consumers not only notice
it, but also understand its significance. This can be a particular challenge when explaining
complicated scientific concepts to a general audience, for example, if an advertiser wants to
promote the effect of a supplement where there is an emerging body of science supporting that
effect, but the evidence is insufficient to substantiate an unqualified claim. The advertiser
should make sure consumers understand both the extent of scientific support and the existence
of any significant contrary evidence. Vague qualifying terms — for example, that the product
“may” have the claimed benefit or “helps” achieve the claimed benefit — are unlikely to be
adequate. Furthermore, advertisers should not make qualified claims where the studies they
rely on are contrary to a stronger body of evidence. In such instance, even a qualified claim
could mislead consumers.
Example 10
A company has results from two studies suggesting that the main ingredient in its supplement helps to maintain healthy cholesterol levels. There are, however, significant limitations to each of the studies and a better controlled study is necessary to confirm whether the effect is genuine. The company makes a claim in advertising that “scientific studies show that our product may be effective in reducing cholesterol.” The use of the word “may” is not likely to be a sufficient disclaimer to convey the limitations of the science. A disclosure that clearly describes the limitations of the research, in language consumers can easily understand, and states directly and unambiguously that additional research is necessary to confirm the preliminary results is more likely to be effective. As discussed in the following section on substantiating claims, the extent to which studies support an unqualified claim will depend largely on what experts in the relevant field would consider to be adequate support.

B. Substantiating Claims

In addition to conveying product claims clearly and accurately, marketers need to verify that there is adequate support for their claims. Under FTC law, before disseminating an ad, advertisers must have a reasonable basis for all express and implied product claims. What constitutes a reasonable basis depends greatly on what claims are being made, how they are presented in the context of the entire ad, and how they are qualified. The FTC’s standard for evaluating substantiation is sufficiently flexible to ensure that consumers have access to information about emerging areas of science. At the same time, it is sufficiently rigorous to ensure that consumers can have confidence in the accuracy of information presented in advertising. A number of factors determine the appropriate amount and type of substantiation, including:

- **The Type of Product.** Generally, products related to consumer health or safety require a relatively high level of substantiation.

- **The Type of Claim.** Claims that are difficult for consumers to assess on their own are held to a more exacting standard. Examples include health claims that may be subject to a placebo effect or technical claims that consumers cannot readily verify for themselves.
**The Benefits of a Truthful Claim** and **The Cost/Feasibility of Developing Substantiation for the Claim.** These factors are often weighed together to ensure that valuable product information is not withheld from consumers because the cost of developing substantiation is prohibitive. This does not mean, however, that an advertiser can make any claim it wishes without substantiation, simply because the cost of research is too high.

**The Consequences of a False Claim.** This includes physical injury, for example, if a consumer relies on an unsubstantiated claim about the therapeutic benefit of a product and foregoes a proven treatment. Economic injury is also considered.

**The Amount of Substantiation that Experts in the Field Believe is Reasonable.** In making this determination, the FTC gives great weight to accepted norms in the relevant fields of research and consults with experts from a wide variety of disciplines, including those with experience in botanicals and traditional medicines. Where there is an existing standard for substantiation developed by a government agency or other authoritative body, the FTC accords great deference to that standard.

The FTC typically requires claims about the efficacy or safety of dietary supplements to be supported with “competent and reliable scientific evidence,” defined in FTC cases as “tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.” This is the same standard the FTC applies to any industry making health-related claims. There is no fixed formula for the number or type of studies required or for more specific parameters like sample size and study duration. There are, however, a number of considerations to guide an advertiser in assessing the adequacy of the scientific support for a specific advertising claim.

**1. Ads that Refer to a Specific Level of Support**

If an advertiser asserts that it has a certain level of support for an advertised claim, it must be able to demonstrate that the assertion is accurate. Therefore, as a starting point, advertisers must have the level of support that they claim, expressly or by implication, to have.

**Example 11**

An ad for a supplement includes the statement “Scientists Now Agree!” in discussing the product’s benefit. This statement likely conveys to consumers that the state of science supporting the benefit has reached the level of scientific consensus. Unless the advertiser possesses this level of evidence, the claim is not substantiated.
Example 12
An advertiser claims that its product has been “studied for years abroad” and is now the “subject of U.S. government-sponsored research.” In addition to the explicit claim that the product has been studied, such phrases likely convey to consumers an implied claim that there exists a substantial body of competently-conducted scientific research supporting the efficacy of the product. The advertiser would be responsible for substantiating both claims.

2. The Amount and Type of Evidence

When no specific claim about the level of support is made, the evidence needed depends on the nature of the claim. A guiding principle for determining the amount and type of evidence that will be sufficient is what experts in the relevant area of study would generally consider to be adequate. The FTC will consider all forms of competent and reliable scientific research when evaluating substantiation. As a general rule, well-controlled human clinical studies are the most reliable form of evidence. Results obtained in animal and in vitro studies will also be examined, particularly where they are widely considered to be acceptable substitutes for human research or where human research is infeasible. Although there is no requirement that a dietary supplement claim be supported by any specific number of studies, the replication of research results in an independently-conducted study adds to the weight of the evidence. In most situations, the quality of studies will be more important than quantity. When a clinical trial is not possible (e.g., in the case of a relationship between a nutrient and a condition that may take decades to develop), epidemiologic evidence may be an acceptable substitute for clinical data, especially when supported by other evidence, such as research explaining the biological mechanism underlying the claimed effect.

Anecdotal evidence about the individual experience of consumers is not sufficient to substantiate claims about the effects of a supplement. Even if those experiences are genuine, they may be attributable to a placebo effect or other factors unrelated to the supplement. Individual experiences are not a substitute for scientific research.

Example 13
An advertiser relies on animal and in vitro studies to support a claim that its vitamin supplement is more easily absorbed into the bloodstream than other forms of the vitamin. However, the animal research uses a species of animal that, unlike humans, is able to synthesize the vitamin, and the in vitro study uses a different formulation with a higher concentration of the
compound than the product being marketed. In addition, human research is feasible and relatively inexpensive to conduct in light of the potential sales of the product and is the type of research generally accepted in this particular field of study. The substantiation is likely to be inadequate in this case, both because there are significant methodological problems and because, in this particular instance, human research is both feasible and the accepted approach in the field.

**Example 14**
A company wants to advertise its supplement as helpful in maintaining good vision into old age. There have been two long-term, large-scale epidemiologic studies showing a strong association between life-long high consumption of the principal ingredient in the supplement and better vision in those over 70. Experts have also discovered a plausible biological mechanism that might explain the effect. A clinical intervention trial would be very difficult and costly to conduct. Assuming that experts in the field generally consider epidemiological evidence to be adequate to support the potential for a protective effect, and assuming the absence of any stronger body of contrary evidence, a claim that is qualified to accurately convey the nature and extent of the evidence would be permitted.

**Example 15**
An advertisement for a supplement claims that the product will cause dramatic improvements in memory and describes the experiences of 10 people who obtained these results. The descriptions of these anecdotal experiences are truthful, but the advertiser has no scientific substantiation for the effect of its product on memory and cannot explain why the product might produce such results. The individual experiences are not adequate to substantiate the claim without confirming scientific research.
3. The Quality of the Evidence

In addition to the amount and type of evidence, the FTC will also examine the internal validity of each piece of evidence. Where the claim is one that would require scientific support, the research should be conducted in a competent and reliable manner to yield meaningful results. The design, implementation, and results of each piece of research are important to assessing the adequacy of the substantiation.

There is no set protocol for how to conduct research that will be acceptable under the FTC substantiation doctrine. There are, however, some principles generally accepted in the scientific community to enhance the validity of test results. For example, a study that is carefully controlled, with blinding of subjects and researchers, is likely to yield more reliable results. A study of longer duration can provide better evidence that the claimed effect will persist and resolve potential safety questions. Other aspects of the research results — such as evidence of a dose-response relationship (i.e., the larger the dose, the greater the effect) or a recognized biological or chemical mechanism to explain the effect — are examples of factors that add weight to the findings. Statistical significance of findings is also important. A study that fails to show a statistically significant difference between test and control group may indicate that the measured effects are merely the result of placebo effect or chance. The results should also translate into a meaningful benefit for consumers. Some results that are statistically significant may still be so small that they would mean only a trivial effect on consumer health.

The nature and quality of the written report of the research are also important. Research cannot be evaluated accurately on the basis of an abstract or an informal summary. In contrast, although the FTC does not require that studies be published and will consider unpublished, proprietary research, the publication of a peer-reviewed study in a reputable journal indicates that the research has received some measure of scrutiny. At the same time, advertisers should not rely simply on the fact that research is published as proof of the efficacy of a supplement. Research may yield results that are of sufficient interest to the scientific community to warrant publication, but publication does not necessarily mean that such research is conclusive evidence of a substance’s effect. The FTC considers studies conducted in foreign countries as long as the design and implementation of the study are scientifically sound.9

Example 16
An advertiser conducts a literature search and finds several abstracts summarizing research about the association between a nutrient and the ability to perform better on memory tests. The advertiser relies on these summaries to support a claim that its supplement, which contains the same nutrient, aids memory. However, without looking carefully at the specifics of the study design, implementation, and results, there is
no way for an advertiser to ascertain whether the research substantiates the product claims. (For example, did the research use a comparable formulation of the ingredient? Was the study adequately controlled? Did the study yield results that are statistically significant?) The advertiser should carefully review the underlying science, with the assistance of an expert if necessary, before drafting advertising claims.

**Example 17**
An advertiser makes an unqualified claim about the anti-clotting effect of a supplement that contains a compound extracted from fruit. There are three studies supporting the effect and no contrary evidence. One study consists of subjects tested over a one-week period, with no control group. The second study is well-controlled, of longer duration, but shows only a slight effect that is not statistically significant. The third study administers the compound through injection and shows a significant anti-clotting effect, but there is some question whether the compound would be absorbed into the bloodstream if administered orally. Because the studies all have significant limitations, it would be difficult to draft even a carefully qualified claim that would adequately convey to consumers the limited nature of the evidence. The advertiser should not base a claim on these studies.

**Example 18**
The marketer of an herbal supplement claims that its product promotes healthy vision and is approved in Germany for this purpose. The product has been used extensively in Europe for years and has obtained approval by the German governmental authorities, through their monograph process, for use to improve vision in healthy people. The company has two abstracts of German trials that were the basis of the German monograph, showing that the ingredient significantly improved the vision of healthy individuals in the test group over the placebo group. Animal trials done by the company suggest a plausible mechanism to explain the
effect. Although approval of the supplement under the German monograph suggests that the supplement is effective, advertisers should still examine the underlying research to confirm that it is relevant to the advertiser’s product (for example, that the dosage and formulation are comparable) and to evaluate whether the studies are scientifically sound. Advertisers should also examine any other research that exists, either supporting or contradicting the monograph, especially if it is not possible to identify and review the research on which the monograph is based.

4. The Totality of the Evidence

Studies cannot be evaluated in isolation. The surrounding context of the scientific evidence is just as important as the internal validity of individual studies. Advertisers should consider all relevant research relating to the claimed benefit of their supplement and should not focus only on research that supports the effect, while discounting research that does not. Ideally, the studies relied on by an advertiser would be largely consistent with the surrounding body of evidence. Wide variation in outcomes of studies and inconsistent or conflicting results will raise serious questions about the adequacy of an advertiser’s substantiation. Where there are inconsistencies in the evidence, it is important to examine whether there is a plausible explanation for those inconsistencies. In some instances, for example, the differences in results are attributable to differences in dosage, the form of administration (e.g., oral or intravenous), the population tested, or other aspects of study methodology. Advertisers should assess how relevant each piece of research is to the specific claim they wish to make, and also consider the relative strengths and weaknesses of each. If a number of studies of different quality have been conducted on a specific topic, advertisers should look first to the results of the studies with more reliable methodologies.

The surrounding body of evidence will have a significant impact both on what type, amount and quality of evidence is required to substantiate a claim and on how that claim is presented — that is, how carefully the claim is qualified to reflect accurately the strength of the evidence. If a stronger body of surrounding evidence runs contrary to a claimed effect, even a qualified claim is likely to be deceptive.

**Example 19**

An advertiser wishes to make the claim that a supplement product will substantially reduce body fat. The advertiser has two controlled, double-blind studies showing a modest but statistically significant loss of fat at the end of a six-week period. However, there is an equally well-controlled, blinded 12-week study showing
no statistically significant difference between test and control groups. Assuming other aspects of methodology are similar, the studies taken together suggest that, if the product has any effect on body fat, it would be very small. Given the totality of the evidence on the subject, the claim is likely to be unsubstantiated.

**Example 20**

Advertisements for a fiber supplement make the claim that the product is “proven” to aid weight loss. Although the company has two published, peer-reviewed studies showing a relationship between fiber and weight loss, neither of these studies used the same proportions of soluble and insoluble fiber or the same total amount of fiber as the supplement product. There are numerous controlled, published human clinical studies, however, using the amount and type of fiber in the supplement product, that provide evidence that the product would not result in measurable weight loss. The totality of the evidence does not support the “proven” claim and, given the stronger body of contrary evidence, even a qualified claim is likely to be deceptive.

**Example 21**

An advertiser runs an ad in a magazine for retired people, claiming that its supplement product has been found effective in improving joint flexibility. The company sponsored a 6-week study of its supplement, involving 50 subjects over the age of 65, to test the product’s effect on improving flexibility. The study was double-blinded and placebo-controlled and has been accepted for publication in a leading medical journal. The study showed dramatic, statistically significant increases in joint flexibility compared to placebo, based on objective measurements. In addition, several large trials have been conducted by European researchers using a similar formulation and dose of the active ingredient in the supplement. These trials also found statistically significant results. The advertiser reviewed the underlying European research and confirmed that it meets accepted research standards. The evidence as a whole likely substantiates the claim.
5. The Relevance of the Evidence to the Specific Claim

A common problem in substantiation of advertising claims is that an advertiser has valid studies, but the studies do not support the claim made in the ad. Advertisers should make sure that the research on which they rely is not just internally valid, but also relevant to the specific product being promoted and to the specific benefit being advertised. Therefore, advertisers should ask questions such as: How does the dosage and formulation of the advertised product compare to what was used in the study? Does the advertised product contain additional ingredients that might alter the effect of the ingredient in the study? Is the advertised product administered in the same manner as the ingredient used in the study? Does the study population reflect the characteristics and lifestyle of the population targeted by the ad? If there are significant discrepancies between the research conditions and the real life use being promoted, advertisers need to evaluate whether it is appropriate to extrapolate from the research to the claimed effect.

In drafting ad copy, the advertiser should take care to make sure that the claims match the underlying support. Claims that do not match the science, no matter how sound that science is, are likely to be unsubstantiated. Advertising should not exaggerate the extent, nature, or permanence of the effects achieved in a study, and should not suggest greater scientific certainty than actually exists. Although emerging science can sometimes be the basis for a carefully qualified claim, advertisers must make consumers aware of any significant limitations or inconsistencies in the scientific literature.

Example 22

An ad for a supplement claims that a particular nutrient helps maintain healthy cholesterol levels. There is a substantial body of epidemiologic evidence suggesting that foods high in that nutrient are associated with lower cholesterol levels. There is no science, however, demonstrating a relationship between the specific nutrient and cholesterol, although it would be feasible to conduct such a study. If there is a basis for believing that the health effect may be attributable to other components of the food, or to a combination of various components, a claim about the cholesterol maintenance benefits of the supplement product is likely not substantiated by this evidence.
**Example 23**
A number of well-controlled clinical studies have been conducted to suggest that a mineral supplement can improve mental alertness and memory in subjects with significantly impaired blood circulation to the brain. A claim suggesting that the supplement will improve memory or mental alertness in healthy adults may not be adequately substantiated by this evidence. Advertisers should not rely on research based on a specific test population for claims targeted at the general population without first considering whether it is scientifically sound to make such extrapolations.

**Example 24**
An advertiser wants to make claims that its combination herbal product helps increase alertness and energy safely and naturally. The product contains two herbs known to have a central nervous system stimulant effect. The advertiser compiles competent and reliable scientific research demonstrating that each of the herbs, individually, is safe and causes no significant side effects in the recommended dose. This evidence may be inadequate to substantiate an unqualified safety claim. Where there is reason to suspect that the combination of multiple ingredients might result in interactions that would alter the effect or safety of the individual ingredients, studies showing the effect of the individual ingredients may be insufficient to substantiate the safety of the multiple ingredient product. In this example, the combination of two herbs with similar stimulant properties could produce a stronger cumulative stimulant effect that might present safety hazards. A better approach would be to investigate the safety of the specific combination of ingredients contained in the product.
Example 25
Several clinical trials have been done on a specific botanical extract showing consistently that the extract is effective for supporting the immune system. The studied extract is a complex combination of many constituents and the active constituents that may produce the benefit are still unknown. An advertiser wishes to cite this research in its advertising, as proof that its product will support the immune system. The advertiser’s product is made using a different extraction method of the same botanical. An analysis of the extract reveals that it has a significantly different chemical profile from the studied extract. The advertiser should not rely on these clinical trials alone as substantiation because the difference in extracts may result in significant differences in the two products’ efficacy.

C. Other Issues Relating to Dietary Supplement Advertising

In addition to the basic principles of ad meaning and substantiation discussed above, a number of other issues commonly arise in the context of dietary supplement advertising. The following sections provide guidance on some of these issues including: the use of consumer or expert endorsements in ads; advertising claims based on traditional uses of supplements; use of the DSHEA disclaimer in advertising; and the application to advertising of the DSHEA exemption for certain categories of publications, commonly referred to as “third party literature.”

1. Claims Based on Consumer Testimonials or Expert Endorsements

An overall principle is that advertisers should not make claims either through consumer or expert endorsements that would be deceptive or could not be substantiated if made directly. It is not enough that a testimonial represents the honest opinion of the endorser. Under FTC law, advertisers must also have appropriate scientific evidence to back up the underlying claim.

Consumer testimonials raise additional concerns about which advertisers need to be aware. Ads that include consumer testimonials about the efficacy or safety of a supplement product should be backed by adequate substantiation that the testimonial experience is representative of what consumers will generally achieve when using the product. As discussed earlier, anecdotal evidence of a product’s effect, based solely on the experiences of individual consumers, is generally insufficient to substantiate a claim. Further, if the advertiser’s substantiation does not demonstrate that the results are representative, then a clear and
When an advertiser uses an expert endorser, it should make sure that the endorser has appropriate qualifications to be represented as an expert and has conducted an examination or testing of the product that would be generally recognized in the field as sufficient to support the endorsement. In addition, whenever an expert or consumer endorser is used, the advertiser should disclose any material connection between the endorser and the advertiser of the product. A material connection is one that would affect the weight or credibility of the endorsement, or put another way, a personal, financial, or similar connection that consumers would not reasonably expect.

Example 27
An infomercial for a dietary supplement features an expert referred to as a “Doctor” and a “leading clinician in joint health” discussing the effect of a supplement product on the maintenance of healthy joints. The expert is not licensed to practice medicine, but has a graduate degree and is a trained physical therapist, running a sports clinic. The expert has not conducted conspicuous disclaimer is necessary. The advertiser should either state what the generally expected results would be or indicate that the consumer should not expect to experience the attested results. Vague disclaimers like “results may vary” are likely to be insufficient.

Example 26
An advertisement for a weight loss supplement features a before-and-after photograph of a woman and quotes her as saying that she lost 20 pounds in 8 weeks while using the supplement. An asterisk next to the quotation references a disclaimer in fine print at the bottom of the ad that reads, “Results may vary.” The experience of the woman is accurately represented, but the separate, competent research demonstrating the efficacy of the supplement showed an average weight loss of only 6 pounds in 8 weeks. Therefore, the disclosure does not adequately convey to consumers that they would likely see much less dramatic results. The placement and size of the disclaimer is also insufficiently prominent to qualify the claim effectively. One approach to adequate qualification of this testimonial would be to include a disclaimer immediately adjacent to the quote, in equal print size that says, “These results are not typical. Average weight loss achieved in clinical study was 6 pounds.”
any review of the scientific literature on the active component of the supplement. In return for appearing in the infomercial, she is given a paid position as an officer the company. The ad is likely to be deceptive for several reasons. First, her qualifications as an expert have been overstated and she has not conducted sufficient examination of the product to support the endorsement. In addition, her connection to the company is one that consumers might not expect and may affect the weight and credibility of her endorsement. Even if she is adequately qualified and has conducted an adequate review of the product, her position as an officer of the company should be clearly disclosed.

**Example 28**
A best-selling book about the benefits of a supplement product includes a footnote mentioning the most effective brand of the supplement, by name. The manufacturer of the brand cited in the book has an exclusive promotional agreement with the author and has paid him to reference the product by name. The manufacturer’s ad touts the fact that its product is the only brand recommended in this best-selling book. The ad is deceptive since it suggests a neutral endorsement when, in fact, the author has been paid by the manufacturer to promote the product.

### 2. Claims Based on Traditional Use

Claims based on historical or traditional use should be substantiated by confirming scientific evidence, or should be presented in such a way that consumers understand that the sole basis for the claim is a history of use of the product for a particular purpose. A number of supplements, particularly botanical products, have a long history of use as traditional medicines in the United States or in other countries to treat certain conditions or symptoms. Several European countries have a separate regulatory approach to these traditional medicines, allowing manufacturers to make certain limited claims about their traditional use for treating certain health conditions. Some countries also require accompanying disclosures about the fact that the product has not been scientifically established to be effective, as well as disclosures about potential adverse effects. At this time there is no separate regulatory process for approval of claims for these traditional medicine products under DSHEA and FDA labeling rules.
In assessing claims based on traditional use, the FTC will look closely at consumer perceptions and specifically at whether consumers expect such claims to be backed by supporting scientific evidence. Advertising claims based solely on traditional use should be presented carefully to avoid the implication that the product has been scientifically evaluated for efficacy. The degree of qualification necessary to communicate the absence of scientific substantiation for a traditional use claim will depend in large part on consumer understanding of this category of products. As consumer awareness of and experience with “traditional use” supplements evolve, the extent and type of qualification necessary is also likely to change.

There are some situations, however, where traditional use evidence alone will be inadequate to substantiate a claim, even if that claim is carefully qualified to convey the limited nature of the support. In determining the level of substantiation necessary to substantiate a claim, the FTC assesses, among other things, the consequences of a false claim. Claims that, if unfounded, could present a substantial risk of injury to consumer health or safety will be held to a higher level of scientific proof. For that reason, an advertiser should not suggest, either directly or indirectly, that a supplement product will provide a disease benefit unless there is competent and reliable scientific evidence to substantiate that benefit. The FTC will closely scrutinize the scientific support for such claims, particularly where the claim could lead consumers to forego other treatments that have been validated by scientific evidence, or to self-medicate for potentially serious conditions without medical supervision.

The advertiser should also make sure that it can document the extent and manner of historical use and be careful not to overstate such use. As part of this inquiry, the advertiser should make sure that the product it is marketing is consistent with the product as traditionally administered. If there are significant differences between the traditional use product and the marketed product, in the form of administration, the formulation of ingredients, or the dose, a “traditional use” claim may not be appropriate.

**Example 29**

The advertiser of an herbal supplement makes the claim, “Ancient folklore remedy used for centuries by Native Americans to aid digestion.” The statement about traditional use is accurate and the supplement product is consistent with the formulation of the product as traditionally used. However, if, in the context of the ad, this statement suggests that there is scientific evidence demonstrating that the product is effective for aiding digestion, the advertiser would need to include a clear and prominent disclaimer about the absence of such evidence.
**Example 30**
A supplement manufacturer wants to market an herbal product that has been used in the same formulation in China as a tonic for improving mental functions. The manufacturer prepares the product in a manner consistent with Chinese preparation methods. The ad claims, “Traditional Chinese Medicine — Used for Thousands of Years to Bring Mental Clarity and Improve Memory.” The ad also contains language that clearly conveys that the efficacy of the product has not been confirmed by research, and that traditional use does not establish that the product will achieve the claimed results. The ad is likely to adequately convey the limited nature of support for the claim.

**Example 31**
A supplement manufacturer markets a capsule containing a concentrated extract of a botanical product that has been used in its raw form in China to brew teas for increasing energy. The advertisement clearly conveys that the energy benefit is based on traditional use and has not been confirmed by scientific research. The ad may still be deceptive, however, because the concentrated extract is not consistent with the traditional use of the botanical in raw form to brew teas and may produce a significantly different effect.

**Example 32**
A supplement ad claims that a supplement liquid mineral solution has been a popular American folk remedy since early pioneer days for shrinking tumors. The ad is likely to convey to consumers that the product is an effective treatment for cancer. There is no scientific support for this disease benefit. Because of the potential risks to consumers of taking a product that may or may not be effective to treat such a serious health condition, possibly without medical supervision, the advertiser should not make the claim.
3. Use of the DSHEA Disclaimer in Advertising

Under DSHEA, all statements of nutritional support for dietary supplements must be accompanied by a two-part disclaimer on the product label: that the statement has not been evaluated by FDA and that the product is not intended to “diagnose, treat, cure or prevent any disease.” Although DSHEA does not apply to advertising, there are situations where such a disclosure is desirable in advertising as well as in labeling to prevent consumers from being misled about the nature of the product and the extent to which its efficacy and safety have been reviewed by regulatory authorities. For example, a disclosure may be necessary if the text or images in the ad lead consumers to believe that the product has undergone the kind of review for safety and efficacy that the FDA conducts on new drugs and has been found to be beneficial for the treatment of disease. Failure to correct those misperceptions may render the advertising deceptive.

At the same time, the inclusion of a DSHEA disclaimer or similar disclosure will not cure an otherwise deceptive ad, particularly where the deception concerns claims about the disease benefits of a product. In making references to DSHEA and FDA review, advertisers should also be careful not to mischaracterize the extent to which a product or claim has been reviewed or approved by the FDA. Compliance with the notification and disclaimer provisions of DSHEA does not constitute authorization of a claim by FDA and advertisers should not imply that FDA has specifically approved any claim on that basis.

**Example 33**

A company markets a supplement for “maintaining joint flexibility.” The product packaging is similar in color and design to a nonprescription drug used to treat joint pain associated with arthritis and the product name is similar to the drug counterpart. The ad includes statements urging consumers to “ask their pharmacist” and “accept no generic substitute.” The various elements of the ad may lead consumers to believe that the supplement is, in fact, an approved drug, or may give consumers more general expectations that the product has been subjected to similar government review for safety and efficacy. A clear and prominent disclaimer may be necessary to indicate that the product has not been evaluated by FDA and is not an approved drug product.
**Example 34**
An advertisement for an herbal supplement includes strong, unqualified claims that the product will effectively treat or prevent diabetes, heart disease, and various circulatory ailments. The advertiser does not have adequate substantiation for this claim, but includes the DSHEA disclaimer prominently in the ad. In face of the strong contradictory message in the ad, the inclusion of the DSHEA disclaimer is not likely to negate the explicit disease claims made in the ad, and will not cure the fact that the claims are not substantiated.

**Example 35**
A dietary supplement advertisement makes a number of claims about the benefits of its product for supporting various body functions. The ad also includes the statement, “Complies with FDA notification procedures of the Dietary Supplement Health and Education Act.” This statement may suggest to consumers that FDA has authorized the claims made in the ad or that it has reviewed the support for the claims and found the product to be effective. Because there is no review and authorization process for such claims under DSHEA, this would be deceptive.

**4. Third Party Literature**
Dietary supplement advertisers should be aware that the use of newspaper articles, abstracts of scientific studies, or other “third party literature” to promote a particular brand or product can have an impact on how consumers interpret an advertisement and on what claims the advertiser will be responsible for substantiating. For purposes of dietary supplement labeling, Section 5 of DSHEA provides an exemption from labeling requirements for scientific journal articles, books and other publications used in the sale of dietary supplements, provided these materials are reprinted in their entirety, are not false or misleading, do not promote a specific brand or manufacturer, are presented with other materials to create a balanced view of the scientific information, and are physically separate from the supplements being sold.

The FTC will generally follow an approach consistent with the labeling approach when evaluating the use of such publications in other contexts, such as advertising. Although the FTC does not regulate the content or accuracy of statements made in independently written and published books, articles, or other non-commercial literature, FTC law does prohibit the deceptive use of such materials in marketing products. The determination of whether the
materials will be subject to FTC jurisdiction turns largely on whether the materials have been created or are being used by an advertiser specifically for the purpose of promoting its product. As a practical matter, publications and other materials that comply with the elements of the DSHEA provision, particularly with the requirement that such materials be truthful, not misleading and balanced, are also likely to comply with FTC advertising law.

Example 36
An author publishes a book on the curative properties of an herb. The book title is “The Miracle Cancer Cure.” The book does not endorse or otherwise mention any particular supplement brand. The author/publisher does not sell the herbal supplement and does not have any material connection to any marketers of the herb. As non-commercial speech, the book itself would not be subject to the FTC’s jurisdiction over advertising. However, if a marketer of the herb referred to the book in advertising materials (for instance, by quoting the title and using excerpts to describe the anti-cancer benefits of its product), such references would likely be considered advertising. The advertiser would be responsible for substantiating any claims about the advertiser’s product that are conveyed by these references.

CONCLUSION

Marketers of dietary supplements should be familiar with the requirements under both DSHEA and the FTC Act that labeling and advertising claims be truthful, not misleading and substantiated. The FTC approach generally requires that claims be backed by sound, scientific evidence, but also provides flexibility in the precise amount and type of support necessary. This flexibility allows advertisers to provide truthful information to consumers about the benefits of supplement products, and at the same time, preserves consumer confidence by curbing unsubstantiated, false, and misleading claims. To ensure compliance with FTC law, supplement advertisers should follow two important steps: 1) careful drafting of advertising claims with particular attention to how claims are qualified and what express and implied messages are actually conveyed to consumers; and 2) careful review of the support for a claim to make sure it is scientifically sound, adequate in the context of the surrounding body of evidence, and relevant to the specific product and claim advertised.
Endnotes

1 The FTC’s authority derives from Section 5 of the FTC Act. In addition, supplements have traditionally been regulated under Sections 12 and 15, which prohibit false advertisements, defined as those that are “misleading in a material respect,” for foods, drugs, devices or cosmetics.

2 Under DSHEA, supplement marketers are allowed to make two kinds of claims on labeling: 1) health claims specifically authorized by the FDA; and 2) statements of nutritional support. Health claims — representations about the relationship between a nutrient and a disease or health-related condition — are permitted only if they have been authorized by an FDA finding that there is “significant scientific agreement” to support the claim. The Food and Drug Administration Modernization Act of 1997 (FDAMA) also now allows health claims that are based on “authoritative statements” from certain federal scientific bodies, such as NIH and the National Academy of Sciences. Aside from these authorized claims, supplement marketers are prohibited from making any labeling claim about the diagnosis, mitigation, treatment or cure of a disease. In contrast to health claims, “structure/function” claims, within the broader category of “statements of nutritional support,” refer to representations about a dietary supplement’s effect on the structure or function of the body for maintenance of good health and nutrition.

3 Structure/function claims are not subject to FDA pre-authorization. A marketer may make these claims in labeling if it notifies FDA and includes a disclaimer that the claim has not been evaluated by FDA and that the product is not intended to diagnose, mitigate, treat, cure, or prevent disease. DSHEA also requires that structure/function claims in labeling be substantiated and be truthful and not misleading. This requirement is fully consistent with the FTC’s standard that advertising claims be truthful, not misleading and substantiated.

4 FTC policy statements and other information for businesses and consumers are available on the FTC’s Internet home page, www.ftc.gov.

5 As indicated in the Food Policy Statement, the FTC will be “especially vigilant in examining whether qualified claims are presented in a manner that ensures that consumers understand both the extent of the support for the claim and the existence of any significant contrary view within the scientific community. In the absence of adequate qualification the Commission will find such claims deceptive.”

6 These principles are articulated in the FTC’s Deception Policy Statement and Advertising Substantiation Policy Statement, available at www.ftc.gov. The FTC also has authority to challenge unfair trade practices. An unfair practice is one that causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or competition. The majority of advertising cases are brought pursuant to the FTC’s deception authority.

7 Throughout these examples the terms “advertiser,” “marketer,” “supplement manufacturer” and “company” are used interchangeably.

8 Additional guidance on the use of consumer testimonials is provided in Part C.1.

9 Any foreign research submitted to the FTC in the course of an investigation should be presented in English translation and with sufficient detail to allow the agency to evaluate the study.

10 The FTC has provided detailed guidance on this subject in its Guides Concerning Use of Endorsements and Testimonials in Advertising, available at www.ftc.gov.
## General Environmental Benefit Claims

- Marketers should not make broad, unqualified general environmental benefit claims like ‘green’ or ‘eco-friendly.’ Broad claims are difficult to substantiate, if not impossible.
- Marketers should qualify general claims with specific environmental benefits. Qualifications for any claim should be clear, prominent, and specific.
  - When a marketer qualifies a general claim with a specific benefit, consumers understand the benefit to be significant. As a result, marketers shouldn’t highlight small or unimportant benefits.
  - If a qualified general claim conveys that a product has an overall environmental benefit because of a specific attribute, marketers should analyze the trade-offs resulting from the attribute to prove the claim.

### Carbon Offsets

- Marketers should have competent and reliable scientific evidence to support carbon offset claims. They should use appropriate accounting methods to ensure they measure emission reductions properly and don’t sell them more than once.
- Marketers should disclose whether the offset purchase pays for emission reductions that won’t occur for at least two years.
- Marketers should not advertise a carbon offset if the law already requires the activity that is the basis of the offset.

### Certifications and Seals of Approval

- Certifications and seals may be endorsements. According to the FTC’s Endorsement Guides:
  - Marketers should disclose any material connections to the certifying organization. A material connection is one that could affect the credibility of the endorsement.
  - Marketers shouldn’t use environmental certifications or seals that don’t clearly convey the basis for the certification, because the seals or certifications are likely to convey general environmental benefits.
  - To prevent deception, marketers using seals or certifications that don’t convey the basis for the certification should identify, clearly and prominently, specific environmental benefits.
Marketers can qualify certifications based on attributes that are too numerous to disclose by saying, “Virtually all products impact the environment. For details on which attributes we evaluated, go to [a website that discusses this product].” The marketer should make sure that the website provides the referenced information, and that the information is truthful and accurate.

A marketer with a third-party certification still must substantiate all express and implied claims.

**Compostable**

- Marketers who claim a product is compostable need competent and reliable scientific evidence that all materials in the product or package will break down into — or become part of — usable compost safely and in about the same time as the materials with which it is composted.

- Marketers should qualify compostable claims if the product can’t be composted at home safely or in a timely way. Marketers also should qualify a claim that a product can be composted in a municipal or institutional facility if the facilities aren’t available to a substantial majority of consumers.

**Degradable**

- Marketers may make an unqualified degradable claim only if they can prove that the “entire product or package will completely break down and return to nature within a reasonably short period of time after customary disposal.” The “reasonably short period of time” for complete decomposition of solid waste products? One year.

- Items destined for landfills, incinerators, or recycling facilities will not degrade within a year, so unqualified biodegradable claims for them shouldn’t be made.

**Free-of**

- Marketers can make a free-of claim for a product that contains some amount of a substance if:
  1. the product doesn’t have more than trace amounts or background levels of the substance; and
  2. the amount of substance present doesn’t cause harm that consumers typically associate with the substance; and
  3. the substance wasn’t added to the product intentionally

- It would be deceptive to claim that a product is “free-of” a substance if it is free of one substance but includes another that poses a similar environmental risk.

- If a product doesn’t contain a substance, it may be deceptive to claim the product is “free-of” that substance if it never has been associated with that product category.
Non-Toxic

- Marketers who claim that their product is non-toxic need competent and reliable scientific evidence that the product is safe for both people and the environment.

Ozone-Safe and Ozone-Friendly

- It is deceptive to misrepresent that a product is ozone-friendly or safe for the ozone layer or atmosphere.

Recyclable

- Marketers should qualify recyclable claims when recycling facilities are not available to at least 60 percent of the consumers or communities where a product is sold.
- The lower the level of access to appropriate facilities, the more a marketer should emphasize the limited availability of recycling for the product.

Recycled Content

- Marketers should make recycled content claims only for materials that have been recovered or diverted from the waste stream during the manufacturing process or after consumer use.
- Marketers should qualify claims for products or packages made partly from recycled material – for example, “Made from 30% recycled material.”
- Marketers whose products contain used, reconditioned, or re-manufactured components should qualify their recycled content claims clearly and prominently to avoid deception about the components.

Refillable

- Marketers shouldn’t make unqualified refillable claims unless they provide a way to refill the package. For example, they can provide a system to collect and refill the package or sell a product consumers can use to refill the original package.
**Made with Renewable Energy**

- Marketers shouldn’t make unqualified renewable energy claims based on energy derived from fossil fuels unless they purchase renewable energy certificates (RECs) to match the energy use.

- Unqualified renewable energy claims may imply that a product is made with recycled content or renewable materials. One way to minimize the risk of misunderstanding is to specify the source of renewable energy clearly and prominently (say, ‘wind’ or ‘solar energy’).

- Marketers should not make an unqualified “made with renewable energy” claim unless all, or virtually all, the significant manufacturing processes involved in making the product or package are powered with renewable energy or non-renewable energy, matched by RECs.

- Marketers who generate renewable energy – say, by using solar panels – but sell RECs for all the renewable energy they generate shouldn’t claim they “use” renewable energy. Using the term “hosting” would be deceptive in this circumstance.

**Made with Renewable Materials**

- Unqualified claims about renewable material may imply that a product is recyclable, made with recycled content, or biodegradable. One way to minimize that risk is to identify the material used clearly and prominently, and explain why it is renewable.

- Marketers should qualify renewable materials claims unless an item is made entirely with renewable materials, except for minor and incidental components.

“**Our flooring is made from 100% bamboo, which grows at the same rate, or faster, than we use it.**”

“**This package is made from 50% plant-based renewable materials. Because we turn fast-growing plants into bio-plastics, only half of our product is made from petroleum-based materials.**”

**Source Reduction**

- Marketers should qualify a claim that a product or package is lower in weight, volume, or toxicity clearly and prominently to avoid deception about the amount of reduction and the basis for comparison. For example, rather than saying the product generates “10 percent less waste,” the marketer could say the product generates “10 percent less waste than our previous product.”

To view the complete Green Guides, information for business, and legal resources related to environmental marketing, go to business.ftc.gov.
§255.0 Purpose and definitions.

(a) The Guides in this part represent administrative interpretations of laws enforced by the Federal Trade Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. Specifically, the Guides address the application of Section 5 of the FTC Act (15 U.S.C. 45) to the use of endorsements and testimonials in advertising. The Guides provide the basis for voluntary compliance with the law by advertisers and endorsers. Practices inconsistent with these Guides may result in corrective action by the Commission under Section 5 if, after investigation, the Commission has reason to believe that the practices fall within the scope of conduct declared unlawful by the statute. The Guides set forth the general principles that the Commission will use in evaluating endorsements and testimonials, together with examples illustrating the application of those principles. The Guides do not purport to cover every possible use of endorsements in advertising. Whether a particular endorsement or testimonial is deceptive will depend on the specific factual circumstances of the advertisement at issue.

(b) For purposes of this part, an endorsement means any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser. The party whose opinions, beliefs, findings, or experience the message appears to reflect will be called the endorser and may be an individual, group, or institution.

(c) The Commission intends to treat endorsements and testimonials identically in the context of its enforcement of the Federal Trade Commission Act and for purposes of this part. The term endorsements is therefore generally used hereinafter to cover both terms and situation

(d) For purposes of this part, the term product includes any product, service, company or industry.

(e) For purposes of this part, an expert is an individual, group, or institution possessing, as a result of experience, study, or training, knowledge of a particular subject, which knowledge is superior to what ordinary individuals generally acquire.
**Example 1:** A film critic’s review of a movie is excerpted in an advertisement. When so used, the review meets the definition of an endorsement because it is viewed by readers as a statement of the critic’s own opinions and not those of the film producer, distributor, or exhibitor. Any alteration in or quotation from the text of the review that does not fairly reflect its substance would be a violation of the standards set by this part because it would distort the endorser’s opinion. [See §255.1(b).]

**Example 2:** A TV commercial depicts two women in a supermarket buying a laundry detergent. The women are not identified outside the context of the advertisement. One comments to the other how clean her brand makes her family’s clothes, and the other then comments that she will try it because she has not been fully satisfied with her own brand. This obvious fictional dramatization of a real life situation would not be an endorsement.

**Example 3:** In an advertisement for a pain remedy, an announcer who is not familiar to consumers except as a spokesman for the advertising drug company praises the drug’s ability to deliver fast and lasting pain relief. He purports to speak, not on the basis of his own opinions, but rather in the place of and on behalf of the drug company. The announcer’s statements would not be considered an endorsement.

**Example 4:** A manufacturer of automobile tires hires a well-known professional automobile racing driver to deliver its advertising message in television commercials. In these commercials, the driver speaks of the smooth ride, strength, and long life of the tires. Even though the message is not expressly declared to be the personal opinion of the driver, it may nevertheless constitute an endorsement of the tires. Many consumers will recognize this individual as being primarily a racing driver and not merely a spokesperson or announcer for the advertiser. Accordingly, they may well believe the driver would not speak for an automotive product unless he actually believed in what he was saying and had personal knowledge sufficient to form that belief. Hence, they would think that the advertising message reflects the driver’s personal views. This attribution of the underlying views to the driver brings the advertisement within the definition of an endorsement for purposes of this part.

**Example 5:** A television advertisement for a particular brand of golf balls shows a prominent and well-recognized professional golfer practicing numerous drives off the tee. This would be an endorsement by the golfer even though she makes no verbal statement in the advertisement.

**Example 6:** An infomercial for a home fitness system is hosted by a well-known entertainer. During the infomercial, the entertainer demonstrates the machine and states that it is the most effective and easy-to-use home exercise machine that she has ever tried. Even if she is reading from a script, this statement would be an endorsement, because consumers are likely to believe it reflects the entertainer’s views.

**Example 7:** A television advertisement for a housewares store features a well-known female comedian and a well-known male baseball player engaging in light-hearted banter about products each one intends to purchase for the other. The comedian says that she will buy him a Brand X, portable, high-definition television so he can finally see the strike zone. He says that he will get her a Brand Y juicer so she can make juice with all the fruit and vegetables thrown at her during her performances. The comedian and baseball player are not likely to be deemed endorsers because consumers will likely realize that the individuals are not expressing their own views.
Example 8: A consumer who regularly purchases a particular brand of dog food decides one day to purchase a new, more expensive brand made by the same manufacturer. She writes in her personal blog that the change in diet has made her dog’s fur noticeably softer and shinier, and that in her opinion, the new food definitely is worth the extra money. This posting would not be deemed an endorsement under the Guides.

Assume that rather than purchase the dog food with her own money, the consumer gets it for free because the store routinely tracks her purchases and its computer has generated a coupon for a free trial bag of this new brand. Again, her posting would not be deemed an endorsement under the Guides.

Assume now that the consumer joins a network marketing program under which she periodically receives various products about which she can write reviews if she wants to do so. If she receives a free bag of the new dog food through this program, her positive review would be considered an endorsement under the Guides.

§255.1 General considerations.

(a) Endorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser. Furthermore, an endorsement may not convey any express or implied representation that would be deceptive if made directly by the advertiser. [See §255.2(a) and (b) regarding substantiation of representations conveyed by consumer endorsements.]

(b) The endorsement message need not be phrased in the exact words of the endorser, unless the advertisement affirmatively so represents. However, the endorsement may not be presented out of context or reworded so as to distort in any way the endorser’s opinion or experience with the product. An advertiser may use an endorsement of an expert or celebrity only so long as it has good reason to believe that the endorser continues to subscribe to the views presented. An advertiser may satisfy this obligation by securing the endorser’s views at reasonable intervals where reasonableness will be determined by such factors as new information on the performance or effectiveness of the product, a material alteration in the product, changes in the performance of competitors’ products, and the advertiser’s contract commitments.

(c) When the advertisement represents that the endorser uses the endorsed product, the endorser must have been a bona fide user of it at the time the endorsement was given. Additionally, the advertiser may continue to run the advertisement only so long as it has good reason to believe that the endorser remains a bona fide user of the product. [See §255.1(b) regarding the “good reason to believe” requirement.]

(d) Advertisers are subject to liability for false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and their endorsers [see §255.5]. Endorsers also may be liable for statements made in the course of their endorsements.

Example 1: A building contractor states in an advertisement that he uses the advertiser’s exterior house paint because of its remarkable quick drying properties and durability. This endorsement
must comply with the pertinent requirements of §255.3 (Expert Endorsements). Subsequently, the advertiser reformulates its paint to enable it to cover exterior surfaces with only one coat. Prior to continued use of the contractor’s endorsement, the advertiser must contact the contractor in order to determine whether the contractor would continue to specify the paint and to subscribe to the views presented previously.

**Example 2:** A television advertisement portrays a woman seated at a desk on which rest five unmarked computer keyboards. An announcer says, “We asked X, an administrative assistant for over ten years, to try these five unmarked keyboards and tell us which one she liked best.” The advertisement portrays X typing on each keyboard and then picking the advertiser’s brand. The announcer asks her why, and X gives her reasons. This endorsement would probably not represent that X actually uses the advertiser’s keyboard at work. In addition, the endorsement also may be required to meet the standards of §255.3 (expert endorsements).

**Example 3:** An ad for an acne treatment features a dermatologist who claims that the product is “clinically proven” to work. Before giving the endorsement, she received a write-up of the clinical study in question, which indicates flaws in the design and conduct of the study that are so serious that they preclude any conclusions about the efficacy of the product. The dermatologist is subject to liability for the false statements she made in the advertisement. The advertiser is also liable for misrepresentations made through the endorsement. [See Section 255.3 regarding the product evaluation that an expert endorser must conduct.]

**Example 4:** A well-known celebrity appears in an infomercial for an oven roasting bag that purportedly cooks every chicken perfectly in thirty minutes. During the shooting of the infomercial, the celebrity watches five attempts to cook chickens using the bag. In each attempt, the chicken is undercooked after thirty minutes and requires sixty minutes of cooking time. In the commercial, the celebrity places an uncooked chicken in the oven roasting bag and places the bag in one oven. He then takes a chicken roasting bag from a second oven, removes from the bag what appears to be a perfectly cooked chicken, tastes the chicken, and says that if you want perfect chicken every time, in just thirty minutes, this is the product you need. A significant percentage of consumers are likely to believe the celebrity’s statements represent his own views even though he is reading from a script. The celebrity is subject to liability for his statement about the product. The advertiser is also liable for misrepresentations made through the endorsement.

**Example 5:** A skin care products advertiser participates in a blog advertising service. The service matches up advertisers with bloggers who will promote the advertiser’s products on their personal blogs. The advertiser requests that a blogger try a new body lotion and write a review of the product on her blog. Although the advertiser does not make any specific claims about the lotion’s ability to cure skin conditions and the blogger does not ask the advertiser whether there is substantiation for the claim, in her review the blogger writes that the lotion cures eczema and recommends the product to her blog readers who suffer from this condition. The advertiser is subject to liability for misleading or unsubstantiated representations made through the blogger’s endorsement. The blogger also is subject to liability for misleading or unsubstantiated representations made in the course of her endorsement. The blogger is also liable if she fails to disclose clearly and conspicuously that she is being paid for her services. [See §255.5.] In order to limit its potential liability, the advertiser should ensure that the advertising service provides guidance and training to its bloggers concerning the need to ensure that statements they
make are truthful and substantiated. The advertiser should also monitor bloggers who are being paid to promote its products and take steps necessary to halt the continued publication of deceptive representations when they are discovered.

§255.2 Consumer endorsements.

(a) An advertisement employing endorsements by one or more consumers about the performance of an advertised product or service will be interpreted as representing that the product or service is effective for the purpose depicted in the advertisement. Therefore, the advertiser must possess and rely upon adequate substantiation, including, when appropriate, competent and reliable scientific evidence, to support such claims made through endorsements in the same manner the advertiser would be required to do if it had made the representation directly, i.e., without using endorsements. Consumer endorsements themselves are not competent and reliable scientific evidence.

(b) An advertisement containing an endorsement relating the experience of one or more consumers on a central or key attribute of the product or service also will likely be interpreted as representing that the endorser’s experience is representative of what consumers will generally achieve with the advertised product or service in actual, albeit variable, conditions of use. Therefore, an advertiser should possess and rely upon adequate substantiation for this representation. If the advertiser does not have substantiation that the endorser’s experience is representative of what consumers will generally achieve, the advertisement should clearly and conspicuously disclose the generally expected performance in the depicted circumstances, and the advertiser must possess and rely on adequate substantiation for that representation.*

(c) Advertisements presenting endorsements by what are represented, directly or by implication, to be “actual consumers” should utilize actual consumers in both the audio and video, or clearly and conspicuously disclose that the persons in such advertisements are not actual consumers of the advertised product.

Example 1: A brochure for a baldness treatment consists entirely of testimonials from satisfied customers who say that after using the product, they had amazing hair growth and their hair is as thick and strong as it was when they were teenagers. The advertiser must have competent and reliable scientific evidence that its product is effective in producing new hair growth.

* The Commission tested the communication of advertisements containing testimonials that clearly and prominently disclosed either “Results not typical” or the stronger “These testimonials are based on the experiences of a few people and you are not likely to have similar results.” Neither disclosure adequately reduced the communication that the experiences depicted are generally representative. Based upon this research, the Commission believes that similar disclaimers regarding the limited applicability of an endorser’s experience to what consumers may generally expect to achieve are unlikely to be effective.

Nonetheless, the Commission cannot rule out the possibility that a strong disclaimer of typicality could be effective in the context of a particular advertisement. Although the Commission would have the burden of proof in a law enforcement action, the Commission notes that an advertiser possessing reliable empirical testing demonstrating that the net impression of its advertisement with such a disclaimer is non-deceptive will avoid the risk of the initiation of such an action in the first instance.
The ad will also likely communicate that the endorsers’ experiences are representative of what new users of the product can generally expect. Therefore, even if the advertiser includes a disclaimer such as, “Notice: These testimonials do not prove our product works. You should not expect to have similar results,” the ad is likely to be deceptive unless the advertiser has adequate substantiation that new users typically will experience results similar to those experienced by the testimonialists.

Example 2: An advertisement disseminated by a company that sells heat pumps presents endorsements from three individuals who state that after installing the company’s heat pump in their homes, their monthly utility bills went down by $100, $125, and $150, respectively. The ad will likely be interpreted as conveying that such savings are representative of what consumers who buy the company’s heat pump can generally expect. The advertiser does not have substantiation for that representation because, in fact, less than 20% of purchasers will save $100 or more. A disclosure such as, “Results not typical” or, “These testimonials are based on the experiences of a few people and you are not likely to have similar results” is insufficient to prevent this ad from being deceptive because consumers will still interpret the ad as conveying that the specified savings are representative of what consumers can generally expect. The ad is less likely to be deceptive if it clearly and conspicuously discloses the generally expected savings and the advertiser has adequate substantiation that homeowners can achieve those results. There are multiple ways that such a disclosure could be phrased, e.g., “the average homeowner saves $35 per month,” “the typical family saves $50 per month during cold months and $20 per month in warm months,” or “most families save 10% on their utility bills.”

Example 3: An advertisement for a cholesterol-lowering product features an individual who claims that his serum cholesterol went down by 120 points and does not mention having made any lifestyle changes. A well-conducted clinical study shows that the product reduces the cholesterol levels of individuals with elevated cholesterol by an average of 15% and the advertisement clearly and conspicuously discloses this fact. Despite the presence of this disclosure, the advertisement would be deceptive if the advertiser does not have adequate substantiation that the product can produce the specific results claimed by the endorser (i.e., a 120-point drop in serum cholesterol without any lifestyle changes).

Example 4: An advertisement for a weight-loss product features a formerly obese woman. She says in the ad, “Every day, I drank 2 WeightAway shakes, ate only raw vegetables, and exercised vigorously for six hours at the gym. By the end of six months, I had gone from 250 pounds to 140 pounds.” The advertisement accurately describes the woman’s experience, and such a result is within the range that would be generally experienced by an extremely overweight individual who consumed WeightAway shakes, only ate raw vegetables, and exercised as the endorser did. Because the endorser clearly describes the limited and truly exceptional circumstances under which she achieved her results, the ad is not likely to convey that consumers who weigh substantially less or use WeightAway under less extreme circumstances will lose 110 pounds in six months. (If the advertisement simply says that the endorser lost 110 pounds in six months using WeightAway together with diet and exercise, however, this description would not adequately alert consumers to the truly remarkable circumstances leading to her weight loss.) The advertiser must have substantiation, however, for any performance claims conveyed by the endorsement (e.g., that WeightAway is an effective weight loss product).
If, in the alternative, the advertisement simply features “before” and “after” pictures of a woman who says “I lost 50 pounds in 6 months with WeightAway,” the ad is likely to convey that her experience is representative of what consumers will generally achieve. Therefore, if consumers cannot generally expect to achieve such results, the ad should clearly and conspicuously disclose what they can expect to lose in the depicted circumstances (e.g., “most women who use WeightAway for six months lose at least 15 pounds”).

If the ad features the same pictures but the testimonialist simply says, “I lost 50 pounds with WeightAway,” and WeightAway users generally do not lose 50 pounds, the ad should disclose what results they do generally achieve (e.g., “most women who use WeightAway lose 15 pounds”).

Example 5: An advertisement presents the results of a poll of consumers who have used the advertiser’s cake mixes as well as their own recipes. The results purport to show that the majority believed that their families could not tell the difference between the advertised mix and their own cakes baked from scratch. Many of the consumers are actually pictured in the advertisement along with relevant, quoted portions of their statements endorsing the product. This use of the results of a poll or survey of consumers represents that this is the typical result that ordinary consumers can expect from the advertiser’s cake mix.

Example 6: An advertisement purports to portray a “hidden camera” situation in a crowded cafeteria at breakfast time. A spokesperson for the advertiser asks a series of actual patrons of the cafeteria for their spontaneous, honest opinions of the advertiser’s recently introduced breakfast cereal. Even though the words “hidden camera” are not displayed on the screen, and even though none of the actual patrons is specifically identified during the advertisement, the net impression conveyed to consumers may well be that these are actual customers, and not actors. If actors have been employed, this fact should be clearly and conspicuously disclosed.

Example 7: An advertisement for a recently released motion picture shows three individuals coming out of a theater, each of whom gives a positive statement about the movie. These individuals are actual consumers expressing their personal views about the movie. The advertiser does not need to have substantiation that their views are representative of the opinions that most consumers will have about the movie. Because the consumers’ statements would be understood to be the subjective opinions of only three people, this advertisement is not likely to convey a typicality message.

If the motion picture studio had approached these individuals outside the theater and offered them free tickets if they would talk about the movie on camera afterwards, that arrangement should be clearly and conspicuously disclosed. [See §255.5.]

§255.3 Expert endorsements.

(a) Whenever an advertisement represents, directly or by implication, that the endorser is an expert with respect to the endorsement message, then the endorser’s qualifications must in fact give the endorser the expertise that he or she is represented as possessing with respect to the endorsement.
(b) Although the expert may, in endorsing a product, take into account factors not within his or her expertise (e.g., matters of taste or price), the endorsement must be supported by an actual exercise of that expertise in evaluating product features or characteristics with respect to which he or she is expert and which are relevant to an ordinary consumer’s use of or experience with the product and are available to the ordinary consumer. This evaluation must have included an examination or testing of the product at least as extensive as someone with the same degree of expertise would normally need to conduct in order to support the conclusions presented in the endorsement. To the extent that the advertisement implies that the endorsement was based upon a comparison, such comparison must have been included in the expert’s evaluation; and as a result of such comparison, the expert must have concluded that, with respect to those features on which he or she is expert and which are relevant and available to an ordinary consumer, the endorsed product is at least equal overall to the competitors’ products. Moreover, where the net impression created by the endorsement is that the advertised product is superior to other products with respect to any such feature or features, then the expert must in fact have found such superiority. [See §255.1(d) regarding the liability of endorsers.]

Example 1: An endorsement of a particular automobile by one described as an “engineer” implies that the endorser’s professional training and experience are such that he is well acquainted with the design and performance of automobiles. If the endorser’s field is, for example, chemical engineering, the endorsement would be deceptive.

Example 2: An endorser of a hearing aid is simply referred to as “Doctor” during the course of an advertisement. The ad likely implies that the endorser is a medical doctor with substantial experience in the area of hearing. If the endorser is not a medical doctor with substantial experience in audiology, the endorsement would likely be deceptive. A non-medical “doctor” (e.g., an individual with a Ph.D. in exercise physiology) or a physician without substantial experience in the area of hearing can endorse the product, but if the endorser is referred to as “doctor,” the advertisement must make clear the nature and limits of the endorser’s expertise.

Example 3: A manufacturer of automobile parts advertises that its products are approved by the “American Institute of Science.” From its name, consumers would infer that the “American Institute of Science” is a bona fide independent testing organization with expertise in judging automobile parts and that, as such, it would not approve any automobile part without first testing its efficacy by means of valid scientific methods. If the American Institute of Science is not such a bona fide independent testing organization (e.g., if it was established and operated by an automotive parts manufacturer), the endorsement would be deceptive. Even if the American Institute of Science is an independent bona fide expert testing organization, the endorsement may nevertheless be deceptive unless the Institute has conducted valid scientific tests of the advertised products and the test results support the endorsement message.

Example 4: A manufacturer of a non-prescription drug product represents that its product has been selected over competing products by a large metropolitan hospital. The hospital has selected the product because the manufacturer, unlike its competitors, has packaged each dose of the product separately. This package form is not generally available to the public. Under the circumstances, the endorsement would be deceptive because the basis for the hospital’s choice—convenience of packaging—is neither relevant nor available to consumers, and the basis for the hospital’s decision is not disclosed to consumers.
Example 5: A woman who is identified as the president of a commercial “home cleaning service” states in a television advertisement that the service uses a particular brand of cleanser, instead of leading competitors it has tried, because of this brand’s performance. Because cleaning services extensively use cleansers in the course of their business, the ad likely conveys that the president has knowledge superior to that of ordinary consumers. Accordingly, the president’s statement will be deemed to be an expert endorsement. The service must, of course, actually use the endorsed cleanser. In addition, because the advertisement implies that the cleaning service has experience with a reasonable number of leading competitors to the advertised cleanser, the service must, in fact, have such experience, and, on the basis of its expertise, it must have determined that the cleaning ability of the endorsed cleanser is at least equal (or superior, if such is the net impression conveyed by the advertisement) to that of leading competitors’ products with which the service has had experience and which remain reasonably available to it. Because in this example the cleaning service’s president makes no mention that the endorsed cleanser was “chosen,” “selected,” or otherwise evaluated in side-by-side comparisons against its competitors, it is sufficient if the service has relied solely upon its accumulated experience in evaluating cleansers without having performed side-by-side or scientific comparisons.

Example 6: A medical doctor states in an advertisement for a drug that the product will safely allow consumers to lower their cholesterol by 50 points. If the materials the doctor reviewed were merely letters from satisfied consumers or the results of a rodent study, the endorsement would likely be deceptive because those materials are not what others with the same degree of expertise would consider adequate to support this conclusion about the product’s safety and efficacy.

§255.4 Endorsements by organizations.

Endorsements by organizations, especially expert ones, are viewed as representing the judgment of a group whose collective experience exceeds that of any individual member, and whose judgments are generally free of the sort of subjective factors that vary from individual to individual. Therefore, an organization’s endorsement must be reached by a process sufficient to ensure that the endorsement fairly reflects the collective judgment of the organization. Moreover, if an organization is represented as being expert, then, in conjunction with a proper exercise of its expertise in evaluating the product under §255.3 (expert endorsements), it must utilize an expert or experts recognized as such by the organization or standards previously adopted by the organization and suitable for judging the relevant merits of such products. [See §255.1(d) regarding the liability of endorsers.]

Example: A mattress seller advertises that its product is endorsed by a chiropractic association. Because the association would be regarded as expert with respect to judging mattresses, its endorsement must be supported by an evaluation by an expert or experts recognized as such by the organization, or by compliance with standards previously adopted by the organization and aimed at measuring the performance of mattresses in general and not designed with the unique features of the advertised mattress in mind.
§255.5 Disclosure of material connections.

When there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience), such connection must be fully disclosed. For example, when an endorser who appears in a television commercial is neither represented in the advertisement as an expert nor is known to a significant portion of the viewing public, then the advertiser should clearly and conspicuously disclose either the payment or promise of compensation prior to and in exchange for the endorsement or the fact that the endorser knew or had reason to know or to believe that if the endorsement favored the advertised product some benefit, such as an appearance on television, would be extended to the endorser. Additional guidance, including guidance concerning endorsements made through other media, is provided by the examples below.

Example 1: A drug company commissions research on its product by an outside organization. The drug company determines the overall subject of the research (e.g., to test the efficacy of a newly developed product) and pays a substantial share of the expenses of the research project, but the research organization determines the protocol for the study and is responsible for conducting it. A subsequent advertisement by the drug company mentions the research results as the “findings” of that research organization. Although the design and conduct of the research project are controlled by the outside research organization, the weight consumers place on the reported results could be materially affected by knowing that the advertiser had funded the project. Therefore, the advertiser’s payment of expenses to the research organization should be disclosed in this advertisement.

Example 2: A film star endorses a particular food product. The endorsement regards only points of taste and individual preference. This endorsement must, of course, comply with §255.1; but regardless of whether the star’s compensation for the commercial is a $1 million cash payment or a royalty for each product sold by the advertiser during the next year, no disclosure is required because such payments likely are ordinarily expected by viewers.

Example 3: During an appearance by a well-known professional tennis player on a television talk show, the host comments that the past few months have been the best of her career and during this time she has risen to her highest level ever in the rankings. She responds by attributing the improvement in her game to the fact that she is seeing the ball better than she used to, ever since having laser vision correction surgery at a clinic that she identifies by name. She continues talking about the ease of the procedure, the kindness of the clinic’s doctors, her speedy recovery, and how she can now engage in a variety of activities without glasses, including driving at night. The athlete does not disclose that, even though she does not appear in commercials for the clinic, she has a contractual relationship with it, and her contract pays her for speaking publicly about her surgery when she can do so. Consumers might not realize that a celebrity discussing a medical procedure in a television interview has been paid for doing so, and knowledge of such payments would likely affect the weight or credibility consumers give to the celebrity’s endorsement. Without a clear and conspicuous disclosure that the athlete has been engaged as a spokesperson for the clinic, this endorsement is likely to be deceptive. Furthermore, if consumers are likely to take away from her story that her experience was typical of those who undergo the same procedure at the clinic, the advertiser must have substantiation for that claim.
Assume that instead of speaking about the clinic in a television interview, the tennis player touts the results of her surgery—mentioning the clinic by name—on a social networking site that allows her fans to read in real time what is happening in her life. Given the nature of the medium in which her endorsement is disseminated, consumers might not realize that she is a paid endorser. Because that information might affect the weight consumers give to her endorsement, her relationship with the clinic should be disclosed.

Assume that during that same television interview, the tennis player is wearing clothes bearing the insignia of an athletic wear company with whom she also has an endorsement contract. Although this contract requires that she wear the company’s clothes not only on the court but also in public appearances, when possible, she does not mention them or the company during her appearance on the show. No disclosure is required because no representation is being made about the clothes in this context.

**Example 4:** An ad for an anti-snoring product features a physician who says that he has seen dozens of products come on the market over the years and, in his opinion, this is the best ever. Consumers would expect the physician to be reasonably compensated for his appearance in the ad. Consumers are unlikely, however, to expect that the physician receives a percentage of gross product sales or that he owns part of the company, and either of these facts would likely materially affect the credibility that consumers attach to the endorsement. Accordingly, the advertisement should clearly and conspicuously disclose such a connection between the company and the physician.

**Example 5:** An actual patron of a restaurant, who is neither known to the public nor presented as an expert, is shown seated at the counter. He is asked for his “spontaneous” opinion of a new food product served in the restaurant. Assume, first, that the advertiser had posted a sign on the door of the restaurant informing all who entered that day that patrons would be interviewed by the advertiser as part of its TV promotion of its new soy protein “steak.” This notification would materially affect the weight or credibility of the patron’s endorsement, and, therefore, viewers of the advertisement should be clearly and conspicuously informed of the circumstances under which the endorsement was obtained.

Assume, in the alternative, that the advertiser had not posted a sign on the door of the restaurant, but had informed all interviewed customers of the “hidden camera” only after interviews were completed and the customers had no reason to know or believe that their response was being recorded for use in an advertisement. Even if patrons were also told that they would be paid for allowing the use of their opinions in advertising, these facts need not be disclosed.

**Example 6:** An infomercial producer wants to include consumer endorsements for an automotive additive product featured in her commercial, but because the product has not yet been sold, there are no consumer users. The producer’s staff reviews the profiles of individuals interested in working as “extras” in commercials and identifies several who are interested in automobiles. The extras are asked to use the product for several weeks and then report back to the producer. They are told that if they are selected to endorse the product in the producer’s infomercial, they will receive a small payment. Viewers would not expect that these “consumer endorsers” are actors who were asked to use the product so that they could appear in the commercial or that they were compensated. Because the advertisement fails to disclose these facts, it is deceptive.
Example 7: A college student who has earned a reputation as a video game expert maintains a personal weblog or “blog” where he posts entries about his gaming experiences. Readers of his blog frequently seek his opinions about video game hardware and software. As it has done in the past, the manufacturer of a newly released video game system sends the student a free copy of the system and asks him to write about it on his blog. He tests the new gaming system and writes a favorable review. Because his review is disseminated via a form of consumer-generated media in which his relationship to the advertiser is not inherently obvious, readers are unlikely to know that he has received the video game system free of charge in exchange for his review of the product, and given the value of the video game system, this fact likely would materially affect the credibility they attach to his endorsement. Accordingly, the blogger should clearly and conspicuously disclose that he received the gaming system free of charge. The manufacturer should advise him at the time it provides the gaming system that this connection should be disclosed, and it should have procedures in place to try to monitor his postings for compliance.

Example 8: An online message board designated for discussions of new music download technology is frequented by MP3 player enthusiasts. They exchange information about new products, utilities, and the functionality of numerous playback devices. Unbeknownst to the message board community, an employee of a leading playback device manufacturer has been posting messages on the discussion board promoting the manufacturer’s product. Knowledge of this poster’s employment likely would affect the weight or credibility of her endorsement. Therefore, the poster should clearly and conspicuously disclose her relationship to the manufacturer to members and readers of the message board.

Example 9: A young man signs up to be part of a “street team” program in which points are awarded each time a team member talks to his or her friends about a particular advertiser’s products. Team members can then exchange their points for prizes, such as concert tickets or electronics. These incentives would materially affect the weight or credibility of the team member’s endorsements. They should be clearly and conspicuously disclosed, and the advertiser should take steps to ensure that these disclosures are being provided.
AVOIDING A PROMOTION COMMOTION
Do you use email in your business? The CAN-SPAM Act establishes requirements for commercial messages, gives recipients the right to have you stop emailing them, and spells out tough penalties for violations.

Despite its name, the CAN-SPAM Act doesn't apply just to bulk email. It covers all commercial messages, which the law defines as “any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service,” including email that promotes content on commercial websites. The law makes no exception for business-to-business email. That means all email — for example, a message to former customers announcing a new product line — must comply with the law.

Each separate email in violation of the CAN-SPAM Act is subject to penalties of up to $42,530, so non-compliance can be costly. But following the law isn’t complicated. Here’s a rundown of CAN-SPAM’s main requirements:

1. **Don’t use false or misleading header information.** Your “From,” “To,” “Reply-To,” and routing information – including the originating domain name and email address – must be accurate and identify the person or business who initiated the message.

2. **Don’t use deceptive subject lines.** The subject line must accurately reflect the content of the message.

3. **Identify the message as an ad.** The law gives you a lot of leeway in how to do this, but you must disclose clearly and conspicuously that your message is an advertisement.

4. **Tell recipients where you’re located.** Your message must include your valid physical postal address. This can be your current street address, a post office box you’ve registered with the U.S. Postal Service, or a private mailbox you’ve registered with a commercial mail receiving agency established under Postal Service regulations.

5. **Tell recipients how to opt out of receiving future email from you.** Your message must include a clear and conspicuous explanation of how the recipient can opt out of getting email from you in the future. Craft the notice in a way that’s easy for an ordinary person to recognize, read, and understand. Creative use of type size, color, and location can improve clarity. Give a return email address or another easy Internet-based way to allow people to communicate their choice to you. You may create a menu to allow a recipient to opt out of certain types of messages, but you must include the option to stop all commercial messages from you. Make sure your spam filter doesn’t block these opt-out requests.

6. **Honor opt-out requests promptly.** Any opt-out mechanism you offer must be able to process opt-out requests for at least 30 days after you send your message. You must honor a recipient’s opt-out request within 10 business days. You can’t charge a fee, require the recipient to give you any personally identifying information beyond an email address, or make the recipient take any step other than sending a reply email or visiting a single page on an Internet website as a condition for honoring an opt-out request. Once people have told you they don’t want to receive more messages from you, you can’t sell or transfer their email addresses, even in the form of a mailing list. The only exception is that you may transfer the addresses to a company you’ve hired to help you comply with the CAN-SPAM Act.

7. **Monitor what others are doing on your behalf.** The law makes clear that even if you hire another company to handle your email marketing, you can’t contract away your legal responsibility to comply with the law. Both the company whose product is promoted in the message and the company that actually sends the message may be held legally responsible.

**Need more information?**

Here are the answers to some questions businesses have had about complying with the CAN-SPAM Act.

**Q. How do I know if the CAN-SPAM Act covers email my business is**
sending?

A. What matters is the “primary purpose” of the message. To determine the primary purpose, remember that an email can contain three different types of information:

- Commercial content – which advertises or promotes a commercial product or service, including content on a website operated for a commercial purpose;
- Transactional or relationship content – which facilitates an already agreed-upon transaction or updates a customer about an ongoing transaction; and
- Other content – which is neither commercial nor transactional or relationship.

If the message contains only commercial content, its primary purpose is commercial and it must comply with the requirements of CAN-SPAM. If it contains only transactional or relationship content, its primary purpose is transactional or relationship. In that case, it may not contain false or misleading routing information, but is otherwise exempt from most provisions of the CAN-SPAM Act.

Q. How do I know if what I’m sending is a transactional or relationship message?

A. The primary purpose of an email is transactional or relationship if it consists only of content that:

1. facilitates or confirms a commercial transaction that the recipient already has agreed to;
2. gives warranty, recall, safety, or security information about a product or service;
3. gives information about a change in terms or features or account balance information regarding a membership, subscription, account, loan or other ongoing commercial relationship;
4. provides information about an employment relationship or employee benefits; or
5. delivers goods or services as part of a transaction that the recipient already has agreed to.

Q. What if the message combines commercial content and transactional or relationship content?

A. It’s common for email sent by businesses to mix commercial content and transactional or relationship content. When an email contains both kinds of content, the primary purpose of the message is the deciding factor. Here’s how to make that determination: If a recipient reasonably interpreting the subject line would likely conclude that the message contains an advertisement or promotion for a commercial product or service or if the message’s transactional or relationship content does not appear mainly at the beginning of the message, the primary purpose of the message is commercial. So, when a message contains both kinds of content – commercial and transactional or relationship – if the subject line would lead the recipient to think it’s a commercial message, it’s a commercial message for CAN-SPAM purposes. Similarly, if the bulk of the transactional or relationship part of the message doesn’t appear at the beginning, it’s a commercial message under the CAN-SPAM Act.

Here’s an example:

MESSAGE A:

TO: Jane Smith
FR: XYZ Distributing
RE: Your Account Statement

We shipped your order of 25,000 deluxe widgets to your Springfield warehouse on June 1st. We hope you received them in good working order. Please call our Customer Service Office at (877) 555-7726 if any widgets were damaged in transit. Per our contract, we must receive your payment of $1,000 by June 30th. If not, we will impose a 10% surcharge for late payment. If you have any questions, please contact our Accounts Receivable Department.

Visit our website for our exciting new line of mini-widgets!

MESSAGE A is most likely a transactional or relationship message subject only to CAN-SPAM’s requirement of truthful routing information. One important factor is that information about the customer’s account is at the beginning of the message and the brief commercial portion of the message is at the end.
TO: Jane Smith  
FR: XYZ Distributing  
RE: Your Account Statement

We offer a wide variety of widgets in the most popular designer colors and styles — all at low, low discount prices. Visit our website for our exciting new line of mini-widgets!

Sizzling Summer Special: Order by June 30th and all waterproof commercial-grade super-widgets are 20% off. Show us a bid from one of our competitors and we’ll match it. XYZ Distributing will not be undersold.

Your order has been filled and will be delivered on Friday, June 1st.

MESSAGE B is most likely a commercial message subject to all CAN-SPAM's requirements. Although the subject line is “Your Account Statement” — generally a sign of a transactional or relationship message — the information at the beginning of the message is commercial in nature and the brief transactional or relationship portion of the message is at the end.

Q. What if the message combines elements of both a commercial message and a message with content defined as "other"?

A. In that case, the primary purpose of the message is commercial and the provisions of the CAN-SPAM Act apply if:

- A recipient reasonably interpreting the subject line would likely conclude that the message advertises or promotes a commercial product or service; and
- A recipient reasonably interpreting the body of the message would likely conclude that the primary purpose of the message is to advertise or promote a product or service.

Factors relevant to that interpretation include the location of the commercial content (for example, is it at the beginning of the message?); how much of the message is dedicated to commercial content; and how color, graphics, type size, style, etc., are used to highlight the commercial content.

Q. What if the email includes information from more than one company? Who is the “sender” responsible for CAN-SPAM compliance?

A. If an email advertises or promotes the goods, services, or websites of more than one marketer, there’s a straightforward method for determining who’s responsible for the duties the CAN-SPAM Act imposes on “senders” of commercial email. Marketers whose goods, services, or websites are advertised or promoted in a message can designate one of the marketers as the “sender” for purposes of CAN-SPAM compliance as long as the designated sender:

- meets the CAN-SPAM Act’s definition of “sender,” meaning that they initiate a commercial message advertising or promoting their own goods, services, or website;
- is specifically identified in the “from” line of the message; and
- complies with the “initiator” provisions of the Act – for example, making sure the email does not contain deceptive transmission information or a deceptive subject heading, and ensuring that the email includes a valid postal address, a working opt-out link, and proper identification of the message’s commercial or sexually explicit nature.

If the designated sender doesn’t comply with the responsibilities the law gives to initiators, all marketers in the message may be held liable as senders.

Q. My company sends email with a link so that recipients can forward the message to others. Who is responsible for CAN-SPAM compliance for these “Forward to a Friend” messages?

A. Whether a seller or forwarder is a “sender” or “initiator” depends on the facts. So deciding if the CAN-SPAM Act applies to a commercial “forward-to-a-friend” message often depends on whether the seller has offered to pay the forwarder or give the
forwarder some other benefit. For example, if the seller offers money, coupons, discounts, awards, additional entries in a sweepstakes, or the like in exchange for forwarding a message, the seller may be responsible for compliance. Or if a seller pays or give a benefit to someone in exchange for generating traffic to a website or for any form of referral, the seller is likely to have compliance obligations under the CAN-SPAM Act.

Q. What are the penalties for violating the CAN-SPAM Act?

A. Each separate email in violation of the law is subject to penalties of up to $42,530, and more than one person may be held responsible for violations. For example, both the company whose product is promoted in the message and the company that originated the message may be legally responsible. Email that makes misleading claims about products or services also may be subject to laws outlawing deceptive advertising, like Section 5 of the FTC Act. The CAN-SPAM Act has certain aggravated violations that may give rise to additional fines. The law provides for criminal penalties – including imprisonment – for:

- accessing someone else’s computer to send spam without permission,
- using false information to register for multiple email accounts or domain names,
- relaying or retransmitting multiple spam messages through a computer to mislead others about the origin of the message,
- harvesting email addresses or generating them through a dictionary attack (the practice of sending email to addresses made up of random letters and numbers in the hope of reaching valid ones), and
- taking advantage of open relays or open proxies without permission.

Q. Are there separate rules that apply to sexually explicit email?

A. Yes, and the FTC has issued a rule under the CAN-SPAM Act that governs these messages. Messages with sexually oriented material must include the warning “SEXUALLY-EXPLICIT:” at the beginning of the subject line. In addition, the rule requires the electronic equivalent of a “brown paper wrapper” in the body of the message. When a recipient opens the message, the only things that may be viewable on the recipient’s screen are:

1. the words “SEXUALLY-EXPLICIT:”; and
2. the same information required in any other commercial email: a disclosure that the message is an ad, the sender’s physical postal address, and the procedure for how recipients can opt out of receiving messages from this sender in the future.

No graphics are allowed on the “brown paper wrapper.” This provision makes sure that recipients cannot view sexually explicit content without an affirmative act on their part – for example, scrolling down or clicking on a link. However, this requirement does not apply if the person receiving the message has already given affirmative consent to receive the sender’s sexually oriented messages.

[Note: Edited March 2019 to reflect Inflation-Adjusted Civil Penalty Maximums.]

Your Opportunity to Comment

The National Small Business Ombudsman and 10 Regional Fairness Boards collect comments from small businesses about federal compliance and enforcement activities. Each year, the Ombudsman evaluates the conduct of these activities and rates each agency’s responsiveness to small businesses. Small businesses can comment to the Ombudsman without fear of reprisal. To comment, call toll-free 1-888-REGFAIR (1-888-734-3247) or go to www.sba.gov/ombudsman.

September 2009
Consumer Review Fairness Act: What Businesses Need to Know

TAGS: Advertising and Marketing | Advertising and Marketing Basics | Endorsements | Online Advertising and Marketing

The Consumer Review Fairness Act protects consumers’ ability to share their honest opinions about a business’s products, services, or conduct in any forum – and that includes social media. The FTC has tips to help your company comply with the law.

The Consumer Review Fairness Act (CRFA) protects people’s ability to share their honest opinions about a business’s products, services, or conduct, in any forum, including social media. Is your company complying?

Contracts that prohibit honest reviews, or threaten legal action over them, harm people who rely on reviews when making their purchase decisions. But another group is also harmed when others try to squelch honest negative reviews: businesses that work hard to earn positive reviews.

The Consumer Review Fairness Act was passed in response to reports that some businesses try to prevent people from giving honest reviews about products or services they received. Some companies put contract provisions in place, including in their online terms and conditions, that allowed them to sue or penalize consumers for posting negative reviews.

Here are some basic tips for complying with the law.

What kind of reviews does the law protect?

The law protects a broad variety of honest consumer assessments, including online reviews, social media posts, uploaded photos, videos, etc. And it doesn’t just cover product reviews. It also applies to consumer evaluations of a company’s customer service.

What does the Consumer Review Fairness Act prohibit?

In summary, the Act makes it illegal for a company to use a contract provision that:

1. bars or restricts the ability of a person who is a party to that contract to review a company’s products, services, or conduct;
2. imposes a penalty or fee against someone who gives a review; or
3. requires people to give up their intellectual property rights in the content of their reviews.

What specific conduct is prohibited by the statute?

The Consumer Review Fairness Act makes it illegal for companies to include standardized provisions that threaten or penalize people for posting honest reviews. For example, in an online transaction, it would be illegal for a company to include a provision in its terms and conditions that prohibits or punishes negative reviews by customers. (The law doesn’t apply to employment contracts or agreements with independent contractors, however.)

What can a company do to protect itself from inappropriate or irrelevant content?

The law says it’s OK to prohibit or remove a review that:

1. contains confidential or private information – for example, a person’s financial, medical, or personnel file information or a
company’s trade secrets;
2. is libelous, harassing, abusive, obscene, vulgar, sexually explicit, or is inappropriate with respect to race, gender, sexuality, ethnicity, or other intrinsic characteristic;
3. is unrelated to the company’s products or services; or
4. is clearly false or misleading.

However, it’s unlikely that a consumer’s assessment or opinion with which you disagree meets the “clearly false or misleading” standard.

What’s the penalty for violating the Consumer Review Fairness Act?

Congress gave enforcement authority to the Federal Trade Commission and the state Attorneys General. The law specifies that a violation of the CRFA will be treated the same as violating an FTC rule defining an unfair or deceptive act or practice. This means that your company could be subject to financial penalties, as well as a federal court order.

To make sure your company is complying with the Consumer Review Fairness Act:

- Review your form contracts, including online terms and conditions; and
- Remove any provision that restricts people from sharing their honest reviews, penalizes those who do, or claims copyright over peoples’ reviews (even if you’ve never tried to enforce it or have no intention of enforcing it).

The wisest policy: Let people speak honestly about your products and their experience with your company.

Opportunity to Comment

The National Small Business Ombudsman and 10 Regional Fairness Boards collect comments from small businesses about federal compliance and enforcement activities. Each year, the Ombudsman evaluates the conduct of these activities and rates each agency’s responsiveness to small businesses. Small businesses can comment to the Ombudsman without fear of reprisal. To comment, call toll-free 1-888-REGFAIR (1-888-734-3247) or go to www.sba.gov/ombudsman.

February 2017
The FTC’s Endorsement Guides: What People Are Asking

Suppose you meet someone who tells you about a great new product. She tells you it performs wonderfully and offers fantastic new features that nobody else has. Would that recommendation factor into your decision to buy the product? Probably.

Now suppose the person works for the company that sells the product – or has been paid by the company to tout the product. Would you want to know that when you’re evaluating the endorser’s glowing recommendation? You bet. That common-sense premise is at the heart of the Federal Trade Commission’s (FTC) Endorsement Guides.

The Guides, at their core, reflect the basic truth-in-advertising principle that endorsements must be honest and not misleading. An endorsement must reflect the honest opinion of the endorser and can’t be used to make a claim that the product’s marketer couldn’t legally make.

In addition, the Guides say, if there’s a connection between an endorser and the marketer that consumers would not expect and it would affect how consumers evaluate the endorsement, that connection should be disclosed. For example, if an ad features an endorser who’s a relative or employee of the marketer, the ad is misleading unless the connection is made clear. The same is usually true if the endorser has been paid or given something of value to tout the product. The reason is obvious: Knowing about the connection is important information for anyone evaluating the endorsement.

Say you’re planning a vacation. You do some research and find a glowing review on someone’s blog that a particular resort is the most luxurious place he has ever stayed. If you knew the hotel had paid the blogger hundreds of dollars to say great things about it or that the blogger had stayed there for several days for free, it could affect how much weight you’d give the blogger’s endorsement. The blogger should, therefore, let his readers know about that relationship.

Another principle in the Guides applies to ads that feature endorsements from people who achieved exceptional, or even above average, results. An example is an endorser who says she lost 20 pounds in two months using the advertised product. If the advertiser doesn’t have proof that the endorser’s experience represents what people will generally achieve using the product as described in the ad (for example, by just taking a pill daily for two months), then an ad featuring that endorser must make clear to the audience what the generally expected results are.

Here are answers to some of our most frequently asked questions from advertisers, ad agencies, bloggers, and others.

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Do the Endorsement Guides apply to social media?

Yes. Truth in advertising is important in all media, whether they have been around for decades (like television and magazines) or are relatively new (like blogs and social media).

Isn’t it common knowledge that bloggers are paid to tout products or that if you click a link on a blogger’s site to buy a product, the blogger will get a commission?

No. Some bloggers who mention products in their posts have no connection to the marketers of those products – they don’t receive anything for their reviews or get a commission. They simply recommend those products to their readers because they believe in them.

Moreover, the financial arrangements between some bloggers and advertisers may be apparent to industry insiders, but not to everyone else who reads a particular blog. Under the law, an act or practice is deceptive if it misleads “a significant minority” of consumers. Even if some readers are aware of these deals, many readers aren’t. That’s why disclosure is important.

Are you monitoring bloggers?

Generally not, but if concerns about possible violations of the FTC Act come to our attention, we evaluate them case by case. If law enforcement becomes necessary, our focus usually will be on advertisers or their ad agencies and public relations firms. Action against an individual endorser, however, might be appropriate in certain circumstances, such as if the endorser has continued to fail to make required disclosures despite warnings.

Does the FTC hold bloggers to a higher standard than reviewers for traditional media outlets?

No. The FTC Act applies across the board. The issue is – and always has been – whether the audience understands the reviewer’s relationship to the company whose products are being recommended. If the audience understands the relationship, a disclosure isn’t needed.

If you’re employed by a newspaper or TV station to give reviews – whether online or offline – your audience probably understands that your job is to provide your personal opinion on behalf of the newspaper or television station. In that situation, it’s clear that you did not buy the product yourself – whether it’s a book or a car or a movie ticket. On a personal blog, a social networking page, or in similar media, the reader might not realize that the reviewer has a relationship with the company whose products are being recommended. Disclosure of that relationship helps readers decide how much weight to give the review.

What is the legal basis for the Guides?

The FTC conducts investigations and brings cases involving endorsements made on behalf of an advertiser under Section 5 of the FTC Act, which generally prohibits deceptive advertising.

The Guides are intended to give insight into what the FTC thinks about various marketing activities involving endorsements and how Section 5 might apply to those activities. The Guides themselves don’t have the force of law. However, practices inconsistent with the Guides may result in law enforcement actions alleging violations of the FTC Act. Law enforcement actions can result in orders requiring the defendants in the case to give up money they received from their violations and to abide by various requirements in the future. Despite inaccurate news reports, there are no “fines” for violations of the FTC Act.

When Does the FTC Act Apply to Endorsements?
I'm a blogger. I heard that every time I mention a product on my blog, I have to say whether I got it for free or paid for it myself. Is that true?

No. If you mention a product you paid for yourself, there isn’t an issue. Nor is it an issue if you get the product for free because a store is giving out free samples to its customers.

The FTC is only concerned about endorsements that are made on behalf of a sponsoring advertiser. For example, an endorsement would be covered by the FTC Act if an advertiser – or someone working for an advertiser – pays you or gives you something of value to mention a product. If you receive free products or other perks with the expectation that you’ll promote or discuss the advertiser’s products in your blog, you’re covered. Bloggers who are part of network marketing programs, where they sign up to receive free product samples in exchange for writing about them, also are covered.

What if all I get from a company is a $1-off coupon, an entry in a sweepstakes or a contest, or a product that is only worth a few dollars? Does that still have to be disclosed?

The question you need to ask is whether knowing about that gift or incentive would affect the weight or credibility your readers give to your recommendation. If it could, then it should be disclosed. For example, being entered into a sweepstakes or a contest for a chance to win a thousand dollars in exchange for an endorsement could very well affect how people view that endorsement. Determining whether a small gift would affect the weight or credibility of an endorsement could be difficult. It’s always safer to disclose that information.

Also, even if getting one free item that’s not very valuable doesn’t affect your credibility, continually getting free stuff from an advertiser or multiple advertisers could suggest you expect future benefits from positive reviews. If a blogger or other endorser has a relationship with a marketer or a network that sends freebies in the hope of positive reviews, it’s best to let readers know about the free stuff.

Even an incentive with no financial value might affect the credibility of an endorsement and would need to be disclosed. The Guides give the example of a restaurant patron being offered the opportunity to appear in television advertising before giving his opinion about a product. Because the chance to appear in a TV ad could sway what someone says, that incentive should be disclosed.

My company makes a donation to charity anytime someone reviews our product. Do we need to make a disclosure?

Some people might be inclined to leave a positive review in an effort to earn more money for charity. The overarching principle remains: If readers of the reviews would evaluate them differently knowing that they were motivated in part by charitable donations, there should be a disclosure. Therefore, it might be better to err on the side of caution and disclose that donations are made to charity in exchange for reviews.

What if I upload a video to YouTube that shows me reviewing several products? Should I disclose that I got them from an advertiser?

Yes. The guidance for videos is the same as for websites or blogs.

What if I return the product after I review it? Should I still make a disclosure?

That might depend on the product and how long you are allowed to use it. For example, if you get free use of a car for a month, we recommend a disclosure even though you have to return it. But even for less valuable products, it’s best to be open and transparent with your readers.

I have a website that reviews local restaurants. It’s clear when a restaurant pays for an ad on my website, but do I have to disclose which restaurants give me free meals?

If you get free meals, you should let your readers know so they can factor that in when they read your reviews.

I’m opening a new restaurant. To get feedback on the food and service, I’m inviting my family and friends to eat for free. If they talk about their experience on social media, is that something that should be disclosed?

You’ve raised two issues here. First, it may be relevant to readers that people endorsing your restaurant on social media are related to you. Therefore, they should disclose that personal relationship. Second, if you are giving free meals to anyone and seeking their endorsement, then their reviews in social media would be viewed as advertising subject to FTC jurisdiction. But even if you don’t specifically ask for their endorsement, there may be an expectation that attendees will spread the word about the restaurant. Therefore, if someone who eats for free at your invitation posts about your restaurant, readers of the post would probably want to know that the meal was on the house.

I have a YouTube channel that focuses on hunting, camping, and the outdoors. Sometimes I’ll do a product review. Knife manufacturers know how much I love knives, so they send me knives as free gifts, hoping that I will review them. I’m under no obligation to talk about any knife and getting the knives as gifts really doesn’t affect my judgment. Do I need to disclose when I’m talking about a knife I got for free?
Even if you don’t think it affects your evaluation of the product, what matters is whether knowing that you got the knife for free might affect how your audience views what you say about the knife. It doesn’t matter that you aren’t required to review every knife you receive. Your viewers may assess your review differently if they knew you got the knife for free, so we advise disclosing that fact.

Several months ago a manufacturer sent me a free product and asked me to write about it in my blog. I tried the product, liked it, and wrote a favorable review. When I posted the review, I disclosed that I got the product for free from the manufacturer. I still use the product. Do I have to disclose that I got the product for free every time I mention it in my blog?

It might depend on what you say about it, but each new endorsement made without a disclosure could be deceptive because readers might not see the original blog post where you said you got the product free from the manufacturer.

A trade association hired me to be its “ambassador” and promote its upcoming conference in social media, primarily on Facebook, Twitter, and in my blog. The association is only hiring me for five hours a week. I disclose my relationship with the association in my blogs and in the tweets and posts I make about the event during the hours I’m working. But sometimes I get questions about the conference in my off time. If I respond via Twitter when I’m not officially working, do I need to make a disclosure? Can that be solved by placing a badge for the conference in my Twitter profile?

You have a financial connection to the company that hired you and that relationship exists whether or not you are being paid for a particular tweet. If you are endorsing the conference in your tweets, your audience has a right to know about your relationship. That said, some of your tweets responding to questions about the event might not be endorsements, because they aren’t communicating your opinions about the conference (for example, if someone just asks you for a link to the conference agenda).

Also, if you respond to someone’s questions about the event via email or text, that person probably already knows your affiliation or they wouldn’t be asking you. You probably wouldn’t need a disclosure in that context. But when you respond via social media, all your followers see your posts and some of them might not have seen your earlier disclosures.

With respect to posting the conference’s badge on your Twitter profile page, a disclosure on a profile page isn’t sufficient because many people in your audience probably won’t see it. Also, depending upon what it says, the badge may not adequately inform consumers of your connection to the trade association. If it’s simply a logo or hashtag for the event, it won’t tell consumers of your relationship to the association.

I’m a blogger and a company wants me to attend the launch of its new product. They will fly me to the launch and put me up in a hotel for a couple of nights. They aren’t paying me or giving me anything else. If I write a blog sharing my thoughts about the product, should I disclose anything?

Yes. Knowing that you received free travel and accommodations could affect how much weight your readers give to your thoughts about the product, so you should disclose that you have a financial relationship with the company.

I share in my social media posts about products I use. Do I actually have to say something positive about a product for my posts to be endorsements covered by the FTC Act?

Simply posting a picture of a product in social media, such as on Pinterest, or a video of you using it could convey that you like and approve of the product. If it does, it’s an endorsement.

You don’t necessarily have to use words to convey a positive message. If your audience thinks that what you say or otherwise communicate about a product reflects your opinions or beliefs about the product, and you have a relationship with the company marketing the product, it’s an endorsement subject to the FTC Act.

Of course, if you don’t have any relationship with the advertiser, then your posts simply are not subject to the FTC Act, no matter what you show or say about the product. The FTC Act covers only endorsements made on behalf of a sponsoring advertiser.

If I post a picture of myself to Instagram and tag the brand of dress I’m wearing, but don’t say anything about the brand in my description of the picture, is that an endorsement? And, even if it is an endorsement, wouldn’t my followers understand that I only tag the brands of my sponsors?

Tagging a brand you are wearing is an endorsement of the brand and, just like any other endorsement, could require a disclosure if you have a relationship with that brand. Some influencers only tag the brands of their sponsors, some tag brands with which they don’t have relationships, and some do a bit of both. Followers might not know why you are tagging a dress and some might think you’re doing it just because you like the dress and want them to know.

Say a car company pays a blogger to write that he wants to buy a certain new sports car and he includes a link to the company’s site. But the blogger doesn’t say he’s going to actually buy the car – or even that he’s driven it. Is that still an endorsement subject to the FTC’s Endorsement Guides?
Yes, an endorsement can be aspirational. It’s an endorsement if the blogger is explicitly or implicitly expressing his or her views about the sports car (e.g., “I want this car”). If the blogger was paid, it should be disclosed.

I’m a book author and I belong to a group where we agree to post reviews in social media for each other. I’ll review someone else’s book on a book review site or a bookstore site if he or she reviews my book. No money changes hands. Do I need to make a disclosure?

It sounds like you have a connection that might materially affect the weight or credibility of your endorsements (that is, your reviews), since bad reviews of each others’ books could jeopardize the arrangement. There doesn’t have to be a monetary payment. The connection could be friendship, family relationships, or strangers who make a deal.

My Facebook page identifies my employer. Should I include an additional disclosure when I post on Facebook about how useful one of our products is?

It’s a good idea. People reading your posts in their news feed – or on your profile page – might not know where you work or what products your employer makes. Many businesses are so diversified that readers might not realize that the products you’re talking about are sold by your company.

A famous athlete has thousands of followers on Twitter and is well-known as a spokesperson for a particular product. Does he have to disclose that he’s being paid every time he tweets about the product?

It depends on whether his followers understand that he’s being paid to endorse that product. If they know he’s a paid endorser, no disclosure is needed. But if a significant portion of his followers don’t know that, the relationship should be disclosed. Determining whether followers are aware of a relationship could be tricky in many cases, so we recommend disclosure.

A famous celebrity has millions of followers on Twitter. Many people know that she regularly charges advertisers to mention their products in her tweets. Does she have to disclose when she’s being paid to tweet about products?

It depends on whether her followers understand that her tweets about products are paid endorsements. If a significant portion of her followers don’t know that, disclosures are needed. Again, determining that could be tricky, so we recommend disclosure.

I’m a video blogger who lives in London. I create sponsored beauty videos on YouTube. The products that I promote are also sold in the U.S. Am I under any obligation to tell my viewers that I have been paid to endorse products, considering that I’m not living in the U.S.?

To the extent it is reasonably foreseeable that your YouTube videos will be seen by and affect U.S. consumers, U.S. law would apply and a disclosure would be required. Also, the U.K. and many other countries have similar laws and policies, so you’ll want to check those, too.

Product Placements

What does the FTC have to say about product placements on television shows?

Federal Communications Commission law (FCC, not FTC) requires TV stations to include disclosures of product placement in TV shows.

The FTC has expressed the opinion that under the FTC Act, product placement (that is, merely showing products or brands in third-party entertainment content – as distinguished from sponsored content or disguised commercials) doesn’t require a disclosure that the advertiser paid for the placement.

What if the host of a television talk show expresses her opinions about a product – let’s say a videogame – and she was paid for the promotion? The segment is entertainment, it’s humorous, and it’s not like the host is an expert. Is that different from a product placement and does the payment have to be disclosed?

If the host endorses the product – even if she is just playing the game and saying something like “wow, this is awesome” – it’s more than a product placement. If the payment for the endorsement isn’t expected by the audience and it would affect the weight the audience gives the endorsement, it should be disclosed. It doesn’t matter that the host isn’t an expert or the segment is humorous as long as the endorsement has credibility that would be affected by knowing about the payment. However, if what the host says is obviously an advertisement – think of an old-time television show where the host goes to a different set, holds up a cup of coffee, says “Wake up with ABC Coffee. It’s how I start my day!” and takes a sip – a disclosure probably isn’t necessary.

Endorsements by Individuals on Social Networking Sites
Many social networking sites allow you to share your interests with friends and followers by clicking a button or sharing a link to show that you’re a fan of a particular business, product, website or service. Is that an “endorsement” that needs a disclosure?

Many people enjoy sharing their fondness for a particular product or service with their social networks. If you write about how much you like something you bought on your own and you’re not being rewarded, you don’t have to worry. However, if you’re doing it as part of a sponsored campaign or you’re being compensated – for example, getting a discount on a future purchase or being entered into a sweepstakes for a significant prize – then a disclosure is appropriate.

I am an avid social media user who often gets rewards for participating in online campaigns on behalf of brands. Is it OK for me to click a “like” button, pin a picture, or share a link to show that I’m a fan of a particular business, product, website or service as part of a paid campaign?

Using these features to endorse a company’s products or services as part of a sponsored brand campaign probably requires a disclosure. We realize that some platforms – like Facebook’s “like” buttons – don’t allow you to make a disclosure. Advertisers shouldn’t encourage endorsements using features that don’t allow for clear and conspicuous disclosures. Whether the Commission may take action would depend on the overall impression, including whether consumers take “likes” to be material in their decision to patronize a business or buy a product.

However, an advertiser buying fake “likes” is very different from an advertiser offering incentives for “likes” from actual consumers. If “likes” are from non-existent people or people who have no experience using the product or service, they are clearly deceptive, and both the purchaser and the seller of the fake “likes” could face enforcement action.

I posted a review of a service on a website. Now the marketer has taken my review and changed it in a way that I think is misleading. Am I liable for that? What can I do?

No, you aren’t liable for the changes the marketer made to your review. You could, and probably should, complain to the marketer and ask them to stop using your altered review. You also could file complaints with the FTC, your local consumer protection organization, and the Better Business Bureau.

How Should I Disclose That I Was Given Something for My Endorsement?

Is there special wording I have to use to make the disclosure?

No. The point is to give readers the essential information. A simple disclosure like “Company X gave me this product to try . . . .” will usually be effective.

Do I have to hire a lawyer to help me write a disclosure?

No. What matters is effective communication. A disclosure like “Company X gave me [name of product], and I think it’s great” gives your readers the information they need. Or, at the start of a short video, you might say, “The products I’m going to use in this video were given to me by their manufacturers.” That gives the necessary heads-up to your viewers.

Do I need to list the details of everything I get from a company for reviewing a product?

No. What matters is whether the information would have an effect on the weight readers would give your review. So whether you got $100 or $1,000 you could simply say you were “paid.” (That wouldn’t be good enough, however, if you’re an employee or co-owner.) And if it is something so small that it would not affect the weight readers would give your review, you may not need to disclose anything.

When should I say more than that I got a product for free?

It depends on whether you got something else from the company. Saying that you got a product for free suggests that you didn’t get anything else.

For example, if an app developer gave you their 99-cent app for free for you to review it, that information might not have much effect on the weight that readers give to your review. But if the app developer also gave you $100, knowledge of that payment would have a much greater effect on the credibility of your review. So a disclosure that simply said you got the app for free wouldn’t be good enough, but as discussed above, you don’t have to disclose exactly how much you were paid.

Similarly, if a company gave you a $50 gift card to give away to one of your readers and a second $50 gift card to keep for yourself, it wouldn’t be good enough only to say that the company gave you a gift card to give away.
I’m doing a review of a videogame that hasn’t been released yet. The manufacturer is paying me to try the game and review it. I was planning on disclosing that the manufacturer gave me a “sneak peek” of the game. Isn’t that enough to put people on notice of my relationship to the manufacturer?

No, it’s not. Getting early access doesn’t mean that you got paid. Getting a “sneak peek” of the game doesn’t even mean that you get to keep the game. If you get early access, you can say that, but if you get to keep the game or are paid, you should say so.

**Would a single disclosure on my home page that “many of the products I discuss on this site are provided to me free by their manufacturers” be enough?**

A single disclosure on your home page doesn’t really do it because people visiting your site might read individual reviews or watch individual videos without seeing the disclosure on your home page.

**If I upload a video to YouTube and that video requires a disclosure, can I just put the disclosure in the description that I upload together with the video?**

No, because consumers can easily miss disclosures in the video description. Many people might watch the video without even seeing the description page, and those who do might not read the disclosure. The disclosure has the most chance of being clear and prominent if it’s included in the video itself. That’s not to say that you couldn’t have disclosures in both the video and the description.

**What about a disclosure in the description of an Instagram post?**

When people view Instagram streams on most smartphones, longer descriptions (currently more than two lines) are truncated, with only the beginning lines displayed. To see the rest, you have to click “more.” If an Instagram post makes an endorsement through the picture or the beginning lines of the description, any required disclosure should be presented without having to click “more.”

**Would a button that says DISCLOSURE, LEGAL, or something like that which links to a full disclosure be sufficient?**

No. A hyperlink like that isn’t likely to be sufficient. It does not convey the importance, nature, and relevance of the information to which it leads and it is likely that many consumers will not click on it and therefore will miss necessary disclosures. The disclosures we are talking about are brief and there is no space-related reason to use a hyperlink to provide access to them.

**The social media platform I use has a built-in feature that allows me to disclose paid endorsements. Is it sufficient for me to rely on that tool?**

Not necessarily. Just because a platform offers a feature like that is no guarantee it’s an effective way for influencers to disclose their material connection to a brand. It still depends on an evaluation of whether the tool clearly and conspicuously discloses the relevant connection. One factor the FTC will look to is placement. The disclosure should catch users’ attention and be placed where they aren’t likely to miss it. A key consideration is how users view the screen when using a particular platform. For example, on a photo platform, users paging through their streams will likely look at the eye-catching images. Therefore, a disclosure placed above a photo may not attract their attention. Similarly, a disclosure in the lower corner of a video could be too easy for users to overlook. Second, the disclosure should use a simple-to-read font with a contrasting background that makes it stand out. Third, the disclosure should be a worded in a way that’s understandable to the ordinary reader. Ambiguous phrases are likely to be confusing. For example, simply flagging that a post contains paid content might not be sufficient if the post mentions multiple brands and not all of the mentions were paid. The big-picture point is that the ultimate responsibility for clearly disclosing a material connection rests with the influencer and the brand – not the platform.

**How can I make a disclosure on Snapchat or in Instagram Stories?**

You can superimpose a disclosure on Snapchat or Instagram Stories just as you can superimpose any other words over the images on those platforms. The disclosure should be easy to notice and read in the time that your followers have to look at the image. In determining whether your disclosure passes muster, factors you should consider include how much time you give your followers to look at the image, how much competing text there is to read, how large the disclosure is, and how well it contrasts against the image. (You might want to have a solid background behind the disclosure.) Keep in mind that if your post includes video and you include an audio disclosure, many users of those platforms watch videos without sound. So they won’t hear an audio-only disclosure. Obviously, other general disclosure guidance would also apply.

**What about a platform like Twitter? How can I make a disclosure when my message is limited to 140 characters?**

The FTC isn’t mandating the specific wording of disclosures. However, the same general principle – that people get the information they need to evaluate sponsored statements – applies across the board, regardless of the advertising medium. The words “Sponsored” and “Promotion” use only 9 characters. “Paid ad” only uses 7 characters. Starting a tweet with “Ad:” or “#ad” – which takes only 3 characters – would likely be effective.

**You just talked about putting “#ad” at the beginning of a social media post. What about “#ad” at or near the end of a post?**
We’re not necessarily saying that “#ad” has to be at the beginning of a post. The FTC does not dictate where you have to place the “#ad.” What the FTC will look at is whether it is easily noticed and understood. So, although we aren’t saying it has to be at the beginning, it’s less likely to be effective in the middle or at the end. Indeed, if #ad is mixed in with links or other hashtags at the end, some readers may just skip over all of that stuff.

**What if we combine our company name, “Cool Stylle” with “ad” as in “#coolstyxleads”**?

There is a good chance that consumers won’t notice and understand the significance of the word “ad” at the end of a hashtag, especially one made up of several words combined like “#coolstyxleads.” Disclosures need to be easily noticed and understood.

**Is it good enough if an endorser says “thank you” to the sponsoring company?**

No. A “thank you” to a company or a brand doesn’t necessarily communicate that the endorser got something for free or that they were given something in exchange for an endorsement. The person posting in social media could just be thanking a company or brand for providing a great product or service. But “Thanks XYZ for the free product” or “Thanks XYZ for the gift of ABC product” would be good enough — if that’s all you got from XYZ. If that’s too long, there’s “Sponsored” or “Ad.”

**What about saying, “XYZ Company asked me to try their product”?**

Depending on the context of the endorsement, it might be clear that the endorser got the product for free and kept it after trying it. If that isn’t clear, then that disclosure wouldn’t be good enough. Also, that disclosure might not be sufficient if, in addition to receiving a free product, the endorser was paid.

I provide marketing consulting and advice to my clients. I’m also a blogger and I sometimes promote my client’s products. Are “#client” “#advisor” and “#consultant” all acceptable disclosures?

Probably not. Such one-word hashtags are ambiguous and likely confusing. In blogs, there isn’t an issue with a limited number of characters available. So it would be much clearer if you say something like, “I’m a paid consultant to the marketers of XYZ” or “I work with XYZ brand” (where XYZ is a brand name).

Of course, it’s possible that that some shorter message might be effective. For example, something like “XYZ_Consultant” or “XYZ_Advisor” might work. But even if a disclosure like that is clearer, no disclosure is effective if consumers don’t see it and read it.

**Would “#ambassador” or “#[BRAND]_Ambassador” work in a tweet?**

The use of “#ambassador” is ambiguous and confusing. Many consumers are unlikely to know what it means. By contrast, “#XYZ_Ambassador” will likely be more understandable (where XYZ is a brand name). However, even if the language is understandable, a disclosure also must be prominent so it will be noticed and read.

I’m a blogger, and XYZ Resort Company is flying me to one of its destinations and putting me up for a few nights. If I write an article sharing my thoughts about the resort destination, how should I disclose the free travel?

Your disclosure could be just, “XYZ Resort paid for my trip” or “Thanks to XYZ Resort for the free trip.” It would also be accurate to describe your blog as “sponsored by XYZ Resort.”

**The Guides say that disclosures have to be clear and conspicuous. What does that mean?**

To make a disclosure “clear and conspicuous,” advertisers should use plain and unambiguous language and make the disclosure stand out. Consumers should be able to notice the disclosure easily. They should not have to look for it. In general, disclosures should be:

- close to the claims to which they relate;
- in a font that is easy to read;
- in a shade that stands out against the background;
- for video ads, on the screen long enough to be noticed, read, and understood;
- for audio disclosures, read at a cadence that is easy for consumers to follow and in words consumers will understand.

A disclosure that is made in both audio and video is more likely to be noticed by consumers. Disclosures should not be hidden or buried in footnotes, in blocks of text people are not likely to read, or in hyperlinks. If disclosures are hard to find, tough to understand, fleeting, or buried in unrelated details, or if other elements in the ad or message obscure or distract from the disclosures, they don’t meet the “clear and conspicuous” standard. With respect to online disclosures, FTC staff has issued a guidance document, “.com Disclosures: How to Make Effective Disclosures in Digital Advertising,” which is available on ftc.gov.

**Where in my blog should I disclose that my review is sponsored by a marketer?** I’ve seen some say it at the top and others at the
bottom. Does it matter?

Yes, it matters. A disclosure should be placed where it easily catches consumers’ attention and is difficult to miss. Consumers may miss a disclosure at the bottom of a blog or the bottom of a page. A disclosure at the very top of the page, outside of the blog, might also be overlooked by consumers. A disclosure is more likely to be seen if it’s very close to, or part of, the endorsement to which it relates.

I’ve been paid to endorse a product in social media. My posts, videos, and tweets will be in Spanish. In what language should I disclose that I’ve been paid for the promotion?

The connection between an endorser and a marketer should be disclosed in whatever language or languages the endorsement is made, so your disclosures should be in Spanish.

I guess I need to make a disclosure that I’ve gotten paid for a video review that I’m uploading to YouTube. When in the review should I make the disclosure? Is it ok if it’s at the end?

It’s more likely that a disclosure at the end of the video will be missed, especially if someone doesn’t watch the whole thing. Having it at the beginning of the review would be better. Having multiple disclosures during the video would be even better. Of course, no one should promote a link to your review that bypasses the beginning of the video and skips over the disclosure. If YouTube has been enabled to run ads during your video, a disclosure that is obscured by ads is not clear and conspicuous.

I’m getting paid to do a videogame playthrough and give commentary while I’m playing. The playthrough – which will last several hours – will be live streamed. Would a disclosure at the beginning of the stream be ok?

Since viewers can tune in any time, they could easily miss a disclosure at the beginning of the stream or at any other single point in the stream. If there are multiple, periodic disclosures throughout the stream people are likely to see them no matter when they tune in. To be cautious, you could have a continuous, clear and conspicuous disclosure throughout the entire stream.

Other Things for Endorsers to Know

Besides disclosing my relationship with the company whose product I’m endorsing, what are the essential things I need to know about endorsements?

The most important principle is that an endorsement has to represent the accurate experience and opinion of the endorser:

- You can’t talk about your experience with a product if you haven’t tried it.
- If you were paid to try a product and you thought it was terrible, you can’t say it’s terrific.

You can’t make claims about a product that would require proof the advertiser doesn’t have. The Guides give the example of a blogger commissioned by an advertiser to review a new body lotion. Although the advertiser does not make any claims about the lotion’s ability to cure skin conditions and the blogger does not ask the advertiser whether there is substantiation for the claim, she writes that the lotion cures eczema. The blogger is subject to liability for making claims without having a reasonable basis for those claims.

Social Media Contests

My company runs contests and sweepstakes in social media. To enter, participants have to send a Tweet or make a pin with the hashtag, #XYZ_Rocks. ("XYZ" is the name of my product.) Isn’t that enough to notify readers that the posts were incentivized?

No, it is likely that many readers would not understand such a hashtag to mean that those posts were made as part of a contest or that the people doing the posting had received something of value (in this case, a chance to win the contest prize). Making the word “contest” or “sweepstakes” part of the hashtag should be enough. However, the word “sweeps” probably isn’t, because it is likely that many people would not understand what that means.

Online Review Programs

My company runs a retail website that includes customer reviews of the products we sell. We believe honest reviews help our customers and we give out free products to a select group of our customers for them to review. We tell them to be honest, whether it’s positive or negative. What we care about is how helpful the reviews are. Do we still need to disclose which reviews were of free products?

Yes. Knowing that reviewers got the product they reviewed for free would probably affect the weight your customers give to the reviews,
even if you didn’t intend for that to happen. And even assuming the reviewers in your program are unbiased, your customers have the right to know which reviewers were given products for free. It’s also possible that the reviewers may wonder whether your company would stop sending them products if they wrote several negative reviews – despite your assurances that you only want their honest opinions – and that could affect their reviews. Also, reviewers given free products might give the products higher ratings on a scale like the number of stars than reviewers who bought the products. If that’s the case, consumers may be misled if they just look at inflated average ratings rather than reading individual reviews with disclosures. Therefore, if you give free products to reviewers you should disclose next to any average or other summary rating that it includes reviewers who were given free products.

My company, XYZ, operates one of the most popular multi-channel networks on YouTube. We just entered into a contract with a videogame marketer to pay some of our network members to produce and upload video reviews of the marketer’s games. We’re going to have these reviewers announce at the beginning of each video (before the action starts) that it’s “sponsored by XYZ” and also have a prominent simultaneous disclosure on the screen saying the same thing. Is that good enough?

Many consumers could think that XYZ is a neutral third party and won’t realize from your disclosures that the review was really sponsored (and paid for) by the videogame marketer, which has a strong interest in positive reviews. If the disclosure said, “Sponsored by [name of the game company],” that would be good enough.

Soliciting Endorsements

My company wants to contact customers and interview them about their experiences with our service. If we like what they say about our service, can we ask them to allow us to quote them in our ads? Can we pay them for letting us use their endorsements?

Yes, you can ask your customers about their experiences with your product and feature their comments in your ads. If they have no reason to expect compensation or any other benefit before they give their comments, there’s no need to disclose your payments to them.

However, if you’ve given these customers a reason to expect a benefit from providing their thoughts about your product, you should disclose that fact in your ads. For example, if customers are told in advance that their comments might be used in advertising, they might expect to receive a payment for a positive review, and that could influence what they say, even if you tell them that you want their honest opinion. In fact, even if you tell your customers that you aren’t going to pay them but that they might be featured in your advertising, that opportunity might be seen as having a value, so the fact that they knew this when they gave the review should be disclosed (e.g., “Customers were told in advance they might be featured in an ad.”).

I’m starting a new Internet business. I don’t have any money for advertising, so I need publicity. Can I tell people that if they say good things about my business on Yelp or Etsy, I’ll give them a discount on items they buy through my website?

It’s not a good idea. Endorsements must reflect the honest opinions or experiences of the endorser, and your plan could cause people to make up positive reviews even if they’ve never done business with you. However, it’s okay to invite people to post reviews of your business after they’ve actually used your products or services. If you’re offering them something of value in return for these reviews, tell them in advance that they should disclose what they received from you. You should also inform potential reviewers that the discount will be conditioned upon their making the disclosure. That way, other consumers can decide how much stock to put in those reviews.

A company is giving me a free product to review on one particular website or social media platform. They say that if I voluntarily review it on another site or on a different social media platform, I don’t need to make any disclosures. Is that true?

No. If you received a free or discounted product to provide a review somewhere, your connection to the company should be disclosed everywhere you endorse the product.

Does it matter how I got the free product to review?

No, it doesn’t. Whether they give you a code, ship it directly to you, or give you money to buy it yourself, it’s all the same for the purpose of having to disclose that you got the product for free. The key question is always the same: If consumers knew the company gave it to you for free (or at a substantial discount), might that information affect how much weight they give your review?

My company wants to get positive reviews. We are thinking about distributing product discounts through various services that encourage reviews. Some services require individuals who want discount codes to provide information allowing sellers to read their other reviews before deciding which reviewers to provide with discount codes. Other services send out offers of a limited number of discount codes and then follow up by email to see whether the recipients have reviewed their products. Still others send offers of discount codes to those who previously posted reviews in exchange for discounted products. All of these services say that reviews are not required. Does it matter which service I choose? I would prefer that recipients of my discount codes not have to disclose that they received discounts.

Whichever service you choose, the recipients of your discount codes need to disclose that they received a discount from you to encourage
their reviews. Even though the services might say that a review is not "required," it's at least implied that a review is expected.

What Are an Advertiser's Responsibilities for What Others Say in Social Media?

Our company uses a network of bloggers and other social media influencers to promote our products. We understand we’re responsible for monitoring our network. What kind of monitoring program do we need? Will we be liable if someone in our network says something false about our product or fails to make a disclosure?

Advertisers need to have reasonable programs in place to train and monitor members of their network. The scope of the program depends on the risk that deceptive practices by network participants could cause consumer harm – either physical injury or financial loss. For example, a network devoted to the sale of health products may require more supervision than a network promoting, say, a new fashion line. Here are some elements every program should include:

1. Given an advertiser’s responsibility for substantiating objective product claims, explain to members of your network what they can (and can’t) say about the products – for example, a list of the health claims they can make for your products, along with instructions not to go beyond those claims;
2. Instruct members of the network on their responsibilities for disclosing their connections to you;
3. Periodically search for what your people are saying; and
4. Follow up if you find questionable practices.

It’s unrealistic to expect you to be aware of every single statement made by a member of your network. But it’s up to you to make a reasonable effort to know what participants in your network are saying. That said, it’s unlikely that the activity of a rogue blogger would be the basis of a law enforcement action if your company has a reasonable training, monitoring, and compliance program in place.

Our company’s social media program is run by our public relations firm. We tell them to make sure that what they and anyone they pay on our behalf do complies with the FTC’s Guides. Is that good enough?

Your company is ultimately responsible for what others do on your behalf. You should make sure your public relations firm has an appropriate program in place to train and monitor members of its social media network. Ask for regular reports confirming that the program is operating properly and monitor the network periodically. Delegating part of your promotional program to an outside entity doesn’t relieve you of responsibility under the FTC Act.

What About Intermediaries?

I have a small network marketing business. Advertisers pay me to distribute their products to members of my network who then try the product for free. How do the principles in the Guides affect me?

You should tell the participants in your network that if they endorse products they have received through your program, they should make it clear they got them for free. Advise your clients – the advertisers – that if they provide free samples directly to your members, they should remind them of the importance of disclosing the relationship when they talk about those products. Put a program in place to check periodically whether your members are making those disclosures, and to deal with anyone who isn’t complying.

My company recruits “influencers” for marketers who want them to endorse their products. We pay and direct the influencers. What are our responsibilities?

Like an advertiser, your company needs to have reasonable programs in place to train and monitor the influencers you pay and direct.

What About Affiliate or Network Marketing?

I’m an affiliate marketer with links to an online retailer on my website. When people read what I’ve written about a particular product and then click on those links and buy something from the retailer, I earn a commission from the retailer. What do I have to disclose? Where should the disclosure be?

If you disclose your relationship to the retailer clearly and conspicuously on your site, readers can decide how much weight to give your endorsement.
In some instances – like when the affiliate link is embedded in your product review – a single disclosure may be adequate. When the review has a clear and conspicuous disclosure of your relationship and the reader can see both the review containing that disclosure and the link at the same time, readers have the information they need. You could say something like, “I get commissions for purchases made through links in this post.” But if the product review containing the disclosure and the link are separated, readers may not make the connection.

As for where to place a disclosure, the guiding principle is that it has to be clear and conspicuous. The closer it is to your recommendation, the better. Putting disclosures in obscure places – for example, buried on an ABOUT US or GENERAL INFO page, behind a poorly labeled hyperlink or in a “terms of service” agreement – isn’t good enough. Neither is placing it below your review or below the link to the online retailer so readers would have to keep scrolling after they finish reading. Consumers should be able to notice the disclosure easily. They shouldn’t have to hunt for it.

Is “affiliate link” by itself an adequate disclosure? What about a “buy now” button?

Consumers might not understand that “affiliate link” means that the person placing the link is getting paid for purchases through the link. Similarly, a “buy now” button would not be adequate.

What if I’m including links to product marketers or to retailers as a convenience to my readers, but I’m not getting paid for them?

Then there isn’t anything to disclose.

Does this guidance about affiliate links apply to links in my product reviews on someone else’s website, to my user comments, and to my tweets?

Yes, the same guidance applies anytime you endorse a product and get paid through affiliate links.

It’s clear that what’s on my website is a paid advertisement, not my own endorsement or review of the product. Do I still have to disclose that I get a commission if people click through my website to buy the product?

If it’s clear that what’s on your site is a paid advertisement, you don’t have to make additional disclosures. Just remember that what’s clear to you may not be clear to everyone visiting your site, and the FTC evaluates ads from the perspective of reasonable consumers.

**Expert Endorsers Making Claims Outside of Traditional Advertisements**

One of our company’s paid spokespersons is an expert who appears on news and talk shows promoting our product, sometimes along with other products she recommends based on her expertise. Your Guides give an example of a celebrity spokesperson appearing on a talk show and recommend that the celebrity disclose her connection to the company she is promoting. Does that principle also apply to expert endorsers?

Yes, it does. Your spokesperson should disclose her connection when promoting your products outside of traditional advertising media (in other words, on programming that consumers won’t recognize as paid advertising). The same guidance also would apply to comments by the expert in her blog or on her website.

**Employee Endorsements**

I work for a terrific company. Can I mention our products to people in my social networks? How about on a review site? My friends won’t be misled since it’s clear in my online profiles where I work.

If your company allows employees to use social media to talk about its products, you should make sure that your relationship is disclosed to people who read your online postings about your company or its products. Put yourself in the reader’s shoes. Isn’t the employment relationship something you would want to know before relying on someone else’s endorsement? Listing your employer on your profile page isn’t enough. After all, people who just read what you post on a review site won’t get that information.

People reading your posting on a review site probably won’t know who you are. You definitely should disclose your employment relationship when making an endorsement.

On her own initiative and without us asking, one of our employees used her personal social network simply to “like” or “share” one of our company’s posts. Does she need to disclose that she works for our company?

Whether there should be any disclosure depends upon whether the “like” or “share” could be viewed as an advertisement for your company. If the post is an ad, then employees endorsing the post should disclose their relationship to the company. With a share, that’s fairly easy to
do, “Check out my company’s great new product ….” Regarding “likes,” see what we said above about “likes.”

Our company’s policy says that employees shouldn’t post positive reviews online about our products without clearly disclosing their relationship to the company. All of our employees agree to abide by this policy when they are hired. But we have several thousand people working here and we can’t monitor what they all do on their own computers and other devices when they aren’t at work. Are we liable if an employee posts a review of one of our products, either on our company website or on a social media site and doesn’t disclose that relationship?

It wouldn’t be reasonable to expect you to monitor every social media posting by all of your employees. However, you should establish a formal program to remind employees periodically of your policy, especially if the company encourages employees to share their opinions about your products. Also, if you learn that an employee has posted a review on the company’s website or a social media site without adequately disclosing his or her relationship to the company, you should remind them of your company policy and ask them to remove that review or adequately disclose that they’re an employee.

What about employees of an ad agency or public relations firm? Can my agency ask our employees to spread the buzz about our clients’ products?

First, an ad agency (or any company for that matter) shouldn’t ask employees to say anything that isn’t true. No one should endorse a product they haven’t used or say things they don’t believe about a product, and an employer certainly shouldn’t encourage employees to engage in such conduct.

Moreover, employees of an ad agency or public relations firm have a connection to the advertiser, which should be disclosed in all social media posts. Agencies asking their employees to spread the word must instruct those employees about their responsibilities to disclose their relationship to the product they are endorsing, e.g., “My employer is paid to promote [name of product],” or simply “Advertisement,” or when space is an issue, “Ad” or “#ad.”

My company XYZ wants to tell our employees what to disclose in social media. Is “#employee” good enough?

Consumers may be confused by “#employee.” Consumers would be more likely to understand “#XYZ_Employee.” Then again, if consumers don’t associate your company’s name with the product or brand being endorsed, that disclosure might not work. It would be much clearer to use the words “my company” or “employer’s” in the body of the message. It’s a lot easier to understand and harder to miss.

Using Testimonials That Don’t Reflect the Typical Consumer Experience

We want to run ads featuring endorsements from consumers who achieved the best results with our company’s product. Can we do that?

Testimonials claiming specific results usually will be interpreted to mean that the endorser’s experience reflects what others can also expect. Statements like “Results not typical” or “Individual results may vary” won’t change that interpretation. That leaves advertisers with two choices:

1. Have adequate proof to back up the claim that the results shown in the ad are typical, or
2. Clearly and conspicuously disclose the generally expected performance in the circumstances shown in the ad.

How would this principle about testimonialists who achieved exceptional results apply in a real ad?

The Guides include several examples with practical advice on this topic. One example is about an ad in which a woman says, “I lost 50 pounds in 6 months with WeightAway.” If consumers can’t generally expect to get those results, the ad should say how much weight consumers can expect to lose in similar circumstances – for example, “Most women who use WeightAway for six months lose at least 15 pounds.”

Our company website includes testimonials from some of our more successful customers who used our product during the past few years and mentions the results they got. We can’t figure out now what the “generally expected results” were back then. What should we do? Do we have to remove those testimonials?

There are two issues here. First, according to the Guides, if your website says or implies that the endorser currently uses the product in question, you can use that endorsement only as long as you have good reason to believe the endorser does still use the product. If you’re using endorsements that are a few years old, it’s your obligation to make sure the claims still are accurate. If your product has changed, it’s best to get new endorsements.
Second, if your product is the same as it was when the endorsements were given and the claims are still accurate, you probably can use the old endorsements if the disclosures are consistent with what the generally expected results are now.

Where can I find out more?

The Guides offer more than 35 examples involving various endorsement scenarios. Questions? Send them to endorsements@ftc.gov. We may address them in future FAQs.

The FTC works to prevent fraudulent, deceptive and unfair business practices in the marketplace and to provide information to help consumers spot, stop and avoid them. To file a complaint or get free information on consumer issues, visit ftc.gov or call toll-free, 1-877-FTC-HELP (1-877-382-4357); TTY: 1-866-653-4261. Watch a video, How to File a Complaint, at consumer.ftc.gov/media to learn more. The FTC enters consumer complaints into the Consumer Sentinel Network, a secure online database and investigative tool used by hundreds of civil and criminal law enforcement agencies in the U.S. and abroad.

Your Opportunity to Comment

The National Small Business Ombudsman and 10 Regional Fairness Boards collect comments from small businesses about federal compliance and enforcement activities. Each year, the Ombudsman evaluates the conduct of these activities and rates each agency’s responsiveness to small businesses. Small businesses can comment to the Ombudsman without fear of reprisal. To comment, call toll-free 1-888-REGFAIR (1-888-734-3247) or go to www.sba.gov/ombudsman.

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THE SECURE ENTREPRENEUR
App developers: How does your app size up? Have your built security in from the start? The FTC has a dozen tips to help you develop kick-app security for your product.

More than a thousand new apps are hitting the market each day. In this fast-moving era of entrepreneurship and creativity, is security keeping up? Apps and devices often rely on consumer data — including contact information, photos, and location to name a few — and can be vulnerable to digital snoops, data breaches, and real-world thieves. The Federal Trade Commission (FTC), the nation’s consumer protection agency, offers these tips to help developers approach app and software security.

Aim for reasonable data security

There is no checklist for securing all apps. Different apps have different security needs. For example, an alarm clock app that collects little or no data will likely raise fewer security considerations than a location-based social network. Apps that are more complex may rely on remote servers for storing and manipulating users’ data, meaning that developers must be familiar with securing software, securing transmissions of data, and securing servers. Adding to the challenge: Security threats and best practices evolve quickly.

The FTC expects app developers to adopt and maintain reasonable data security practices and doesn’t prescribe a one-size-fits-all approach. This brochure offers a starting point to help you provide a secure experience for your users. If applied thoughtfully and consistently, these tips can help protect you, your users, and the reputation of your app.

Before you start, evaluate the ecosystem

The mobile and Internet of Things ecosystem present developers with both challenges and opportunities. Before getting into the nuts and bolts of data security, consider the landscape:

- App developers can code quickly with the support of powerful software development kits (SDKs). However, a rush to release may result in dangerous security oversights.
- Popular app stores can introduce apps to millions of users, and can lead to overnight popularity. But the bigger the user base and the more sensitive the information, the greater the need for strong security. Is your app ready?
- Ready-made software libraries and cross-platform toolkits can provide a head start in the development process. However, as a developer, you are your app’s last line of defense, determining what goes in it and how it performs.
- Mobile and Internet-connected devices offer an array of exciting technologies. GPS receivers, cameras, and sensors let you create a unique experience for users. But threats — like loss, theft, and users who rely on unsecure Wi-Fi networks — raise the security stakes. Balance these features and risks to protect users’ personal information and your own business reputation.

Getting your product working and accepted by an app store are two key milestones. But there’s a critical third step: Anticipating and preventing potential security glitches.

Tips for app security

Make someone responsible for security.

Your team should include at least one person responsible for considering security at every stage of your app’s development. If you’re running a solo operation, that person is you. It’s easy to assume someone else is handling security — whether that someone is a mobile operating system provider, a device manufacturer, or another member of the development team. It’s true that everyone has a role to play, but as the developer, you’re the final line of defense.

Take stock of the data you collect and retain.

Don’t collect or keep data you don’t need. For example, if your photo-editing app doesn’t require access to a user’s contact info, don’t ask for it. Simply put, data you don’t collect is data you don’t need to worry about protecting. Avoid keeping data longer than you need
to. For example, if you offer a location-based mobile game, get rid of the location data when it’s no longer relevant.

**Understand differences between platforms.**

Research the platforms you work with and make sure you enable proper configurations. Each mobile operating system uses different application programming interface (APIs), provides you with different security-related features, and handles permissions its own way. Don’t expect that one platform works exactly like another. Do your research and adapt your code accordingly.

**Don’t rely on a platform alone to protect your users.**

Platforms often provide helpful security features. But it’s your job to understand those features (and their limitations), implement them properly, and take other measures necessary to protect your users. In addition, while platform-based permissions might be helpful in conveying security information to your customers, they’re no substitute for your own effective communication. Talk to your users in your own words.

**Generate credentials securely.**

If you create credentials for your users (like usernames and passwords), create them securely. For example, a short number string might be an appropriate token for authenticating a user on a game score board, but the same credential wouldn’t be appropriate for a social networking app.

**Don’t store passwords in plaintext.**

Don’t store passwords in plaintext on your server. Instead, consider using an iterated cryptographic hash function to hash users’ passwords and then verify against these hash values. (Your users can simply reset their passwords if they forget.) That way, if your server suffers a data breach, passwords aren’t left completely exposed.

**Use transit encryption for usernames, passwords, and other important data.**

Anytime your app transmits usernames, passwords, API keys, or other types of important data, use transit encryption. Mobile and Internet-connected devices commonly rely on open Wi-Fi access points at coffee shops, airports, and the like — and it’s easy for troublemakers to snoop and intercept data.

To protect users, developers often deploy TLS in the form of HTTPS. Consider using HTTPS or another industry-standard method. There’s no need to reinvent the wheel. If you use HTTPS, use a digital certificate and ensure your app checks it properly. A no-frills digital certificate from a reputable vendor is inexpensive and helps your customers ensure they’re communicating with your servers, and not someone else’s. But standards change, so keep an eye on current technologies, and make sure you’re using the latest and greatest security features.

**Use due diligence on libraries and other third-party code.**

Before using someone else’s code to build or augment your app, do your research. Does this library or SDK have known security vulnerabilities? Has it been tested in real-world settings? Have other developers reported problems? Third-party libraries can save time, but make sure you stay accountable for your app.

**Consider protecting data you store on a user’s device.**

If your app handles personal information, consider protecting or obscuring the data — for example, by using encryption. Some platforms have special storage schemes for sensitive data like passwords and keys. Use them if they’re available. This helps protect your users in the event of viruses, malware, or a lost device.

**Protect your servers, too.**

If you maintain a server that communicates with your app, take appropriate security measures to protect it. If you rely on a commercial cloud provider, understand the divisions of responsibility for securing and updating software on the server. While some commercial services will monitor and update your servers’ security, others leave you in control.

Server security is its own complex topic, so do some research. Take steps to protect yourself from common vulnerabilities, including injection attacks, cross-site scripting, and other threats.

**You’re not done once you release your app. Stay aware and communicate with your users.**

Even after you ship your app, stay involved. New vulnerabilities arise daily, and even the most reputable software libraries require security updates. Follow general and library-specific mailing lists and have a plan for shipping security updates if needed.

Check your inbox, too. User feedback can help you spot and fix security vulnerabilities. When they discover vulnerabilities, researchers often try to resolve the issue with developers before publishing their findings. It’s best to be part of that discussion early on.
If you’re dealing with financial data, health data, or kids’ data, make sure you understand applicable standards and regulations.

If your app deals with kids’ data, health data, or financial data, ensure you’re complying with relevant rules and regulations, which are more complex. See Additional Resources for more detail.

Additional Resources

- Children’s Privacy
- Gramm-Leach-Bliley Act
- Health Insurance Portability and Accountability Act (HIPAA) Security Rule
- Health Breach Notification Rule

For More Information

The FTC works for the consumer to prevent fraudulent, deceptive, and unfair practices in the marketplace and to provide information to businesses to help them comply with the law. For free information, visit the BCP Business Center, business.ftc.gov. To file a complaint, visit ftc.gov or call toll-free, 1-877-FTC-HELP (1-877-382-4357); TTY: 1-866-653-4261. Watch a video, How to File a Complaint, to learn more. The FTC enters consumer complaints into the Consumer Sentinel Network, a secure online database and investigative tool used by hundreds of civil and criminal law enforcement agencies in the U.S. and abroad.

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spyware and malware
May 2017
CYBERSECURITY FOR SMALL BUSINESS

Cybersecurity Basics • NIST Cybersecurity Framework • Physical Security • Ransomware
Phishing • Business Email Imposters • Tech Support Scams • Vendor Security • Cyber Insurance
Email Authentication • Hiring a Web Host • Secure Remote Access
This booklet contains fact sheets on cybersecurity topics. Online versions are available at FTC.gov/SmallBusiness, as well as videos and quizzes. These materials will help you and your staff learn about cybersecurity and make it part of your business routine. Here are some ideas to get you started:

- Review the information in this booklet and watch the videos online at FTC.gov/SmallBusiness. Familiarize yourself with the information and consider how it applies to your business.
- Talk about cybersecurity with your employees, vendors, and others involved in your business. Share with them the information in this booklet. You can download each of the fact sheets from FTC.gov/SmallBusiness.
- Ask your employees to go to FTC.gov/SmallBusiness to watch videos about the topics in this booklet — and take the online quizzes to test their understanding of cybersecurity issues.
- Assign a staff person to guide a discussion on one of the cybersecurity topics in this booklet at your next staff meeting. Play a video for all to watch together and discuss how the information can be applied to your business.
- For more free copies of this booklet to use in your employee trainings, go to FTC.gov/Bulkorder.
Cyber criminals target companies of all sizes. Knowing some cybersecurity basics and putting them in practice will help you protect your business and reduce the risk of a cyber attack.

**PROTECT YOUR FILES & DEVICES**

- **Update your software**
  This includes your apps, web browsers, and operating systems. Set updates to happen automatically.

- **Encrypt devices**
  Encrypt devices and other media that contain sensitive personal information. This includes laptops, tablets, smartphones, removable drives, backup tapes, and cloud storage solutions.

- **Secure your files**
  Back up important files offline, on an external hard drive, or in the cloud. Make sure you store your paper files securely, too.

- **Require passwords**
  Use passwords for all laptops, tablets, and smartphones. Don’t leave these devices unattended in public places.

- **Use multi-factor authentication**
  Require multi-factor authentication to access areas of your network with sensitive information. This requires additional steps beyond logging in with a password — like a temporary code on a smartphone or a key that’s inserted into a computer.
PROTECT YOUR WIRELESS NETWORK

Secure your router
Change the default name and password, turn off remote management, and log out as the administrator once the router is set up.

Use at least WPA2 encryption
Make sure your router offers WPA2 or WPA3 encryption, and that it’s turned on. Encryption protects information sent over your network so it can’t be read by outsiders.

MAKE SMART SECURITY YOUR BUSINESS AS USUAL

Require strong passwords
A strong password is at least 12 characters that are a mix of numbers, symbols, and capital lowercase letters.
Never reuse passwords and don’t share them on the phone, in texts, or by email.
Limit the number of unsuccessful log-in attempts to limit password-guessing attacks.

Train all staff
Create a culture of security by implementing a regular schedule of employee training. Update employees as you find out about new risks and vulnerabilities. If employees don’t attend, consider blocking their access to the network.

Have a plan
Have a plan for saving data, running the business, and notifying customers if you experience a breach. The FTC’s Data Breach Response: A Guide for Business gives steps you can take. You can find it at FTC.gov/DataBreach.
You may have heard about the NIST Cybersecurity Framework, but what exactly is it?

And does it apply to you?

NIST is the National Institute of Standards and Technology at the U.S. Department of Commerce. The NIST Cybersecurity Framework helps businesses of all sizes better understand, manage, and reduce their cybersecurity risk and protect their networks and data. The Framework is voluntary. It gives your business an outline of best practices to help you decide where to focus your time and money for cybersecurity protection.

You can put the NIST Cybersecurity Framework to work in your business in these five areas: Identify, Protect, Detect, Respond, and Recover.

1. **IDENTIFY**

   Make a list of all equipment, software, and data you use, including laptops, smartphones, tablets, and point-of-sale devices.

   Create and share a company cybersecurity policy that covers:

   - Roles and responsibilities for employees, vendors, and anyone else with access to sensitive data.
   - Steps to take to protect against an attack and limit the damage if one occurs.

2. **PROTECT**

   - Control who logs on to your network and uses your computers and other devices.
   - Use security software to protect data.
   - Encrypt sensitive data, at rest and in transit.
   - Conduct regular backups of data.
   - Update security software regularly, automating those updates if possible.
   - Have formal policies for safely disposing of electronic files and old devices.
   - Train everyone who uses your computers, devices, and network about cybersecurity. You can help employees understand their personal risk in addition to their crucial role in the workplace.
3. DETECT

Monitor your computers for unauthorized personnel access, devices (like USB drives), and software.

Check your network for unauthorized users or connections.

Investigate any unusual activities on your network or by your staff.

4. RESPOND

Have a plan for:

- Notifying customers, employees, and others whose data may be at risk.
- Keeping business operations up and running.
- Reporting the attack to law enforcement and other authorities.

Test your plan regularly.

- Investigating and containing an attack.
- Updating your cybersecurity policy and plan with lessons learned.
- Preparing for inadvertent events (like weather emergencies) that may put data at risk.

5. RECOVER

After an attack:

Repair and restore the equipment and parts of your network that were affected.

Keep employees and customers informed of your response and recovery activities.

For more information on the NIST Cybersecurity Framework and resources for small businesses, go to NIST.gov/CyberFramework and NIST.gov/Programs-Projects/Small-Business-Corner-SBC.
Cybersecurity begins with strong physical security.

Lapses in physical security can expose sensitive company data to identity theft, with potentially serious consequences.

For example:

An employee accidentally leaves a flash drive on a coffeehouse table. When he returns hours later to get it, the drive — with hundreds of Social Security numbers saved on it — is gone.

Another employee throws stacks of old company bank records into a trash can, where a criminal finds them after business hours.

A burglar steals files and computers from your office after entering through an unlocked window.

**HOW TO PROTECT EQUIPMENT & PAPER FILES**

Here are some tips for protecting information in paper files and on hard drives, flash drives, laptops, point-of-sale devices, and other equipment.

**Store securely**

When paper files or electronic devices contain sensitive information, store them in a locked cabinet or room.

**Limit physical access**

When records or devices contain sensitive data, allow access only to those who need it.

**Send reminders**

Remind employees to put paper files in locked file cabinets, log out of your network and applications, and never leave files or devices with sensitive data unattended.

**Keep stock**

Keep track of and secure any devices that collect sensitive customer information. Only keep files and data you need and know who has access to them.
A burglary, lost laptop, stolen mobile phone, or misplaced flash drive — all can happen due to lapses in physical security. But they’re less likely to result in a data breach if information on those devices is protected. Here are a few ways to do that:

**Require complex passwords**
Require passwords that are long, complex, and unique. And make sure that these passwords are stored securely. Consider using a password manager.

**Use multi-factor authentication**
Require multi-factor authentication to access areas of your network with sensitive information. This requires additional steps beyond logging in with a password — like a temporary code on a smartphone or a key that’s inserted into a computer.

**Limit login attempts**
Limit the number of incorrect login attempts allowed to unlock devices. This will help protect against intruders.

**Encrypt**
Encrypt portable media, including laptops and thumb drives, that contain sensitive information. Encrypt any sensitive data you send outside of the company, like to an accountant or a shipping service.

**Always shred documents**
Shred documents with sensitive information before throwing them away.

**Use software to erase data correctly**
Use software to erase data before donating or discarding old computers, mobile devices, digital copiers, and drives. Don’t rely on “delete” alone. That does not actually remove the file from the computer.

**Know the response plan**
All staff should know what to do if equipment or paper files are lost or stolen, including whom to notify and what to do next. Use *Data Breach Response: A Guide for Business* for help creating a response plan. You can find it at FTC.gov/DataBreach.
Someone in your company gets an email.

It looks legitimate — but with one click on a link, or one download of an attachment, everyone is locked out of your network. That link downloaded software that holds your data hostage. That’s a ransomware attack.

The attackers ask for money or cryptocurrency, but even if you pay, you don’t know if the cybercriminals will keep your data or destroy your files. Meanwhile, the information you need to run your business and sensitive details about your customers, employees, and company are now in criminal hands. Ransomware can take a serious toll on your business.

**HOW IT HAPPENS**

- **Scam emails** with links and attachments that put your data and network at risk. These phishing emails make up most ransomware attacks.

- **Infected websites** that automatically download malicious software onto your computer.

- **Server vulnerabilities** which can be exploited by hackers.

- **Online ads** that contain malicious code — even on websites you know and trust.
HOW TO PROTECT YOUR BUSINESS

Have a plan
How would your business stay up and running after a ransomware attack? Put this plan in writing and share it with everyone who needs to know.

Back up your data
Regularly save important files to a drive or server that’s not connected to your network. Make data backup part of your routine business operations.

Keep your security up to date
Always install the latest patches and updates. Look for additional means of protection, like email authentication, and intrusion prevention software, and set them to update automatically on your computer. On mobile devices, you may have to do it manually.

Alert your staff
Teach them how to avoid phishing scams and show them some of the common ways computers and devices become infected. Include tips for spotting and protecting against ransomware in your regular orientation and training.

WHAT TO DO IF YOU’RE ATTACKED

Limit the damage
Immediately disconnect the infected computers or devices from your network. If your data has been stolen, take steps to protect your company and notify those who might be affected.

Contact the authorities
Report the attack right away to your local FBI office.

Notify customers
If your data or personal information was compromised, make sure you notify the affected parties — they could be at risk of identity theft. Find information on how to do that at Data Breach Response: A Guide for Business. You can find it at FTC.gov/DataBreach.

Keep your business running
Now’s the time to implement that plan. Having data backed up will help.

Should I pay the ransom?
Law enforcement doesn’t recommend that, but it’s up to you to determine whether the risks and costs of paying are worth the possibility of getting your files back. However, paying the ransom may not guarantee you get your data back.
You get an email that looks like it’s from someone you know.

It seems to be from one of your company’s vendors and asks that you click on a link to update your business account. Should you click? Maybe it looks like it’s from your boss and asks for your network password. Should you reply? In either case, probably not. These may be phishing attempts.

**PHISHING WORKS**

**You get an email or text**

It seems to be from someone you know, and it asks you to click a link, or give your password, business bank account, or other sensitive information.

**It looks real**

It’s easy to spoof logos and make up fake email addresses. Scammers use familiar company names or pretend to be someone you know.

**It’s urgent**

The message pressures you to act now — or something bad will happen.

**What happens next**

If you click on a link, scammers can install ransomware or other programs that can lock you out of your data and spread to the entire company network. If you share passwords, scammers now have access to all those accounts.

**WHAT YOU CAN DO —**

Before you click on a link or share any of your sensitive business information:

**Check it out**

Look up the website or phone number for the company or person behind the text or email. Make sure that you’re getting the real company and not about to download malware or talk to a scammer.

**Talk to someone**

Talking to a colleague might help you figure out if the request is real or a phishing attempt.

**Make a call if you’re not sure**

Pick up the phone and call that vendor, colleague, or client who sent the email. Confirm that they really need information from you. Use a number you know to be correct, not the number in the email or text.
HOW TO PROTECT YOUR BUSINESS

Back up your data
Regularly back up your data and make sure those backups are not connected to the network. That way, if a phishing attack happens and hackers get to your network, you can restore your data. Make data backup part of your routine business operations.

Keep your security up to date
Always install the latest patches and updates. Look for additional means of protection, like email authentication and intrusion prevention software, and set them to update automatically on your computers. On mobile devices, you may have to do it manually.

Alert your staff
Share with them this information. Keep in mind that phishing scammers change their tactics often, so make sure you include tips for spotting the latest phishing schemes in your regular training.

Deploy a safety net
Use email authentication technology to help prevent phishing emails from reaching your company’s inboxes in the first place.

WHAT IF YOU FALL FOR A PHISHING SCHEME

Alert others
Talk to your colleagues and share your experience. Phishing attacks often happen to more than one person in a company.

Limit the damage
Immediately change any compromised passwords and disconnect from the network any computer or device that’s infected with malware.

Follow your company’s procedures
These may include notifying specific people in your organization or contractors that help you with IT.

Notify customers
If your data or personal information was compromised, make sure you notify the affected parties — they could be at risk of identity theft. Find information on how to do that at Data Breach Response: A Guide for Business (FTC.gov/DataBreach).

Report it
Forward phishing emails to spam@uce.gov (an address used by the FTC) and to reportphishing@apwg.org (an address used by the Anti-Phishing Working Group, which includes ISPs, security vendors, financial institutions, and law enforcement agencies). Let the company or person that was impersonated know about the phishing scheme. And report it to the FTC at FTC.gov/Complaint.
A scammer sets up an email address that looks like it’s from your company. Then the scammer sends out messages using that email address. This practice is called spoofing, and the scammer is what we call a business email imposter.

Scammers do this to get passwords and bank account numbers or to get someone to send them money. When this happens, your company has a lot to lose. Customers and partners might lose trust and take their business elsewhere — and your business could then lose money.

HOW TO PROTECT YOUR BUSINESS

Use email authentication
When you set up your business’s email, make sure the email provider offers email authentication technology. That way, when you send an email from your company’s server, the receiving servers can confirm that the email is really from you. If it’s not, the receiving servers may block the email and foil a business email imposter.

Keep your security up to date
Always install the latest patches and updates. Set them to update automatically on your network. Look for additional means of protection, like intrusion prevention software, which checks your network for suspicious activity and sends you alerts if it finds any.

Train your staff
Teach them how to avoid phishing scams and show them some of the common ways attackers can infect computers and devices with malware. Include tips for spotting and protecting against cyber threats in your regular employee trainings and communications.
WHAT TO DO
IF SOMEONE SPOOFS YOUR COMPANY’S EMAIL

Report it
Report the scam to local law enforcement, the FBI's Internet Crime Complaint Center at IC3.gov, and the FTC at FTC.gov/Complaint. You can also forward phishing emails to spam@uce.gov (an address used by the FTC) and to reportphishing@apwg.org (an address used by the Anti-Phishing Working Group, which includes ISPs, security vendors, financial institutions, and law enforcement agencies).

Notify your customers
If you find out scammers are impersonating your business, tell your customers as soon as possible — by mail, email, or social media. If you email your customers, send an email without hyperlinks. You don’t want your notification email to look like a phishing scam. Remind customers not to share any personal information through email or text. If your customers’ data was stolen, direct them to IdentityTheft.gov to get a recovery plan.

Alert your staff
Use this experience to update your security practices and train your staff about cyber threats.
You get a phone call, pop-up, or email telling you there’s a problem with your computer. Often, scammers are behind these calls, pop-up messages, and emails. They want to get your money, personal information, or access to your files. This can harm your network, put your data at risk, and damage your business.

**HOW THE SCAM WORKS**

The scammers may pretend to be from a well-known tech company, such as Microsoft. They use lots of technical terms to convince you that the problems with your computer are real. They may ask you to open some files or run a scan on your computer — and then tell you those files or the scan results show a problem...but there isn’t one.

**The scammers may then:**

- Ask you to give them remote access to your computer — which lets them access all information stored on it, and on any network connected to it

- Install malware that gives them access to your computer and sensitive data, like user names and passwords

- Try to sell you software or repair services that are worthless or available elsewhere for free

- Try to enroll you in a worthless computer maintenance or warranty program

- Ask for credit card information so they can bill you for phony services or services available elsewhere for free

- Direct you to websites and ask you to enter credit card, bank account, and other personal information
HOW TO PROTECT YOUR BUSINESS

If a caller says your computer has a problem, hang up. A tech support call you don’t expect is a scam — even if the number is local or looks legitimate. These scammers use fake caller ID information to look like local businesses or trusted companies.

If you get a pop-up message to call tech support, ignore it. Some pop-up messages about computer issues are legitimate, but do not call a number or click on a link that appears in a pop-up message warning you of a computer problem.

If you’re worried about a virus or other threat, call your security software company directly, using the phone number on its website, the sales receipt, or the product packaging. Or consult a trusted security professional.

Never give someone your password, and don’t give remote access to your computer to someone who contacts you unexpectedly.

WHAT TO DO IF YOU’RE SCAMMED

If you shared your password with a scammer, change it on every account that uses this password. Remember to use unique passwords for each account and service. Consider using a password manager.

Get rid of malware. Update or download legitimate security software. Scan your computer, and delete anything the software says is a problem. If you need help, consult a trusted security professional.

If the affected computer is connected to your network, you or a security professional should check the entire network for intrusions.

If you bought bogus services, ask your credit card company to reverse the charges, and check your statement for any charges you didn’t approve. Keep checking your credit card statements to make sure the scammer doesn’t try to re-charge you every month.

Report the attack right away to the FTC at FTC.gov/Complaint.
Your business vendors may have access to sensitive information. Make sure those vendors are securing their own computers and networks. For example, what if your accountant, who has all your financial data, loses his laptop? Or a vendor whose network is connected to yours gets hacked? The result: your business data and your customers’ personal information may end up in the wrong hands — putting your business and your customers at risk.

**HOW TO MONITOR YOUR VENDORS**

**Put it in writing**
Include provisions for security in your vendor contracts, like a plan to evaluate and update security controls, since threats change. Make the security provisions that are critical to your company non-negotiable.

**Verify compliance**
Establish processes so you can confirm that vendors follow your rules. Don’t just take their word for it.

**Make changes as needed**
Cybersecurity threats change rapidly. Make sure your vendors keep their security up to date.
HOW TO PROTECT YOUR BUSINESS ——

**Control access**
Put controls on databases with sensitive information. Limit access to a need-to-know basis, and only for the amount of time a vendor needs to do a job.

**Use multi-factor authentication**
This makes vendors take additional steps beyond logging in with a password to access your network — like a temporary code on a smartphone or a key that's inserted into a computer.

**Secure your network**
Require strong passwords: at least 12 characters with a mix of numbers, symbols, and both capital and lowercase letters. Never reuse passwords, don't share them, and limit the number of unsuccessful log-in attempts to limit password-guessing attacks.

**Safeguard your data**
Use properly configured, strong encryption. This protects sensitive information as it's transferred and stored.

WHAT TO DO IF A VENDOR HAS A DATA BREACH

**Contact the authorities**
Report the attack right away to your local police department. If they're not familiar with investigating information compromises, contact your local FBI office.

**Confirm the vendor has a fix**
Make sure that the vendor fixes the vulnerabilities and ensures that your information will be safe going forward, if your business decides to continue using the vendor.

**Notify customers**
If your data or personal information was compromised, make sure you notify the affected parties — they could be at risk of identity theft. Find information on how to do that at *Data Breach Response: A Guide for Business*. Find it at FTC.gov/DataBreach.
Recovering from a cyber attack can be costly.

Cyber insurance is one option that can help protect your business against losses resulting from a cyber attack. If you’re thinking about cyber insurance, discuss with your insurance agent what policy would best fit your company’s needs, including whether you should go with first-party coverage, third-party coverage, or both. Here are some general tips to consider.

**WHAT SHOULD YOUR CYBER INSURANCE POLICY COVER?**

Make sure your policy includes coverage for:

- Data breaches (like incidents involving theft of personal information)
- Cyber attacks (like breaches of your network)
- Cyber attacks on your data held by vendors and other third parties
- Cyber attacks that occur anywhere in the world (not only in the United States)
- Terrorist acts

Also, consider whether your cyber insurance provider will:

- Defend you in a lawsuit or regulatory investigation (look for “duty to defend” wording)
- Provide coverage in excess of any other applicable insurance you have
- Offer a breach hotline that’s available every day of the year at all times

The FTC thanks the National Association of Insurance Commissioners (NAIC) for its role in developing this content.
WHAT IS
FIRST-PARTY COVERAGE
AND WHAT SHOULD YOU LOOK FOR?
First-party cyber coverage protects your data, including employee and customer information. This coverage typically includes your business’s costs related to:

☐ Legal counsel to determine your notification and regulatory obligations
☐ Customer notification and call center services
☐ Crisis management and public relations
☐ Forensic services to investigate the breach

☐ Recovery and replacement of lost or stolen data
☐ Lost income due to business interruption
☐ Cyber extortion and fraud
☐ Fees, fines, and penalties related to the cyber incident

WHAT IS
THIRD-PARTY COVERAGE
AND WHAT SHOULD YOU LOOK FOR?
Third-party cyber coverage generally protects you from liability if a third party brings claims against you. This coverage typically includes:

☐ Payments to consumers affected by the breach
☐ Claims and settlement expenses relating to disputes or lawsuits
☐ Losses related to defamation and copyright or trademark infringement

☐ Costs for litigation and responding to regulatory inquiries
☐ Other settlements, damages, and judgments
☐ Accounting costs

More insurance resources for small businesses available at www.insureuonline.org/smallbusiness

The FTC thanks the National Association of Insurance Commissioners (NAIC) for its role in developing this content.
Email authentication technology makes it a lot harder for a scammer to send phishing emails that look like they’re from your company.

Using email authentication technology makes it a lot harder for scammers to send phishing emails. This technology allows a receiving server to verify an email from your company and block emails from an imposter — or send them to a quarantine folder and then notify you about them.

**WHAT TO KNOW**

Some web host providers let you set up your company’s business email using your domain name (which you may think of as your website name). Your domain name might look like this: yourbusiness.com. And your email may look like this: name@yourbusiness.com. Without email authentication, scammers can use that domain name to send emails that look like they’re from your business. If your business email uses your company’s domain name, make sure that your email provider has these three email authentication tools:

**Sender Policy Framework (SPF)**

tells other servers which servers are allowed to send emails using your business’s domain name. So when you send an email from name@yourbusiness.com, the receiving server can confirm that the sending server is on an approved list. If it is, the receiving server lets the email through. If it can’t find a match, the email can be flagged as suspicious.

**Domain Keys Identified Mail (DKIM)**

puts a digital signature on outgoing mail so servers can verify that an email from your domain actually was sent from your organization’s servers and hasn’t been tampered with in transit.

**Domain-based Message Authentication, Reporting & Conformance (DMARC)**

is the essential third tool for email authentication. SPF and DKIM verify the address the server uses “behind the scenes.” DMARC verifies that this address matches the “from” address you see. It also lets you tell other servers what to do when they get an email that looks like it came from your domain, but the receiving server has reason to be suspicious (based on SPF or DKIM). You can have other servers reject the email, flag it as spam, or take no action. You also can set up DMARC so that you’re notified when this happens.

It takes some expertise to configure these tools so that they work as intended and don’t block legitimate email. Make sure that your email hosting provider can set them up if you don’t have the technical knowledge. If they can’t, or don’t include that in their service agreement, consider getting another provider.
WHAT TO DO IF YOUR EMAIL IS SPOOFED

Email authentication helps keep your business’s email from being used in phishing schemes because it notifies you if someone spoofs your company’s email. If you get that notification, take these actions:

**Report it**
Report the scam to local law enforcement, the FBI’s Internet Crime Complaint Center at IC3.gov, and the FTC at FTC.gov/Complaint. You also can forward phishing emails to spam@uce.gov (an address used by the FTC) and to reportphishing@apwg.org (an address used by the Anti-Phishing Working Group, which includes ISPs, security vendors, financial institutions, and law enforcement agencies).

**Notify your customers**
If you find out scammers are impersonating your business, tell your customers as soon as possible — by mail, email, or social media. If you email your customers, send an email without hyperlinks: you don’t want your notification email to look like a phishing scam. Remind customers not to share any personal information through email or text. And if your customers’ data was stolen, direct them to IdentityTheft.gov to get a recovery plan.

**Alert your staff**
Use this experience to update your security practices and train your staff about cyber threats.
You may want a new or upgraded website for your business.

But if you don’t have the skills to set up the web presence you want, you may want to hire a web host provider to do it for you. Whether you’re upgrading a website or launching a new business, there are many web-hosting options. When comparing services, security should be a top concern.

**WHAT TO LOOK FOR**

**Transport Layer Security (TLS)**

The service you choose should include TLS, which will help to protect your customers’ privacy. (You may have heard of its predecessor, Secure Sockets Layer, or SSL.) TLS helps make sure that your customers get to your real website when they type your URL into the address bar. When TLS is correctly implemented on your website, your URL will begin with https://.

TLS also helps make sure the information sent to your website is encrypted. That’s especially important if you ask customers for sensitive information, like credit card numbers or passwords.

**Email authentication**

Some web host providers let you set up your company’s business email using your domain name (that’s part of your URL, and what you may think of as your website name). Your domain name might look like this: yourbusiness.com. And your email may look like this: name@yourbusiness.com.

If you don’t have email authentication, scammers can impersonate that domain name and send emails that look like they’re from your business.

When your business email is set up using your company’s domain name, make sure that your web host can give you these three email authentication tools:

- Sender Policy Framework (SPF)
- Domain Keys Identified Mail (DKIM)
- Domain-based Message Authentication, Reporting & Conformance (DMARC)
Software updates
Many web host providers offer pre-built websites or software packages designed to make it quick and easy to set up your company’s website. As with any software, it is essential that you use the latest versions with up-to-date security patches. Make sure you know how to keep the website’s software up to date, or whether the web host provider will do this for you.

Website management
If a web host provider is managing your website, you may have to go through that provider to make any changes — though you may be able to log in and make some changes yourself. Some web host providers may instead offer you the option of managing the website on your own. It’s important to clarify from the beginning who will manage the website after it’s built.

WHAT TO ASK
When you’re hiring a web host provider, ask these questions to make sure you’re helping protect your customer information and your business data.

- Is TLS included in the hosting plan? paid add-on? Will I set it up myself or will you help me set it up?
- Are the most up-to-date software versions available with your service, and will you keep software updated? If it’s my responsibility to keep software updated, is it easy for me to do?
- Can my business email use my business website name? If so, can you help me set up SPF, DKIM, and DMARC email authentication technology? (If not, consider looking for a provider that does.)
- After the website is set up, who will be able to make changes to it? Will I have to go through you? Will I be able to log in and make changes on my own? If I can log in to make changes, is multi-factor authentication available?
Employees and vendors may need to connect to your network remotely. Put your network’s security first. Make employees and vendors follow strong security standards before they connect to your network. Give them the tools to make security part of their work routine.

**HOW TO PROTECT DEVICES**

Whether employees or vendors use company-issued devices or their own when connecting remotely to your network, those devices should be secure. Follow these tips — and make sure your employees and vendors do as well:

- Always change any pre-set router passwords and the default name of your router. And keep the router’s software up to date; you may have to visit the router’s website often to do so.
- Consider enabling full-disk encryption for laptops and other mobile devices that connect remotely to your network. Check your operating system for this option, which will protect any data stored on the device if it’s lost or stolen. This is especially important if the device stores any sensitive personal information.
- Change smartphone settings to stop automatic connections to public Wi-Fi.
- Keep up-to-date antivirus software on devices that connect to your network, including mobile devices.
HOW TO CONNECT REMOTELY — TO THE NETWORK

Require employees and vendors to use secure connections when connecting remotely to your network. They should:

- Use a router with WPA2 or WPA3 encryption when connecting from their homes. Encryption protects information sent over a network so that outsiders can’t read it. WPA2 and WPA3 are the only encryption standards that will protect information sent over a wireless network.

- Only use public Wi-Fi when also using a virtual private network (VPN) to encrypt traffic between their computers and the internet. Public Wi-Fi does not provide a secure internet connection on its own. Your employees can get a personal VPN account from a VPN service provider, or you may want to hire a vendor to create an enterprise VPN for all employees to use.

WHAT TO DO TO MAINTAIN SECURITY —

Train your staff:

- Include information on secure remote access in regular trainings and new staff orientations.

- Have policies covering basic cybersecurity, give copies to your employees, and explain the importance of following them.

- Before letting any device — whether at an employee’s home or on a vendor’s network — connect to your network, make sure it meets your network’s security requirements.

- Tell your staff about the risks of public Wi-Fi.

Give your staff tools that will help maintain security:

- Require employees to use unique, complex network passwords and avoid unattended, open workstations.

- Consider creating a VPN for employees to use when connecting remotely to the business network.

- Require multi-factor authentication to access areas of your network that have sensitive information. This requires additional steps beyond logging in with a password — like a temporary code on a smartphone or a key that’s inserted into a computer.

- If you offer Wi-Fi on your business premises for guests and customers, make sure it’s separate from and not connected to your business network.

- Include provisions for security in your vendor contracts, especially if the vendor will be connecting remotely to your network.
This information is part of the Federal Trade Commission's efforts to help small business navigate the cybersecurity world. It was developed in collaboration with:

As the nation’s consumer protection agency, the FTC’s mission is to protect all consumers, including small business owners. In addition to law enforcement efforts, we provide information for small businesses about cybersecurity, protecting sensitive information, and avoiding scams. This information is available at FTC.gov/SmallBusiness, where you also can find links to sign up for our Business Blog and to report a scam. Print publications can be ordered for free at FTC.gov/Bulkorder.

The U.S. Department of Homeland Security’s National Protection and Programs Directorate (NPPD) leads the national effort to protect and enhance the resilience of the nation’s physical and cyber infrastructure. NPPD provides a range of cybersecurity programs to public and private sector stakeholders, including small and midsize businesses.

The mission of the National Institute of Standards and Technology (NIST), an agency within the U.S. Department of Commerce, is to promote U.S. innovation and industrial competitiveness by advancing measurement science, standards, and technology in ways that enhance economic security and improve our quality of life. As part of its mission, NIST collaborates with federal agencies, as well as other public and private partners, to provide resources for small and medium-sized businesses to reduce their cybersecurity risks.

As the only go-to resource and voice for small businesses backed by the strength of the federal government, the SBA empowers entrepreneurs and small business owners with the resources and support they need to start, grow or expand their businesses, or recover from a declared disaster. It delivers services through an extensive network of SBA field offices and partnerships with public and private organizations. To learn more, visit www.sba.gov.
You just learned that your business experienced a data breach. Whether hackers took personal information from your corporate server, an insider stole customer information, or information was inadvertently exposed on your company’s website, you are probably wondering what to do next.

What steps should you take and whom should you contact if personal information may have been exposed? Although the answers vary from case to case, the following guidance from the Federal Trade Commission (FTC) can help you make smart, sound decisions.

This guide addresses the steps to take once a breach has occurred. For advice on implementing a plan to protect consumers’ personal information, to prevent breaches and unauthorized access, check out the FTC’s *Protecting Personal Information: A Guide for Business* and *Start with Security: A Guide for Business*. 
Secure Your Operations

Move quickly to secure your systems and fix vulnerabilities that may have caused the breach. The only thing worse than a data breach is multiple data breaches. Take steps so it doesn’t happen again.

Mobilize your breach response team right away to prevent additional data loss. The exact steps to take depend on the nature of the breach and the structure of your business.

**Assemble a team of experts** to conduct a comprehensive breach response. Depending on the size and nature of your company, they may include forensics, legal, information security, information technology, operations, human resources, communications, investor relations, and management.

- **Identify a data forensics team.** Consider hiring independent forensic investigators to help you determine the source and scope of the breach. They will capture forensic images of affected systems, collect and analyze evidence, and outline remediation steps.

- **Consult with legal counsel.** Talk to your legal counsel. Then, you may consider hiring outside legal counsel with privacy and data security expertise. They can advise you on federal and state laws that may be implicated by a breach.

**Secure physical areas** potentially related to the breach. Lock them and change access codes, if needed. Ask your forensics experts and law enforcement when it is reasonable to resume regular operations.
Stop additional data loss. Take all affected equipment offline immediately— but don’t turn any machines off until the forensic experts arrive. Closely monitor all entry and exit points, especially those involved in the breach. If possible, put clean machines online in place of affected ones. In addition, update credentials and passwords of authorized users. If a hacker stole credentials, your system will remain vulnerable until you change those credentials, even if you’ve removed the hacker’s tools.

Remove improperly posted information from the web.

- **Your website:** If the data breach involved personal information improperly posted on your website, immediately remove it. Be aware that internet search engines store, or “cache,” information for a period of time. You can contact the search engines to ensure that they don’t archive personal information posted in error.

- **Other websites:** Search for your company’s exposed data to make sure that no other websites have saved a copy. If you find any, contact those sites and ask them to remove it.

Interview people who discovered the breach. Also, talk with anyone else who may know about it. If you have a customer service center, make sure the staff knows where to forward information that may aid your investigation of the breach. Document your investigation.

Do not destroy evidence. Don’t destroy any forensic evidence in the course of your investigation and remediation.
**Fix Vulnerabilities**

**Think about service providers.** If service providers were involved, examine what personal information they can access and decide if you need to change their access privileges. Also, ensure your service providers are taking the necessary steps to make sure another breach does not occur. If your service providers say they have remedied vulnerabilities, verify that they really fixed things.

**Check your network segmentation.** When you set up your network, you likely segmented it so that a breach on one server or in one site could not lead to a breach on another server or site. Work with your forensics experts to analyze whether your segmentation plan was effective in containing the breach. If you need to make any changes, do so now.

**Work with your forensics experts.** Find out if measures such as encryption were enabled when the breach happened. Analyze backup or preserved data. Review logs to determine who had access to the data at the time of the breach. Also, analyze who currently has access, determine whether that access is needed, and restrict access if it is not. Verify the types of information compromised, the number of people affected, and whether you have contact information for those people. When you get the forensic reports, take the recommended remedial measures as soon as possible.

**Have a communications plan.** Create a comprehensive plan that reaches all affected audiences — employees, customers, investors, business partners, and other stakeholders. Don’t make misleading statements about the breach. And don’t withhold key details that might help consumers protect themselves and their information. Also, don’t publicly share information that might put consumers at further risk.
Anticipate questions that people will ask. Then, put top tier questions and clear, plain-language answers on your website where they are easy to find. Good communication up front can limit customers’ concerns and frustration, saving your company time and money later.

Notify Appropriate Parties

When your business experiences a data breach, notify law enforcement, other affected businesses, and affected individuals.

Determine your legal requirements.

Most states, the District of Columbia, Puerto Rico, and the Virgin Islands have enacted legislation requiring notification of security breaches involving personal information. In addition, depending on the types of information involved in the breach, there may be other laws or regulations that apply to your situation. Check state and federal laws or regulations for any specific requirements for your business.

Notify Law Enforcement

Call your local police department immediately. Report your situation and the potential risk for identity theft. The sooner law enforcement learns about the theft, the more effective they can be. If your local police aren’t familiar with investigating information compromises, contact the local office of the FBI or the U.S. Secret Service. For incidents involving mail theft, contact the U.S. Postal Inspection Service.
Did the breach involve electronic health information?

Then check if you’re covered by the Health Breach Notification Rule. If so, you must notify the FTC and in some cases, the media. Complying with the FTC’s Health Breach Notification Rule explains who you must notify, and when.

Also, check if you’re covered by the HIPAA Breach Notification Rule. If so, you must notify the Secretary of the U.S. Department of Health and Human Services (HHS) and in some cases, the media. HHS’s Breach Notification Rule explains who you must notify, and when.

Health Breach Resources

HIPAA Breach Notification Rule:

hhs.gov/hipaa/for-professionals/breach-notification

HHS HIPAA Breach Notification Form:

hhs.gov/hipaa/for-professionals/breach-notification/breach-reporting

Complying with the FTC’s Health Breach Notification Rule:

ftc.gov/healthbreachnotificationrule

Notify Affected Businesses

If account access information—say, credit card or bank account numbers—has been stolen from you, but you don’t maintain the accounts, notify the institution that does so it can monitor the accounts for fraudulent activity.
If you collect or store personal information on behalf of other businesses, notify them of the data breach.

If names and Social Security numbers have been stolen, contact the major credit bureaus for additional information or advice. If the compromise may involve a large group of people, advise the credit bureaus if you are recommending that people request fraud alerts and credit freezes for their files.

Equifax: equifax.com or 1-800-685-1111
Experian: experian.com or 1-888-397-3742
TransUnion: transunion.com or 1-888-909-8872

**Notify Individuals**

If you quickly notify people that their personal information has been compromised, they can take steps to reduce the chance that their information will be misused. In deciding who to notify, and how, consider:

- state laws
- the nature of the compromise
- the type of information taken
- the likelihood of misuse
- the potential damage if the information is misused

For example, thieves who have stolen names and Social Security numbers can use that information not only to sign up for new accounts in the victim’s name but also to commit tax identity theft. People who are notified early can take steps to limit the damage.
When notifying individuals, the FTC recommends you:

- **consult with your law enforcement contact** about the timing of the notification so it doesn’t impede the investigation.

- **designate a point person within your organization for releasing information.** Give the contact person the latest information about the breach, your response, and how individuals should respond. Consider using letters (see sample on page 10), websites, and toll-free numbers to communicate with people whose information may have been compromised. If you don’t have contact information for all of the affected individuals, you can build an extensive public relations campaign into your communications plan, including press releases or other news media notification.

- **consider offering at least a year of free credit monitoring or other support** such as identity theft protection or identity restoration services, particularly if financial information or Social Security numbers were exposed. When such information is exposed, thieves may use it to open new accounts.

Most states have breach notification laws that tell you what information you must, or must not, provide in your breach notice. In general, unless your state law says otherwise, you’ll want to:

- **clearly describe what you know about the compromise.** Include:

  » how it happened

  » what information was taken

  » how the thieves have used the information (if you know)
» what actions you have taken to remedy the situation

» what actions you are taking to protect individuals, such as offering free credit monitoring services

» how to reach the relevant contacts in your organization

Consult with your law enforcement contact about what information to include so your notice doesn’t hamper the investigation.

• **Tell people what steps they can take, given the type of information exposed, and provide relevant contact information.** For example, people whose Social Security numbers have been stolen should contact the credit bureaus to ask that fraud alerts or credit freezes be placed on their credit reports and contact the IRS Identity Protection Specialized Unit at 1-800-908-4490. See IdentityTheft.gov/databreach for information on appropriate follow-up steps after a compromise, depending on the type of personal information that was exposed. Consider adding this information as an attachment to your breach notification letter, as we’ve done in the model letter on page 10.

• **Include current information about how to recover from identity theft.** For a list of recovery steps, refer consumers to IdentityTheft.gov.

• **Consider providing information about the law enforcement agency working on the case, if the law enforcement agency agrees that would help.** Identity theft victims often can provide important information to law enforcement.
• **Encourage people who discover that their information has been misused to file a complaint with the FTC, using IdentityTheft.gov.** This information is entered into the Consumer Sentinel Network, a secure, online database available to civil and criminal law enforcement agencies.

• **Describe how you’ll contact consumers in the future.** For example, if you’ll only contact consumers by mail, then say so. If you won’t ever call them about the breach, then let them know. This information may help victims avoid phishing scams tied to the breach, while also helping to protect your company’s reputation. Some organizations tell consumers that updates will be posted on their website. This gives consumers a place they can go at any time to see the latest information.

**Model Letter**

The following letter is a model for notifying people whose names and Social Security numbers have been stolen. When Social Security numbers have been stolen, it’s important to advise people to place a free fraud alert on their credit reports. A fraud alert may hinder identity thieves from getting credit with stolen information because it’s a signal to creditors to contact the consumer before opening new accounts or changing existing accounts.

Also, advise consumers to consider placing a credit freeze on their file.
NOTICE OF DATA BREACH

Dear [Insert Name]:
We are contacting you about a data breach that has occurred at [insert Company Name].

What Happened?
[Describe how the data breach happened, the date of the breach, and how the stolen information has been misused (if you know)].

What Information Was Involved?
This incident involved your [describe the type of personal information that may have been exposed due to the breach].

What We Are Doing
[Describe how you are responding to the data breach, including: what actions you’ve taken to remedy the situation; what steps you are taking to protect individuals whose information has been breached; and what services you are offering (like credit monitoring or identity theft restoration services).]
What You Can Do

We recommend that you place a fraud alert on your credit file. A fraud alert tells creditors to contact you before they open any new accounts or change your existing accounts. Call any one of the three major credit bureaus. As soon as one credit bureau confirms your fraud alert, the others are notified to place fraud alerts. The initial fraud alert stays on your credit report for one year. You can renew it after one year.

Equifax: equifax.com or 1-800-685-1111

Experian: experian.com or 1-888-397-3742

TransUnion: transunion.com or 1-888-909-8872

Request that all three credit reports be sent to you, free of charge, for your review. Even if you do not find any suspicious activity on your initial credit reports, the Federal Trade Commission (FTC) recommends that you check your credit reports periodically. Thieves may hold stolen information to use at different times. Checking your credit reports periodically can help you spot problems and address them quickly.

If your personal information has been misused, visit the FTC’s site at IdentityTheft.gov to get recovery steps and to file an identity theft complaint. Your complaint will be added to the FTC’s Consumer Sentinel Network, where it will be accessible to law enforcers for their investigations.
You also may want to consider contacting the major credit bureaus at the telephone numbers above to place a free credit freeze on your credit file. A credit freeze means potential creditors cannot get your credit report. That makes it less likely that an identify thief can open new accounts in your name.

We have enclosed a copy of *Identity Theft: A Recovery Plan*, a comprehensive guide from the FTC to help you guard against and deal with identity theft. We’ve also attached information from IdentityTheft.gov about steps you can take to help protect yourself from identity theft, depending on the type of information exposed.

**Other Important Information**
[Insert other important information here.]

**For More Information**
Call [telephone number] or go to [Internet website]. [State how additional information or updates will be shared/or where they will be posted.]

[Insert Closing]

[Your Name]
Consider attaching the relevant section from IdentityTheft.gov, based on the type of information exposed in the breach. This is for a data breach involving Social Security numbers. There is similar information about other types of personal information.

**Optional Attachment**

**IdentityTheft.gov**

**What information was lost or exposed?**

Social Security number

☐ If a company responsible for exposing your information offers you free credit monitoring, take advantage of it.

☐ Get your free credit reports from annualcreditreport.com. Check for any accounts or charges you don’t recognize.

☐ Consider placing a credit freeze. A credit freeze makes it harder for someone to open a new account in your name.

- If you place a freeze, be ready to take a few extra steps the next time you apply for a new credit card or cell phone — or any service that requires a credit check.

- If you decide not to place a credit freeze, at least consider placing a fraud alert.

☐ Try to file your taxes early — before a scammer can. Tax identity theft happens when someone uses your Social Security number to get a tax refund or a job. Respond right away to letters from the IRS.

☐ Don’t believe anyone who calls and says you’ll be arrested unless you pay for taxes or debt — even if they have part or all of your Social Security number, or they say they’re from the IRS.

☐ Continue to check your credit reports at annualcreditreport.com. You can order a free report from each of the three credit reporting companies once a year.
This publication provides general guidance for an organization that has experienced a data breach. If you’d like more individualized guidance, you may contact the FTC at 1-877-ID-THEFT (877-438-4338). Please provide information regarding what has occurred, including the type of information taken, the number of people potentially affected, your contact information, and contact information for the law enforcement agent with whom you are working. The FTC can prepare its Consumer Response Center for calls from the people affected, help law enforcement with information from its national victim complaint database, and provide you with additional guidance as necessary. Because the FTC has a law enforcement role with respect to information privacy, you may seek guidance anonymously.

For additional information and resources, please visit business.ftc.gov.
# CYBERFORGROWTH
Have a written plan implementing cyber security planning and incident response alike, vetted by counsel and insurer and tested regularly.

## TECHNOLOGY & CONTRACTS
Upgrade technology regularly and as recommended by providers. Standardize contract terms to cover data security.

## CULTUREOFCONFIDENTIALITY
Create a culture of confidentiality through strategic partnerships, compliance initiatives, training, and discussion.

## POLICIES AND PROCEDURES
Update employee vendor management, and customer-facing policies as needed to account for business, security, and privacy promise changes.

## BE PREPARED
Expect the unexpected.
The Issue

Each year, there are more than 1.5 million cyber-attacks on U.S. businesses. Increasingly, victims include not just large companies, but smaller businesses across all types of industries. Perhaps more importantly, everyday access to data can result in losses even without an attack: devices can be lost or stolen, for example. In addition, employees can and do lose, misroute, and steal data assets every day. Every data incident has the potential to become a legal matter and can result in financial losses, litigation and erosion of investor and customer confidence.

The Solution

We advise clients on all aspects of cybersecurity preparedness, including: compliance with government regulations, internal assessment and planning, and response to incidents and litigation. Most companies benefit from a cross-functional team, including legal counsel, IT professionals and the C-suite executives, that addresses risk management and best practices in order to limit exposure. Our breadth of experience is the perfect complement to your internal cross-functional team. Likewise, we have assembled a multi-disciplinary team of attorneys and other professionals who work with clients to manage risks in advance of any problems, and respond quickly if an incident occurs.

Services

- Crisis Response Plan
- Crisis Response Management
- Employee Handbook Updates
- Employee Training
- Cyber for Growth (Internal Assessment and Strategy)

Core Audience

- CEO/President
- CIO/CTO/CISO
- Head of Compliance
- General Counsel
- Risk Management Committee

Talking Points

Do you have and have you tested your company’s cyber breach plan?

Do you conduct a cyber audit as part of your acquisition due diligence?

Is your employee handbook up to date regarding cyber management policies?

Are you aware of upcoming legislation and regulation for all domestic and international markets where you conduct business (not just where you have facilities)?

Is your risk management/audit committee apprised of your cyber breach plan and cyber policies?

Is your company prepared for the new EU privacy regulations taking effect May 1, 2018?
Privacy Is (Now) Your Business
November 26, 2018 | By Mitzi Hill

How to Prepare for New Legislation

Privacy is no longer a niche specialty or one-off discussion reserved for big companies with big resources. Mitzi Hill, a cybersecurity and data privacy attorney at Taylor English, discusses recent cybersecurity legislation that just passed in California and what companies big and small, local and national can do to ensure compliance.

Until 2018, there was very little regulation of consumer privacy in the United States. Other than financial services and health care, companies in most sectors were free to collect and use information about customers with virtually no restriction, and there was no requirement that employee or customer information be kept secured. This left companies in the U.S. free to collect and use information virtually without restriction and to not spend time and money investing in keeping customer and employee data secured, confidential and private.

2019 is a year of change—or at least it should be—regarding how U.S. companies treat the privacy of their employees and customers. The rules and norms are changing. Although some changes are required by law—and those requirements will apply to far more companies by 2020—the fact is that marketplace expectations are likely to drive changes in best practices, even where the law may not require them. Smart companies will take 2019 as an opportunity to plan for privacy and tout it to customers and employees as a differentiator. For smaller companies that have not taken advantage of privacy planning before now, 2019 is the year to find ways to make privacy profitable.

Legal Changes Required

You may know that the European Union passed new privacy laws that took effect this year, rules that specifically apply to U.S. companies and carry stiff fines for noncompliance. Because the rules only concern U.S. businesses that “target” the EU, a lot of smaller American companies have been able to take the calculated risk that the rules do not apply to them. As a result, many companies have carried on without making significant changes to their privacy practices.

In 2020, this is likely to change. California has passed a new privacy law, the California Consumer Privacy Act (CCPA), that reflects many of the same ideas embodied in the EU laws, including:

- A consumer privacy “bill of rights,” including the right to opt out of having one’s personal information shared for commercial purposes;
- Steep fines for failure to secure personal information from data breaches;
- Extremely broad definitions of what is considered personal data that must be protected, and in which consumers have rights; and
- A requirement to be up front about what information a business collects and how it uses that information.
The CCPA has several important differences from the EU laws, but the concepts are similar. One important distinction is that the CCPA gives very clear and low threshold requirements that spell out what companies are subject to the law. Those requirements will ensnare a lot of small and medium companies with customers or employees in California; this will include many businesses with sales or an internet presence there. Because the CCPA is here in America, it will also be harder to dodge when it comes to visibility and enforcement than the rules from the EU.

In reaction to the CCPA, there is mounting pressure in Washington, D.C. to pass a federal consumer privacy law – and thus avoid a 50-state patchwork that would make running any national or regional business difficult. It is unclear how much traction a federal law might get in the short term, but it is very clear that California is the first domino to fall and that U.S. companies should expect possibly more onerous regulations to come. Coupled with the EU rules, which already affect many internet users, the expectations that employees and customers have about their privacy are very likely to change. Being ahead of both the expectations and the legal requirements is smart planning.

What can you do?

What does this mean in terms of best practices?

At a minimum, U.S. companies with a website should examine it and ensure that it meets the disclosure requirements and opt-out regime of the CCPA. Likewise, they should revamp any customer-facing materials, such as privacy policies.

Internally, a data collection and use audit is a smart measure that will help with website and privacy policy refresh, cyber insurance underwriting, incident response planning and product design that takes into account exactly what information the company needs for its operations and who will have access to it.

Taking all these measures together, it is wise to raise awareness with employees about how the company handles private data, data loss and breach and confidentiality. This can take place with new policies (such as a personal information processing policy) and training.

Reap the Value

Any U.S. company that takes privacy seriously and is on the leading edge should start talking about its philosophy with customers, employees and the marketplace. Use “European-style privacy commitments” as a selling point regarding your services. Make your website transparent and easy to use. Give consumers tools that allow them to see what you have collected and to opt out of its use.

Right now, all privacy inquiries are handled as one-offs. Plan for the day when they are routine enough that they should be automated and self-serve. For corporate customers, make affirmative efforts to demonstrate compliance with CCPA and EU rules, rather than responding piecemeal to their security surveys and RFP and audit questions.
The final point in this chain is to ensure that investors and potential buyers know of your efforts. Privacy and data security are fast becoming a standard part of the due diligence on any transaction. Having addressed them will make you a better target. Planning ahead and having these measures grow with your business – as opposed to implementing them only when you reach a certain scale – will also make you ready for any new opportunity those investors may bring. Privacy can profit you, if you know how to capitalize on it and make it easy for those in your ambit to gather information and to take new steps.
Theft Prevention: Information Security When Employees Leave
September 5, 2018 | By Mitzi Hill

Planning for information security is now a routine part of any company’s normal operations. Although much of the counsel regarding cyber and information preparedness focuses on compliance objectives and on minimizing third-party liability, the plain truth is securing the confidential information held by your company is a big part of preserving your bottom line. For third-party service entities such as software or SaaS and managed service providers (MSPs), the incentive to protect confidential information may come both from self-interest and from the need to keep customer material secured.

Many articles focus on nuts and bolts of security in IT, but this article discusses an element of planning and security that is not commonly part of an IT-driven strategy: Making sure departing employees do not take sensitive information with them when they leave. Achieving peace of mind in this regard takes a combination of resources including legal, management/executive, HR, and IT. IT measures are of course a vital part of the process and there are many tools available to enforce and monitor compliance with the below suggestions.

There are several low-tech steps any service provider can and should take when considering departing employees, whether those departures are voluntary or involuntary on the employee’s part. In each case, having these measures (1) be enshrined in company policy and (2) audited for compliance is key to successful implementation. Onboarding and exit procedures are the ideal time to introduce, and follow up on, such policies with individual employees.

Helpful Policies And Agreements (“Policies”)

Below is a sample list of potential policies any company could put in place, singly or together, to help alert employees to their responsibilities regarding confidential information, whether it belongs to the company or the company’s customers, and to provide mechanisms for enforcement. In each case, state in writing that violation of the policy is punishable under company HR processes.

Confidentiality

A policy or agreement stating all information to which the employee may have access during her employment (1) belongs to the company or the company’s customers, (2) is confidential, and (3) is only to be used as authorized in the performance of the employee’s duties while employed with the company. For MSPs, consider stating explicitly that the company prohibits use of third-party confidential information except as permitted by signed agreements between the company and the third party.

Computer Usage/Acceptable Use Policy

A policy stating all equipment provided to the employee belongs to the company, all activities conducted on that equipment are subject to monitoring by the company, and all use of company equipment must be in compliance with applicable law, company policies, and/or the confidentiality clauses of the company’s customer contracts.
For companies that provide employees with credentials to company accounts such as suppliers, portals, and others, the policy should state such access and credentials are subject to the policy and the credentials may be used only during the course of employment, for authorized uses, by that employee. If any particular customer confidentiality terms are more robust than industry norms, they can and should be incorporated into this policy, as well.

*Personal Information Protection*

A policy outlining the company’s commitment to data privacy principles and setting forth protocols for use and protection of employee, customer, and other personal information. Such a policy is particularly relevant to an MSP that handles personal information for its customers and may be required by local data protection law in international – and, increasingly, domestic – jurisdictions. Such a policy may also be part of an overall written information security program promulgated chiefly by the IT team.

*BYOD*

A policy allocating responsibility for maintenance and oversight of an employee’s personal device (phone, tablet) used to connect to the company’s network. This policy should give the company the right to examine the device, to remove data from it, to wipe company data remotely if the device is lost, and to require that the employee use password or other protection.

*Assignment of Intellectual Property/Work Made for Hire Agreement*

A policy or agreement stating that all material and information generated by the employee in the course of employment is work made for hire and that the company is the author of such information and the holder of all rights in and to it.

*Information Retention*

A policy setting forth procedures for routine elimination of information that is not needed by the business and not subject to any legal requirement of retention.

Taken together, the above Policies create norms regarding sensitive and confidential information – including customer information – as well as set forth behavioral expectations. They also announce that the company will take action for infractions. The framework the Policies create gives the company recourse if an employee misappropriates any information. By creating a “culture of confidentiality,” the Policies may also help deter casual misappropriation of information, or even theft by only-marginally-motivated bad actors. Finally, the Policies give the company a written record to point to with customer who may inquire about training, policies, and procedures regarding confidentiality and information security.
Connecting Policies To Employment Milestones

Onboarding

All incoming employees should be required to review and acknowledge the company’s Policies in writing. The fact that the Policies are binding on every employee (including executives) should be made clear, as should the fact that violation of the Policies is punishable by company actions up to and including termination of employment. As employees are issued devices, or their personal devices are connected to the network, the company can ensure that set-up contains appropriate IT protocols to enforce rules and policies, and that such devices are tracked as part of an enterprise inventory of outstanding devices.

At Separation

The above Policies create a handy checklist of items to go over when an employee leaves: has she turned in all her devices and keys/keycards? Have all accounts been disabled and credentials revoked? Are there any IP assignments she should sign before leaving? In addition, the employer can ask for a signed acknowledgement that the employee has not taken company or customer information electronically and that she has returned all physical media including paper, hard drives, thumb drives, etc. Finally, the company can remind the employee that she remains bound by confidentiality requirements.

There is no foolproof way to prevent employee information theft. A smart plan will incorporate suggestions from above, along with IT measures that prevent downloads or unencrypted transfer of information (for example), or that automatically impose password requirements on certain material if it passes outside the company firewalls. But having the framework of rules and policies to govern expectations and behavior, along with IT tools that force accountability, can go a long way to preventing or minimizing incidents with employee information theft.

Targeted cyber attacks resulting in the loss of consumers’ protected personal information (“PPI”) have dominated the national headlines over the last few years amid growing concerns of identity theft. While the threat of a cyber breach and the exposure of PPI is indeed one of the most serious threats facing general counsel and executive leadership of companies in a host of industries, a less-discussed but just as significant threat is the loss of a company’s proprietary information (confidential information and trade secrets) through targeted attacks by bad actors. In some cases, these bad actors take the shadowy “dragon tattoo” form of hackers eager to sell company secrets to foreign competitors on the dark web. More often, however, these thieves look like the person at the water cooler grousing about the cost of college tuition and changes to the company’s compensation plan. When it comes to loss of proprietary information, a company’s employees can be its worst enemy.
If a company’s proprietary information is its most valuable asset, fostering a “culture of confidentiality” is necessary to [1] protect the proprietary data from bad actors and [2] in the event of legal action, demonstrate to a court that the data is actually entitled to legal protection as either confidential information or a trade secret. There are a number of common-sense and cost-effective steps general counsel can take to help achieve these objectives.
Cyber Insurance: A Common Exclusion Tested in Court

July 9, 2018 | By Mitzi L. Hill

A recent court dispute makes clear that there are many elements to cyber planning and protection for any company to consider. Although some do involve technical bells and whistles, many or most are merely business operation decisions involving non-technical matters. Just like other operational decisions, the success of these planning measures can have a direct impact on your bottom line.

The Spec’s Family Partners Ltd. v. The Hanover Insurance Co. case involves insurance coverage for a data breach. The insured retailer sought insurance coverage of losses incurred under its merchant account with a payment card processor. Because that account and those losses are governed by a merchant account agreement, the insurer denied coverage under the retailer’s cyber policy, citing the policy’s “contractual exclusions” clause. In other words: the insurer refused to pay for losses the retailer suffered because of the terms of its merchant account agreement. In the case, the appeals court ruled in favor of the retailer, saying that there are several non-contractual theories relating to the losses (costs), and that the trial court must consider those before ruling that the insurer may decline payment. The appeals court did NOT require that the contractual claims be considered, and so in effect it has implicitly endorsed the validity of the exclusion in the policy.

What does this mean for insureds, i.e., ordinary business operators?

**First:** vendor management is a critical part of cyber planning.

Where you can, try to negotiate for your vendors to take on part of the losses following a data breach; and if the breach is of their system, have your agreement specify that you are entitled to full coverage and remedies from the vendor. Where, as here, the vendor is likely a large market power and you have little basis to negotiate, at least understand what losses the contract apportions to you, so that you can tailor your insurance and other planning appropriately.

**Second:** cyber insurance.

The main rule of thumb is to have a policy. The corollary is to understand what it covers. They are not comprehensive, and not all policies cover all losses; in this way, they resemble the homeowner’s policy that may cover flooding but NOT sewage backup, depending on what you bought.
This “contractual claims” exclusion is common, and it generally means that the insurer will not cover any costs or losses you bear in a cyber-breach that are the result of a contractual provision with a third party. Thus, if you have a weak vendor contract and end up carrying the costs of a data breach because of that weak contract, you cannot count on your insurance to make you whole. In other words, you will have lost two chances to spread the risk and losses to third parties.

Although a contractual claims exclusion is common, they are by no means non-negotiable. There are carriers that do not use such exclusions, or that use them sparingly. Because so many breaches end up involving some form of third-party contractual dispute, it is worth shopping around on the front end to avoid finding that you are self-insuring all your contractual losses on the back end.
Most companies keep sensitive personal information in their files—names, Social Security numbers, credit card, or other account data—that identifies customers or employees.

This information often is necessary to fill orders, meet payroll, or perform other necessary business functions. However, if sensitive data falls into the wrong hands, it can lead to fraud, identity theft, or similar harms. Given the cost of a security breach—losing your customers’ trust and perhaps even defending yourself against a lawsuit—safeguarding personal information is just plain good business.

Some businesses may have the expertise in-house to implement an appropriate plan. Others may find it helpful to hire a contractor. Regardless of the size—or nature—of your business, the principles in this brochure will go a long way toward helping you keep data secure.
A sound data security plan is built on 5 key principles:

1. **TAKE STOCK.**
   Know what personal information you have in your files and on your computers.

2. **SCALE DOWN.**
   Keep only what you need for your business.

3. **LOCK IT.**
   Protect the information that you keep.

4. **PITCH IT.**
   Properly dispose of what you no longer need.

5. **PLAN AHEAD.**
   Create a plan to respond to security incidents.

Use the checklists on the following pages to see how your company’s practices measure up—and where changes are necessary.
1. TAKE STOCK.

Know what personal information you have in your files and on your computers.

Effective data security starts with assessing what information you have and identifying who has access to it. Understanding how personal information moves into, through, and out of your business and who has—or could have—access to it is essential to assessing security vulnerabilities. You can determine the best ways to secure the information only after you’ve traced how it flows.

- Inventory all computers, laptops, mobile devices, flash drives, disks, home computers, digital copiers, and other equipment to find out where your company stores sensitive data. Also, inventory the information you have by type and location. Your file cabinets and computer systems are a start, but remember: your business receives personal information in a number of ways—through websites, from contractors, from call centers, and the like. What about information saved on laptops, employees’ home computers, flash drives, digital copiers, and mobile devices? No inventory is complete until you check everywhere sensitive data might be stored.
Track personal information through your business by talking with your sales department, information technology staff, human resources office, accounting personnel, and outside service providers. Get a complete picture of:

- **Who sends sensitive personal information to your business.** Do you get it from customers? Credit card companies? Banks or other financial institutions? Credit bureaus? Job applicants? Other businesses?

- **How your business receives personal information.** Does it come to your business through a website? By email? Through the mail? Is it transmitted through cash registers in stores?

- **What kind of information you collect at each entry point.** Do you get credit card information online? Does your accounting department keep information about customers’ checking accounts?
Where you keep the information you collect at each entry point. Is it in a central computer database? On individual laptops? On a cloud computing service? On employees’ smartphones, tablets, or other mobile devices? On disks or tapes? In file cabinets? In branch offices? Do employees have files at home?

**SECURITY CHECK**

**Question:**
Are there laws that require my company to keep sensitive data secure?

**Answer:**
Yes. While you’re taking stock of the data in your files, take stock of the law, too. Statutes like the Gramm-Leach-Bliley Act, the Fair Credit Reporting Act, and the Federal Trade Commission Act may require you to provide reasonable security for sensitive information.

To find out more, visit [business.ftc.gov/privacy-and-security](http://business.ftc.gov/privacy-and-security)
- Who has—or could have—access to the information? Which of your employees has permission to access the information? Do they need access? Could anyone else get hold of it? What about vendors who supply and update software you use to process credit card transactions? Contractors operating your call center?

- Different types of information present varying risks. Pay particular attention to how you keep personally identifying information: Social Security numbers, credit card or financial information, and other sensitive data. That’s what thieves use most often to commit fraud or identity theft.
2. SCALE DOWN.

Keep only what you need for your business.

If you don’t have a legitimate business need for sensitive personally identifying information, don’t keep it. In fact, don’t even collect it. If you have a legitimate business need for the information, keep it only as long as it’s necessary.

- Use Social Security numbers only for required and lawful purposes—like reporting employee taxes. Don’t use Social Security numbers unnecessarily—for example, as an employee or customer identification number, or because you’ve always done it.

SECURITY CHECK

Question:
We like to have accurate information about our customers, so we usually create a permanent file about all aspects of their transactions, including the information we collect from the magnetic stripe on their credit cards. Could this put their information at risk?

Answer:
Yes. Keep sensitive data in your system only as long as you have a business reason to have it. Once that business need is over, properly dispose of it. If it’s not in your system, it can’t be stolen by hackers.
If your company develops a mobile app, make sure the app accesses only the data and functionality that it needs. And don’t collect and retain personal information unless it’s integral to your product or service. Remember, if you collect and retain data, you must protect it.

Don’t keep customer credit card information unless you have a business need for it. For example, don’t retain the account number and expiration date unless you have an essential business need to do so. Keeping this information—or keeping it longer than necessary—raises the risk that the information could be used to commit fraud or identity theft.

Scale down access to data. Follow the “principle of least privilege.” That means each employee should have access only to those resources needed to do their particular job.

If you must keep information for business reasons, or to comply with the law, develop a written records retention policy to identify what information must be kept, how to secure it, how long to keep it, and how to dispose of it securely when you no longer need it.
3. LOCK IT.

Protect the information that you keep.

What’s the best way to protect the sensitive personally identifying information you need to keep? It depends on the kind of information and how it’s stored. The most effective data security plans deal with four key elements: physical security, electronic security, employee training, and the security practices of contractors and service providers.

**Physical Security**

Many data compromises happen the old-fashioned way—through lost or stolen paper documents. Often, the best defense is a locked door or an alert employee.

- Store paper documents or files, as well as thumb drives and backups containing personally identifiable information, in a locked room or in a locked file cabinet. Limit access to employees with a legitimate business need. Control who has a key, and the number of keys.

- Require that files containing personally identifiable information be kept in locked file cabinets except when an employee is working on the file. Remind employees not to leave sensitive papers out on their desks when they are away from their workstations.

- Require employees to put files away, log off their computers, and lock their file cabinets and office doors at the end of the day.
3 Lock It

- Implement appropriate access controls for your building. Tell employees what to do and whom to call if they see an unfamiliar person on the premises.

- If you maintain offsite storage facilities, limit employee access to those with a legitimate business need. Know if and when someone accesses the storage site.

- If you ship sensitive information using outside carriers or contractors, encrypt the information and keep an inventory of the information being shipped. Also use an overnight shipping service that will allow you to track the delivery of your information.

- If you have devices that collect sensitive information, like PIN pads, secure them so that identity thieves can’t tamper with them. Also, inventory those items to ensure that they have not been switched.

**Electronic Security**

Computer security isn’t just the realm of your IT staff. Make it your business to understand the vulnerabilities of your computer system, and follow the advice of experts in the field.

**General Network Security**

- Identify the computers or servers where sensitive personal information is stored.

- Identify all connections to the computers where you store sensitive information. These may include the internet, electronic cash registers, computers at your branch offices, computers used by service providers to support your network, digital copiers, and wireless devices like smartphones, tablets, or inventory scanners.
● Assess the vulnerability of each connection to commonly known or reasonably foreseeable attacks. Depending on your circumstances, appropriate assessments may range from having a knowledgeable employee run off-the-shelf security software to having an independent professional conduct a full-scale security audit.

● Don’t store sensitive consumer data on any computer with an internet connection unless it’s essential for conducting your business.

● Encrypt sensitive information that you send to third parties over public networks (like the internet), and encrypt sensitive information that is stored on your computer network, laptops, or portable storage devices used by your employees. Consider also encrypting email transmissions within your business.

● Regularly run up-to-date anti-malware programs on individual computers and on servers on your network.

● Check expert websites (such as www.us-cert.gov) and your software vendors’ websites regularly for alerts about new vulnerabilities, and implement policies for installing vendor-approved patches to correct problems.
Restrict employees’ ability to download unauthorized software. Software downloaded to devices that connect to your network (computers, smartphones, and tablets) could be used to distribute malware.

Scan computers on your network to identify and profile the operating system and open network services. If you find services that you don’t need, disable them to prevent hacks or other potential security problems. For example, if email service or an internet connection is not necessary on a certain computer, consider closing the ports to those services on that computer to prevent unauthorized access to that machine.

When you receive or transmit credit card information or other sensitive financial data, use Transport Layer Security (TLS) encryption or another secure connection that protects the information in transit.
Pay particular attention to the security of your web applications—the software used to give information to visitors to your website and to retrieve information from them. Web applications may be particularly vulnerable to a variety of hack attacks. In one variation called an “injection attack,” a hacker inserts malicious commands into what looks like a legitimate request for information. Once in your system, hackers transfer sensitive information from your network to their computers. Relatively simple defenses against these attacks are available from a variety of sources.

SECURITY CHECK

Question:
We encrypt the financial data customers submit on our website. But once we receive it, we decrypt it and email it over the internet to our branch offices in regular text. Is there a safer practice?

Answer:
Yes. Regular email is not a secure method for sending sensitive data. The better practice is to encrypt any transmission that contains information that could be used by fraudsters or identity thieves.
Authentication

- Control access to sensitive information by requiring that employees use “strong” passwords. Tech security experts say the longer the password, the better. Because simple passwords—like common dictionary words—can be guessed easily, insist that employees choose passwords with a mix of letters, numbers, and characters. Require an employee’s user name and password to be different. Require password changes when appropriate—for example, following a breach.
  - Consider using multi-factor authentication, such as requiring the use of a password and a code sent by different methods.

- Explain to employees why it’s against company policy to share their passwords or post them near their workstations.

- Use password-activated screen savers to lock employee computers after a period of inactivity.

- Lock out users who don’t enter the correct password within a designated number of log-on attempts.

- Warn employees about possible calls from identity thieves attempting to deceive them into giving out their passwords by impersonating members of your IT staff. Let employees know that calls like this are always fraudulent, and that no one should be asking them to reveal their passwords.
● When installing new software, immediately change vendor-supplied default passwords to a more secure strong password.

● Caution employees against transmitting sensitive personally identifying data—Social Security numbers, passwords, account information—via email. Unencrypted email is not a secure way to transmit information.
Laptop Security

- Restrict the use of laptops to those employees who need them to perform their jobs.

- Assess whether sensitive information really needs to be stored on a laptop. If not, delete it with a “wiping” program that overwrites data on the laptop. Deleting files using standard keyboard commands isn’t sufficient because data may remain on the laptop’s hard drive. Wiping programs are available at most office supply stores.

- Require employees to store laptops in a secure place. Even when laptops are in use, consider using cords and locks to secure laptops to employees’ desks.

- Consider allowing laptop users to only access sensitive information, but not to store the information on their laptops. Under this approach, the information is stored on a secure central computer and the laptops function as terminals that display information from the central computer, but do not store it. The information could be further protected by requiring the use of a token, “smart card,” thumb print, or other biometric—as well as a password—to access the central computer.
If a laptop contains sensitive data, encrypt it and configure it so users can’t download any software or change the security settings without approval from your IT specialists. Consider adding an “auto-destroy” function so that data on a computer that is reported stolen will be destroyed when the thief uses the computer to try to get on the internet.

Train employees to be mindful of security when they’re on the road. They should never leave a laptop visible in a car, at a hotel luggage stand, or packed in checked luggage unless directed to by airport security. If someone must leave a laptop in a car, it should be locked in a trunk. Everyone who goes through airport security should keep an eye on their laptop as it goes on the belt.
Firewalls

- Use a firewall to protect your computer from hacker attacks while it is connected to a network, especially the internet. A firewall is software or hardware designed to block hackers from accessing your computer. A properly configured firewall makes it tougher for hackers to locate your computer and get into your programs and files.

SECURITY CHECK

Question:
Our account staff needs access to our database of customer financial information. To make it easier to remember, we just use our company name as the password. Could that create a security problem?

Answer:
Yes. Hackers will first try words like “password,” your company name, the software’s default password, and other easy-to-guess choices. They’ll also use programs that run through common English words and dates. To make it harder for them to crack your system, select strong passwords—the longer, the better—that use a combination of letters, symbols, and numbers. Don’t store passwords in clear text. Use a password management system that adds salt—random data—to hashed passwords and consider using slow hash functions.
Determine whether you should install a “border” firewall where your network connects to the internet. A border firewall separates your network from the internet and may prevent an attacker from gaining access to a computer on the network where you store sensitive information. Set “access controls”—settings that determine which devices and traffic get through the firewall—to allow only trusted devices with a legitimate business need to access the network. Since the protection a firewall provides is only as effective as its access controls, review them periodically.

If some computers on your network store sensitive information while others do not, consider using additional firewalls to protect the computers with sensitive information.

Wireless and Remote Access

Determine if you use wireless devices like smartphones, tablets, or inventory scanners or cell phones to connect to your computer network or to transmit sensitive information.

If you do, consider limiting who can use a wireless connection to access your computer network. You can make it harder for an intruder to access the network by limiting the wireless devices that can connect to your network.
Encrypt the information you send over your wireless network, so that nearby attackers can’t eavesdrop on these communications. Look for a wireless router that has Wi-Fi Protected Access 2 (WPA2) capability and devices that support WPA2.

Use encryption if you allow remote access to your computer network by employees or by service providers, such as companies that troubleshoot and update software you use to process credit card purchases. Consider implementing multi-factor authentication for access to your network.
Digital Copiers

Your information security plan should cover the digital copiers your company uses. The hard drive in a digital copier stores data about the documents it copies, prints, scans, faxes, or emails. If you don’t take steps to protect that data, it can be stolen from the hard drive, either by remote access or by extraction once the drive has been removed.

Here are some tips about safeguards for sensitive data stored on the hard drives of digital copiers:

- Get your IT staff involved when you’re thinking about getting a copier. Employees responsible for securing your computers also should be responsible for securing data on digital copiers.

- When you’re buying or leasing a copier, consider data security features offered, either as standard equipment or as optional add-on kits. Typically, these features involve encryption and overwriting. Encryption scrambles the data on the hard drive so it can be read only by particular software. Overwriting—also known as file wiping or shredding—replaces the existing data with random characters, making it harder for someone to reconstruct a file.
Once you choose a copier, take advantage of all its security features. You may be able to set the number of times data is overwritten—generally, the more times the data is overwritten, the safer it is from being retrieved. In addition, make it an office practice to securely overwrite the entire hard drive at least once a month.

When you return or dispose of a copier, find out whether you can have the hard drive removed and destroyed, or overwrite the data on the hard drive. Have a skilled technician remove the hard drive to avoid the risk of breaking the machine.

To find out more, read *Copier Data Security: A Guide for Businesses* at ftc.gov/privacy-and-security (click on Data Security).

**Detecting Breaches**

- To detect network breaches when they occur, consider using an intrusion detection system. To be effective, it must be updated frequently to address new types of hacking.

- Maintain central log files of security-related information to monitor activity on your network so that you can spot and respond to attacks. If there is an attack on your network, the log will provide information that can identify the computers that have been compromised.
● Monitor incoming traffic for signs that someone is trying to hack in. Keep an eye out for activity from new users, multiple log-in attempts from unknown users or computers, and higher-than-average traffic at unusual times of the day.

● Monitor outgoing traffic for signs of a data breach. Watch for unexpectedly large amounts of data being transmitted from your system to an unknown user. If large amounts of information are being transmitted from your network, investigate to make sure the transmission is authorized.

● Have in place and implement a breach response plan. See page 30 for more information.
Question:
I’m not really a “tech” type. Are there steps our computer people can take to protect our system from common hack attacks?

Answer:
Yes. There are simple fixes to protect your computers from some of the most common vulnerabilities. For example, a threat called an “SQL injection attack” can give fraudsters access to sensitive data on your system.

Protect your systems by keeping software updated and conducting periodic security reviews for your network. Bookmark the websites of groups like the Open Web Application Security Project, [www.owasp.org](http://www.owasp.org), or SANS (SysAdmin, Audit, Network, Security) Institute’s *The Top Cyber Security Risks*, [www.sans.org/top20](http://www.sans.org/top20), for up-to-date information on the latest threats—and fixes. And check with your software vendors for patches that address new vulnerabilities. For more tips on keeping sensitive data secure, read *Start with Security: A Guide for Business* at [ftc.gov/startwithsecurity](http://ftc.gov/startwithsecurity).
Employee Training

Your data security plan may look great on paper, but it’s only as strong as the employees who implement it. Take time to explain the rules to your staff, and train them to spot security vulnerabilities. Periodic training emphasizes the importance you place on meaningful data security practices. A well-trained workforce is the best defense against identity theft and data breaches.

- Check references or do background checks before hiring employees who will have access to sensitive data.
- Ask every new employee to sign an agreement to follow your company’s confidentiality and security standards for handling sensitive data. Make sure they understand that abiding by your company’s data security plan is an essential part of their duties.
- Regularly remind employees of your company’s policy—and any legal requirement—to keep customer information secure and confidential.
Know which employees have access to consumers’ sensitive personally identifying information. Pay particular attention to data like Social Security numbers and account numbers. Limit access to personal information to employees with a “need to know.”

Have a procedure in place for making sure that workers who leave your employ or transfer to another part of the company no longer have access to sensitive information. Terminate their passwords and collect keys and identification cards as part of the check-out routine.

Create a “culture of security” by implementing a regular schedule of employee training. Update employees as you find out about new risks and vulnerabilities. Make sure training includes employees at satellite offices, temporary help, and seasonal workers. If employees don’t attend, consider blocking their access to the network.

Train employees to recognize security threats. Tell them how to report suspicious activity and publicly reward employees who alert you to vulnerabilities. Visit ftc.gov/startwithsecurity to show them videos on vulnerabilities that could affect your company, along with practical guidance on how to reduce data security risks.
Tell employees about your company policies regarding keeping information secure and confidential. Post reminders in areas where sensitive information is used or stored, as well as where employees congregate. Make sure your policies cover employees who telecommute or access sensitive data from home or an offsite location.

Teach employees about the dangers of spear phishing—emails containing information that makes the emails look legitimate. These emails may appear to come from someone within your company, generally someone in a position of authority. Make it office policy to independently verify any emails requesting sensitive information. When verifying, do not reply to the email and do not use links, phone numbers, or websites contained in the email.

Warn employees about phone phishing. Train them to be suspicious of unknown callers claiming to need account numbers to process an order or asking for customer or employee contact information. Make it office policy to double-check by contacting the company using a phone number you know is genuine.

Require employees to notify you immediately if there is a potential security breach, such as a lost or stolen laptop.

Impose disciplinary measures for security policy violations.

For computer security tips, tutorials, and quizzes for everyone on your staff, visit www.ftc.gov/OnGuardOnline.
Security Practices of Contractors and Service Providers

Your company’s security practices depend on the people who implement them, including contractors and service providers.

● Before you outsource any of your business functions—payroll, web hosting, customer call center operations, data processing, or the like—investigate the company’s data security practices and compare their standards to yours. If possible, visit their facilities.

● Put your security expectations in writing in contracts with service providers. Then, don’t just take their word for it—verify compliance.

● Insist that your service providers notify you of any security incidents they experience, even if the incidents may not have led to an actual compromise of your data.
4. **PITCH IT.**

Properly dispose of what you no longer need.

What looks like a sack of trash to you can be a gold mine for an identity thief. Leaving credit card receipts or papers or CDs with personally identifying information in a dumpster facilitates fraud and exposes consumers to the risk of identity theft. By properly disposing of sensitive information, you ensure that it cannot be read or reconstructed.

- Implement information disposal practices that are reasonable and appropriate to prevent unauthorized access to—or use of—personally identifying information. Reasonable measures for your operation are based on the sensitivity of the information, the costs and benefits of different disposal methods, and changes in technology.

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**SECURITY CHECK**

**Question:**
My company collects credit applications from customers. The form requires them to give us lots of financial information. Once we’re finished with the applications, we’re careful to throw them away. Is that sufficient?

**Answer:**
No. Have a policy in place to ensure that sensitive paperwork is unreadable before you throw it away. Burn it, shred it, or pulverize it to make sure identity thieves can’t steal it from your trash.
Effectively dispose of paper records by shredding, burning, or pulverizing them before discarding. Make shredders available throughout the workplace, including next to the photocopier.

When disposing of old computers and portable storage devices, use software for securely erasing data, usually called wipe utility programs. They’re inexpensive and can provide better results by overwriting the entire hard drive so that the files are no longer recoverable. Deleting files using the keyboard or mouse commands usually isn’t sufficient because the files may continue to exist on the computer’s hard drive and could be retrieved easily.

Make sure employees who work from home follow the same procedures for disposing of sensitive documents and old computers and portable storage devices.

If you use consumer credit reports for a business purpose, you may be subject to the FTC’s Disposal Rule. For more information, see *Disposing of Consumer Report Information? Rule Tells How* at ftc.gov/privacy-and-security (click on Credit Reporting).
5. PLAN AHEAD.

Create a plan for responding to security incidents.

Taking steps to protect data in your possession can go a long way toward preventing a security breach. Nevertheless, breaches can happen. Here’s how you can reduce the impact on your business, your employees, and your customers:

- Have a plan in place to respond to security incidents. Designate a senior member of your staff to coordinate and implement the response plan.

- If a computer is compromised, disconnect it immediately from your network.

- Investigate security incidents immediately and take steps to close off existing vulnerabilities or threats to personal information.

- Consider whom to notify in the event of an incident, both inside and outside your organization. You may need to notify consumers, law enforcement, customers, credit bureaus, and other businesses that may be affected by the breach. In addition, many states and the federal bank regulatory agencies have laws or guidelines addressing data breaches. Consult your attorney.
Question:
I own a small business. Aren’t these precautions going to cost me a mint to implement?

Answer:
No. There’s no one-size-fits-all approach to data security, and what’s right for you depends on the nature of your business and the kind of information you collect from your customers. Some of the most effective security measures—using strong passwords, locking up sensitive paperwork, training your staff, etc.—will cost you next to nothing and you’ll find free or low-cost security tools at non-profit websites dedicated to data security. Furthermore, it’s cheaper in the long run to invest in better data security than to lose the goodwill of your customers, defend yourself in legal actions, and face other possible consequences of a data breach.
Additional Resources

These websites and publications have more information on securing sensitive data:

Start with Security
www.ftc.gov/startwithsecurity

National Institute of Standards and Technology (NIST) Computer Security Resource Center
www.csrc.nist.gov

SANS (SysAdmin, Audit, Network, Security) Institute Critical Security Controls
www.sans.org/top20

United States Computer Emergency Readiness Team (US-CERT)
www.us-cert.gov

OnGuard Online
www.ftc.gov/OnGuardOnline

Small Business Administration
www.sba.gov/cybersecurity

Better Business Bureau
www.bbb.org/cybersecurity
About the FTC

The FTC works for the consumer to prevent fraudulent, deceptive, and unfair practices in the marketplace and to provide information to businesses to help them comply with the law. For free compliance resources visit the Business Center at business.ftc.gov.

Opportunity to Comment

The National Small Business Ombudsman and 10 Regional Fairness Boards collect comments from small businesses about federal compliance and enforcement activities. Each year, the Ombudsman evaluates the conduct of these activities and rates each agency’s responsiveness to small businesses. Small businesses can comment to the Ombudsman without fear of reprisal. To comment, call toll-free 1-888-REGFAIR (1-888-734-3247) or go to www.sba.gov/ombudsman.
START WITH SECURITY
A GUIDE FOR BUSINESS
LESSONS LEARNED FROM FTC CASES
FEDERAL TRADE COMMISSION
1. Start with security.

2. Control access to data sensibly.

3. Require secure passwords and authentication.

4. Store sensitive personal information securely and protect it during transmission.

5. Segment your network and monitor who’s trying to get in and out.

6. Secure remote access to your network.

7. Apply sound security practices when developing new products.

8. Make sure your service providers implement reasonable security measures.

9. Put procedures in place to keep your security current and address vulnerabilities that may arise.

10. Secure paper, physical media, and devices.
When managing your network, developing an app, or even organizing paper files, sound security is no accident. Companies that consider security from the start assess their options and make reasonable choices based on the nature of their business and the sensitivity of the information involved. Threats to data may transform over time, but the fundamentals of sound security remain constant. As the Federal Trade Commission outlined in *Protecting Personal Information: A Guide for Business*, you should know what personal information you have in your files and on your computers, and keep only what you need for your business. You should protect the information that you keep, and properly dispose of what you no longer need. And, of course, you should create a plan to respond to security incidents.

In addition to *Protecting Personal Information*, the FTC has resources to help you think through how those principles apply to your business. There’s an online tutorial to help train your employees; publications to address particular data security challenges; and news releases, blog posts, and guidance to help you identify – and possibly prevent – pitfalls.

There’s another source of information about keeping sensitive data secure: the lessons learned from the more than 50 law enforcement actions the FTC has announced so far. These are settlements – no findings have been made by a court – and the specifics of the orders apply just to those companies, of course. But learning about alleged lapses that led to law enforcement can help your company improve its practices. And most of these alleged practices involve basic, fundamental security missteps. Distilling the facts of those cases down to their essence, here are ten lessons to learn that touch on vulnerabilities that could affect your company, along with practical guidance on how to reduce the risks they pose.
Start with security.

From personal data on employment applications to network files with customers’ credit card numbers, sensitive information pervades every part of many companies. Business executives often ask how to manage confidential information. Experts agree on the key first step: Start with security. Factor it into the decisionmaking in every department of your business – personnel, sales, accounting, information technology, etc. Collecting and maintaining information “just because” is no longer a sound business strategy. Savvy companies think through the implication of their data decisions. By making conscious choices about the kind of information you collect, how long you keep it, and who can access it, you can reduce the risk of a data compromise down the road. Of course, all of those decisions will depend on the nature of your business. Lessons from FTC cases illustrate the benefits of building security in from the start by going lean and mean in your data collection, retention, and use policies.

Don’t collect personal information you don’t need.

Here’s a foundational principle to inform your initial decision-making: No one can steal what you don’t have. When does your company ask people for sensitive information? Perhaps when they’re registering online or setting up a new account. When was the last time you looked at that process to make sure you really need everything you ask for? That’s the lesson to learn from a number of FTC cases. For example, the FTC’s complaint against RockYou charged that the company collected lots of information during the site registration process, including the user’s email address and email password. By collecting email passwords – not something the business needed – and then storing them in clear text, the FTC said the company created an unnecessary risk to people’s email accounts. The business could have avoided that risk simply by not collecting sensitive information in the first place.

Hold on to information only as long as you have a legitimate business need.

Sometimes it’s necessary to collect personal data as part of a transaction. But once the deal is done, it may be unwise to keep it. In the FTC’s BJ’s Wholesale Club case, the company collected customers’ credit and debit card information to process transactions in its retail stores. But according to the complaint, it continued to store that data for up to 30 days – long after the sale was complete. Not only did that violate bank rules, but by holding on to the information without a legitimate business need, the FTC said BJ’s Wholesale Club created an unreasonable risk. By exploiting other weaknesses in the company’s security practices, hackers stole the account data and used it to make counterfeit credit and debit cards. The business could have limited its risk by securely disposing of the financial information once it no longer had a legitimate need for it.
Don’t use personal information when it’s not necessary.

You wouldn’t juggle with a Ming vase. Nor should businesses use personal information in contexts that create unnecessary risks. In the Accretive case, the FTC alleged that the company used real people’s personal information in employee training sessions, and then failed to remove the information from employees’ computers after the sessions were over. Similarly, in foru International, the FTC charged that the company gave access to sensitive consumer data to service providers who were developing applications for the company. In both cases, the risk could have been avoided by using fictitious information for training or development purposes.

Control access to data sensibly.

Once you’ve decided you have a legitimate business need to hold on to sensitive data, take reasonable steps to keep it secure. You’ll want to keep it from the prying eyes of outsiders, of course, but what about your own employees? Not everyone on your staff needs unrestricted access to your network and the information stored on it. Put controls in place to make sure employees have access only on a “need to know” basis. For your network, consider steps such as separate user accounts to limit access to the places where personal data is stored or to control who can use particular databases. For paper files, external drives, disks, etc., an access control could be as simple as a locked file cabinet. When thinking about how to control access to sensitive information in your possession, consider these lessons from FTC cases.

Restrict access to sensitive data.

If employees don’t have to use personal information as part of their job, there’s no need for them to have access to it. For example, in Goal Financial, the FTC alleged that the company failed to restrict employee access to personal information stored in paper files and on its network. As a result, a group of employees transferred more than 7,000 consumer files containing sensitive information to third parties without authorization. The company could have prevented that misstep by implementing proper controls and ensuring that only authorized employees with a business need had access to people’s personal information.
Limit administrative access.

Administrative access, which allows a user to make system-wide changes to your system, should be limited to the employees tasked to do that job. In its action against Twitter, for example, the FTC alleged that the company granted almost all of its employees administrative control over Twitter’s system, including the ability to reset user account passwords, view users’ nonpublic tweets, and send tweets on users’ behalf. According to the complaint, by providing administrative access to just about everybody in-house, Twitter increased the risk that a compromise of any of its employees’ credentials could result in a serious breach. How could the company have reduced that risk? By ensuring that employees’ access to the system’s administrative controls was tailored to their job needs.

Require secure passwords and authentication.

If you have personal information stored on your network, strong authentication procedures – including sensible password “hygiene” – can help ensure that only authorized individuals can access the data. When developing your company’s policies, here are tips to take from FTC cases.

Insist on complex and unique passwords.

“Passwords” like 121212 or qwerty aren’t much better than no passwords at all. That’s why it’s wise to give some thought to the password standards you implement. In the Twitter case, for example, the company let employees use common dictionary words as administrative passwords, as well as passwords they were already using for other accounts. According to the FTC, those lax practices left Twitter’s system vulnerable to hackers who used password-guessing tools, or tried passwords stolen from other services in the hope that Twitter employees used the same password to access the company’s system. Twitter could have limited those risks by implementing a more secure password system – for example, by requiring employees to choose complex passwords and training them not to use the same or similar passwords for both business and personal accounts.
Store passwords securely.

Don’t make it easy for interlopers to access passwords. In *Guidance Software*, the FTC alleged that the company stored network user credentials in clear, readable text that helped a hacker access customer credit card information on the network. Similarly, in *Reed Elsevier*, the FTC charged that the business allowed customers to store user credentials in a vulnerable format in cookies on their computers. In *Twitter*, too, the FTC said the company failed to establish policies that prohibited employees from storing administrative passwords in plain text in personal email accounts. In each of those cases, the risks could have been reduced if the companies had policies and procedures in place to store credentials securely. Businesses also may want to consider other protections – two-factor authentication, for example – that can help protect against password compromises.

Guard against brute force attacks.

Remember that adage about an infinite number of monkeys at an infinite number of typewriters? Hackers use automated programs that perform a similar function. These brute force attacks work by typing endless combinations of characters until hackers luck into someone’s password. In the *Lookout Services*, *Twitter*, and *Reed Elsevier* cases, the FTC alleged that the businesses didn’t suspend or disable user credentials after a certain number of unsuccessful login attempts. By not adequately restricting the number of tries, the companies placed their networks at risk. Implementing a policy to suspend or disable accounts after repeated login attempts would have helped to eliminate that risk.

Protect against authentication bypass.

Locking the front door doesn’t offer much protection if the back door is left open. In *Lookout Services*, the FTC charged that the company failed to adequately test its web application for widely-known security flaws, including one called “predictable resource location.” As a result, a hacker could easily predict patterns and manipulate URLs to bypass the web app’s authentication screen and gain unauthorized access to the company’s databases. The company could have improved the security of its authentication mechanism by testing for common vulnerabilities.
Store sensitive personal information securely and protect it during transmission.

For many companies, storing sensitive data is a business necessity. And even if you take appropriate steps to secure your network, sometimes you have to send that data elsewhere. Use strong cryptography to secure confidential material during storage and transmission. The method will depend on the types of information your business collects, how you collect it, and how you process it. Given the nature of your business, some possibilities may include Transport Layer Security/Secure Sockets Layer (TLS/SSL) encryption, data-at-rest encryption, or an iterative cryptographic hash. But regardless of the method, it’s only as good as the personnel who implement it. Make sure the people you designate to do that job understand how your company uses sensitive data and have the know-how to determine what’s appropriate for each situation. With that in mind, here are a few lessons from FTC cases to consider when securing sensitive information during storage and transmission.

Keep sensitive information secure throughout its lifecycle.

Data doesn’t stay in one place. That’s why it’s important to consider security at all stages, if transmitting information is a necessity for your business. In Superior Mortgage Corporation, for example, the FTC alleged that the company used SSL encryption to secure the transmission of sensitive personal information between the customer’s web browser and the business’s website server. But once the information reached the server, the company’s service provider decrypted it and emailed it in clear, readable text to the company’s headquarters and branch offices. That risk could have been prevented by ensuring the data was secure throughout its lifecycle, and not just during the initial transmission.

Use industry-tested and accepted methods.

When considering what technical standards to follow, keep in mind that experts already may have developed effective standards that can apply to your business. Savvy companies don’t start from scratch when it isn’t necessary. Instead, they take advantage of that collected wisdom. The ValueClick case illustrates that principle. According to the FTC, the company stored sensitive customer information collected through its e-commerce sites in a database that used a non-standard, proprietary form of encryption. Unlike widely-accepted encryption algorithms that are extensively tested, the complaint charged that ValueClick’s method used a simple alphabetic substitution system subject to significant vulnerabilities. The company could have avoided those weaknesses by using tried-and-true industry-tested and accepted methods for securing data.
Ensure proper configuration.

Encryption – even strong methods – won’t protect your users if you don’t configure it properly. That’s one message businesses can take from the FTC’s actions against Fandango and Credit Karma. In those cases, the FTC alleged that the companies used SSL encryption in their mobile apps, but turned off a critical process known as SSL certificate validation without implementing other compensating security measures. That made the apps vulnerable to man-in-the-middle attacks, which could allow hackers to decrypt sensitive information the apps transmitted. Those risks could have been prevented if the companies’ implementations of SSL had been properly configured.

Segment your network and monitor who’s trying to get in and out.

When designing your network, consider using tools like firewalls to segment your network, thereby limiting access between computers on your network and between your computers and the internet. Another useful safeguard: intrusion detection and prevention tools to monitor your network for malicious activity. Here are some lessons from FTC cases to consider when designing your network.

Segment your network.

Not every computer in your system needs to be able to communicate with every other one. You can help protect particularly sensitive data by housing it in a separate secure place on your network. That’s a lesson from the DSW case. The FTC alleged that the company didn’t sufficiently limit computers from one in-store network from connecting to computers on other in-store and corporate networks. As a result, hackers could use one in-store network to connect to, and access personal information on, other in-store and corporate networks. The company could have reduced that risk by sufficiently segmenting its network.
Monitor activity on your network.

“Who’s that knocking on my door?” That’s what an effective intrusion detection tool asks when it detects unauthorized activity on your network. In the *Dave & Buster’s* case, the FTC alleged that the company didn’t use an intrusion detection system and didn’t monitor system logs for suspicious activity. The FTC says something similar happened in *Cardsystem Solutions*. The business didn’t use sufficient measures to detect unauthorized access to its network. Hackers exploited weaknesses, installing programs on the company’s network that collected stored sensitive data and sent it outside the network every four days. In each of these cases, the businesses could have reduced the risk of a data compromise or its breadth by using tools to monitor activity on their networks.

Secure remote access to your network.

Business doesn’t just happen in the office. While a mobile workforce can increase productivity, it also can pose new security challenges. If you give employees, clients, or service providers remote access to your network, have you taken steps to secure those access points? FTC cases suggest some factors to consider when developing your remote access policies.

Ensure endpoint security.

Just as a chain is only as strong as its weakest link, your network security is only as strong as the weakest security on a computer with remote access to it. That’s the message of FTC cases in which companies failed to ensure that computers with remote access to their networks had appropriate endpoint security. For example, in *Premier Capital Lending*, the company allegedly activated a remote login account for a business client to obtain consumer reports, without first assessing the business’s security. When hackers accessed the client’s system, they stole its remote login credentials and used them to grab consumers’ personal information. According to the complaint in *Settlement One*, the business allowed clients that didn’t have basic security measures, like firewalls and updated antivirus software, to access consumer reports through its online portal. And in *Lifelock*, the FTC charged that the company failed to install antivirus programs on the computers that employees used to remotely access its network. These businesses could have reduced those risks by securing computers that had remote access to their networks.
Put sensible access limits in place.
Not everyone who might occasionally need to get on your network should have an all-access, backstage pass. That’s why it’s wise to limit access to what’s needed to get the job done. In the Dave & Buster’s case, for example, the FTC charged that the company failed to adequately restrict third-party access to its network. By exploiting security weaknesses in the third-party company’s system, an intruder allegedly connected to the network numerous times and intercepted personal information. What could the company have done to reduce that risk? It could have placed limits on third-party access to its network – for example, by restricting connections to specified IP addresses or granting temporary, limited access.

Apply sound security practices when developing new products.
So you have a great new app or innovative software on the drawing board. Early in the development process, think through how customers will likely use the product. If they’ll be storing or sending sensitive information, is your product up to the task of handling that data securely? Before going to market, consider the lessons from FTC cases involving product development, design, testing, and roll-out.

Train your engineers in secure coding.
Have you explained to your developers the need to keep security at the forefront? In cases like MTS, HTC America, and TRENDnet, the FTC alleged that the companies failed to train their employees in secure coding practices. The upshot: questionable design decisions, including the introduction of vulnerabilities into the software. For example, according to the complaint in HTC America, the company failed to implement readily available secure communications mechanisms in the logging applications it pre-installed on its mobile devices. As a result, malicious third-party apps could communicate with the logging applications, placing consumers’ text messages, location data, and other sensitive information at risk. The company could have reduced the risk of vulnerabilities like that by adequately training its engineers in secure coding practices.
Follow platform guidelines for security.

When it comes to security, there may not be a need to reinvent the wheel. Sometimes the wisest course is to listen to the experts. In actions against **HTC America**, **Fandango**, and **Credit Karma**, the FTC alleged that the companies failed to follow explicit platform guidelines about secure development practices. For example, Fandango and Credit Karma turned off a critical process known as SSL certificate validation in their mobile apps, leaving the sensitive information consumers transmitted through those apps open to interception through man-in-the-middle attacks. The companies could have prevented this vulnerability by following the iOS and Android guidelines for developers, which explicitly warn against turning off SSL certificate validation.

Verify that privacy and security features work.

If your software offers a privacy or security feature, verify that the feature works as advertised. In **TRENDnet**, for example, the FTC charged that the company failed to test that an option to make a consumer’s camera feed private would, in fact, restrict access to that feed. As a result, hundreds of “private” camera feeds were publicly available. Similarly, in **Snapchat**, the company advertised that messages would “disappear forever,” but the FTC says it failed to ensure the accuracy of that claim. Among other things, the app saved video files to a location outside of the app’s sandbox, making it easy to recover the video files with common file browsing tools. The lesson for other companies: When offering privacy and security features, ensure that your product lives up to your advertising claims.

Test for common vulnerabilities.

There is no way to anticipate every threat, but some vulnerabilities are commonly known and reasonably foreseeable. In more than a dozen FTC cases, businesses failed to adequately assess their applications for well-known vulnerabilities. For example, in the **Guess?** case, the FTC alleged that the business failed to assess whether its web application was vulnerable to Structured Query Language (SQL) injection attacks. As a result, hackers were able to use SQL attacks to gain access to databases with consumers’ credit card information. That’s a risk that could have been avoided by testing for commonly-known vulnerabilities, like those identified by the Open Web Application Security Project (OWASP).
Make sure your service providers implement reasonable security measures.

When it comes to security, keep a watchful eye on your service providers – for example, companies you hire to process personal information collected from customers or to develop apps. Before hiring someone, be candid about your security expectations. Take reasonable steps to select providers able to implement appropriate security measures and monitor that they’re meeting your requirements. FTC cases offer advice on what to consider when hiring and overseeing service providers.

Put it in writing.

Insist that appropriate security standards are part of your contracts. In *GMR Transcription*, for example, the FTC alleged that the company hired service providers to transcribe sensitive audio files, but failed to require the service provider to take reasonable security measures. As a result, the files – many containing highly confidential health-related information – were widely exposed on the internet. For starters, the business could have included contract provisions that required service providers to adopt reasonable security precautions – for example, encryption.

Verify compliance.

Security can’t be a “take our word for it” thing. Including security expectations in contracts with service providers is an important first step, but it’s also important to build oversight into the process. The *Upromise* case illustrates that point. There, the company hired a service provider to develop a browser toolbar. Upromise claimed that the toolbar, which collected consumers’ browsing information to provide personalized offers, would use a filter to “remove any personally identifiable information” before transmission. But, according to the FTC, Upromise failed to verify that the service provider had implemented the information collection program in a manner consistent with Upromise’s privacy and security policies and the terms in the contract designed to protect consumer information. As a result, the toolbar collected sensitive personal information – including financial account numbers and security codes from secure web pages – and transmitted it in clear text. How could the company have reduced that risk? By asking questions and following up with the service provider during the development process.
Put procedures in place to keep your security current and address vulnerabilities that may arise.

Securing your software and networks isn’t a one-and-done deal. It’s an ongoing process that requires you to keep your guard up. If you use third-party software on your networks, or you include third-party software libraries in your applications, apply updates as they’re issued. If you develop your own software, how will people let you know if they spot a vulnerability, and how will you make things right? FTC cases offer points to consider in thinking through vulnerability management.

Update and patch third-party software.

Outdated software undermines security. The solution is to update it regularly and implement third-party patches. In the TJX Companies case, for example, the FTC alleged that the company didn’t update its anti-virus software, increasing the risk that hackers could exploit known vulnerabilities or overcome the business’s defenses. Depending on the complexity of your network or software, you may need to prioritize patches by severity; nonetheless, having a reasonable process in place to update and patch third-party software is an important step to reducing the risk of a compromise.

Heed credible security warnings and move quickly to fix them.

When vulnerabilities come to your attention, listen carefully and then get a move on. In the HTC America case, the FTC charged that the company didn’t have a process for receiving and addressing reports about security vulnerabilities. HTC’s alleged delay in responding to warnings meant that the vulnerabilities found their way onto even more devices across multiple operating system versions. Sometimes, companies receive security alerts, but they get lost in the shuffle. In Fandango, for example, the company relied on its general customer service system to respond to warnings about security risks. According to the complaint, when a researcher contacted the business about a vulnerability, the system incorrectly categorized the report as a password reset request, sent an automated response, and marked the message as “resolved” without flagging it for further review. As a result, Fandango didn’t learn about the vulnerability until FTC staff contacted the company. The lesson for other businesses? Have an effective process in place to receive and address security vulnerability reports. Consider a clearly publicized and effective channel (for example, a dedicated email address like security@yourcompany.com) for receiving reports and flagging them for your security staff.
Secure paper, physical media, and devices.

Network security is a critical consideration, but many of the same lessons apply to paperwork and physical media like hard drives, laptops, flash drives, and disks. FTC cases offer some things to consider when evaluating physical security at your business.

Securely store sensitive files.

If it’s necessary to retain important paperwork, take steps to keep it secure. In the *Gregory Navone* case, the FTC alleged that the defendant maintained sensitive consumer information, collected by his former businesses, in boxes in his garage. In *Lifelock*, the complaint charged that the company left faxed documents that included consumers’ personal information in an open and easily accessible area. In each case, the business could have reduced the risk to their customers by implementing policies to store documents securely.

Protect devices that process personal information.

Securing information stored on your network won’t protect your customers if the data has already been stolen through the device that collects it. In the 2007 *Dollar Tree* investigation, FTC staff said that the business’s PIN entry devices were vulnerable to tampering and theft. As a result, unauthorized persons could capture consumer’s payment card data, including the magnetic stripe data and PIN, through an attack known as “PED skimming.” Given the novelty of this type of attack at the time, and a number of other factors, staff closed the investigation. However, attacks targeting point-of-sale devices are now common and well-known, and businesses should take reasonable steps to protect such devices from compromise.

Keep safety standards in place when data is en route.

Savvy businesses understand the importance of securing sensitive information when it’s outside the office. In *Accretive*, for example, the FTC alleged that an employee left a laptop containing more than 600 files, with 20 million pieces of information related to 23,000 patients, in the locked passenger compartment of a car, which was then stolen. The *CBR Systems* case concerned alleged unencrypted backup tapes, a laptop, and an external hard drive – all of which contained sensitive information – that were lifted from an employee’s car. In each case, the business could have reduced the risk to consumers’ personal information by implementing reasonable security policies when data is en route. For example, when sending files, drives, disks, etc., use a mailing method that lets you track where the package is. Limit the instances when employees need to be out and about with sensitive data in their possession. But when there’s a legitimate business need to travel with confidential information, employees should keep it out of sight and under lock and key whenever possible.
Dispose of sensitive data securely.

Paperwork or equipment you no longer need may look like trash, but it’s treasure to identity thieves if it includes personal information about consumers or employees. For example, according to the FTC complaints in *Rite Aid* and *CVS Caremark*, the companies tossed sensitive personal information – like prescriptions – in dumpsters. In *Goal Financial*, the FTC alleged that an employee sold surplus hard drives that contained the sensitive personal information of approximately 34,000 customers in clear text. The companies could have prevented the risk to consumers’ personal information by shredding, burning, or pulverizing documents to make them unreadable and by using available technology to wipe devices that aren’t in use.

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Looking for more information?

The FTC’s Business Center ([business.ftc.gov](http://business.ftc.gov)) has a Data Security section with an up-to-date listing of relevant cases and other free resources.

About the FTC

The FTC works for the consumer to prevent fraudulent, deceptive, and unfair practices in the marketplace. The Business Center gives you and your business tools to understand and comply with the law. Regardless of the size of your organization or the industry you’re in, knowing – and fulfilling – your compliance responsibilities is smart, sound business. Visit the Business Center at [business.ftc.gov](http://business.ftc.gov).

Your Opportunity to Comment

The National Small Business Ombudsman and 10 Regional Fairness Boards collect comments from small businesses about federal compliance and enforcement activities. Each year, the Ombudsman evaluates the conduct of these activities and rates each agency’s responsiveness to small businesses. Small businesses can comment to the Ombudsman without fear of reprisal. To comment, call toll-free 1-888-REGFAIR (1-888-734-3247) or go to [sba.gov/ombudsman](http://sba.gov/ombudsman).
COMPETITION COUNTS
Competition Counts: The Basics of Antitrust Law

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Overview of Antitrust Law

Goals of the Antitrust Laws:

- Preserve and promote free and fair competition throughout the U.S. economy
- Protect competition, not competitors
- Ensure a level playing field

Reach and Scope of the Antitrust Laws: Prohibit conduct that “unreasonably” restrains trade

Statutory Framework:

- Sherman Act
- Clayton Act
- Federal Trade Commission Act
- Robinson-Patman Act
- State antitrust and unfair competition laws
Sherman Antitrust Act, 15 U.S.C. §1

“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”

In the absence of a valid joint venture arrangement, agreements between competitors concerning prices are automatically unlawful, and may subject the parties to criminal and civil sanctions.

“Per se” offenses include:
- price-fixing (applies equally to price-related terms such as rebates, discounts, credit and warranty terms, service charges)
- bid rigging
- market allocation
- bid rotation

“Rule of Reason” analysis typically applies to vertical arrangements.

As a middle ground, courts can undertake a “quick look” analysis if the arrangement is likely anticompetitive but not a per se violation.

**Dealings with Competitors**

In general, competitors are expected to compete.

Competition can sometimes take a turn you don’t expect, but resorting to communicating and cooperating with a rival to jointly manage competitive pressures carries civil and criminal risk.

DOJ and FTC can bring enforcement actions. (Note: FTC does not do criminal enforcement; FTC actions lead to injunctions and sometimes monetary relief.) There are also state enforcers.

Government actions often lead to private lawsuits and class actions.

**Example:** FTC charged two drug makers with an illegal agreement not to compete to sell a generic version of a popular drug to treat ADHD. The branded company reached out to a company that was just about to obtain FDA approval to sell a generic version of its product and paid the generic firm a share of its profits not to enter the market.

**Group Boycotts**

In general, any company may, on its own, decide who it will do business with. But when a group of competitors come to an agreement not to do business with targeted individuals or businesses, that concerted action may violate the antitrust laws if it reduces competition.
**Example:** A group of auto dealers agreed to pull their advertising from a local paper after it ran a story telling consumers how to negotiate a better price when buying a car. The car dealers could have made individual decisions to pull their advertising, but an agreement to do so restrains competition among dealers and chills the publication of important consumer information, making it more difficult for consumers to compare dealer prices and services.

**Trade Association Activities**

In general, trade association members are subject to the same antitrust rules of the road as any business – that is, if the members agree to fix prices or restrict output in order to eliminate competition among the members, those agreements (which may be in trade association rules or codes) may be illegal.

Trade associations serve many legitimate purposes, and most of their activities are procompetitive or benign from a competition perspective.

But when the trade association is made up of competitors, some trade association activity may wander across the line into antitrust territory.

The FTC continues to bring cases where the rules or conduct of a trade association restrict competition in a way that harms consumers.

**Example:** A national alliance of independent licensed electricians allowed members to designate a territory that it served, but then its bylaws offered members the “right of first refusal” for work within its designated territory. In addition, any work performed in that territory would be done according to a price schedule established by the association. The FTC found that these bylaws discouraged competition by out-of-territory members, much like an illegal market division agreement. The association agreed to change its bylaws to eliminate these restraints. If you are a member of a trade association, you should be aware (and beware) of any rules that limit competition among the members.

**Hiring Workers: No-Poach and Non-Compete Agreements**

[FTC/DOJ Guidance for HR Professionals](#) covers the basic principles about how employers compete for workers, and an agreement to limit or fix the terms of employment may violate the antitrust laws.

“No-poach” agreements between employers are agreements NOT to compete to hire workers from the other company: These are always illegal when they involve companies that compete for workers.

From an antitrust perspective, not all companies compete for workers. Labor markets can be local or very skill-dependent.
**Example:** DOJ brought three high-profile cases involving technology companies that entered into no-poaching agreements not to try to hire each other’s workers. These cases (eBay/Intuit; Pixar/Adobe/Apple/Google/Intel/Intuit; Lucasfilms) involved CEOs and other senior executives agreeing not to solicit (No Cold Calls) or hire skilled workers such as computer engineers, digital animators, or scientists.

**Agreements to Fix Wages**

Agreements to fix wages, and other benefits, paid to workers are also illegal – just like agreements to fix product prices.

**Example:** Your Therapy Source involved an agreement between owners of therapist staffing companies to lower rates paid to therapists for treating home health patients in Dallas/Fort Worth.

**DOJ has a helpful list of don’ts**

**Invitations to Collude**

Section 5 of the FTC Act also bars contacting your competitor with an offer to fix prices or restrict competition – even if they turn you down.

The reasoning is that because agreements not to compete are usually secret, and all it takes is a nod to get to an illegal agreement.

Because there is no business justification for trying (and failing) to fix prices, the FTC has the authority to ban this conduct.

**Example:** Two executives of truck parts company paid a surprise visit to the headquarters of a competitor with a proposal: the price of your axles is too low. We promise not to sell below a certain price, if you agree. The competitor declined the offer, but the FTC found out and charged them with violating Section 5 of the FTC Act. This comes with a ban on doing it again.

**Example:** An executive of a company that sold bar codes online reached out to a competitor with the following email:

“Hello Phil, Our company name is InstantUPCCodes.com, as you may be aware, we are one of your competitors within the same direct industry that you are in .... Here's the deal Phil, I'm your friend, not your enemy .... Here's what I'd like to do: All 3 of us- US, YOU and [Company A] need to match the price that [Company B] has .... I'd say that 48 hours would be an acceptable amount of time to get these price changes completed for all 3 of us. The thing is though we all need to agree to do this or it won't work . . .Reply and let me know if you are willing to do this or not.”
Phil did not respond. He called the FTC.

**Bottom line:** If you merely invite a competitor to enter into an illegal agreement – fix prices, rig bids, divide markets – you risk an FTC investigation for your invitation to collude, even if your target doesn’t agree to join you.

**Antitrust in Technology Markets**

Hot topic these days, but note that the same antitrust rules apply to business conducted online.

**Example:** DOJ has charged the executives of several online retailers selling promotional products such as lanyards and wristbands with criminal price fixing. According to the indictments, the executives used social media platforms and encrypted messaging apps such as Facebook, Skype and WhatsApp to reach an agreement to fix prices for their products.

**Example:** FTC’s case against 1-800 Contacts, which involves the company’s efforts to stop competitors’ ads from showing up in online searches using its name. The FTC found that a dozen agreements between 1-800 Contacts and its rivals (“a web of anticompetitive agreements”) restrained competition in auctions to place ads on the search results page. These agreements prevented consumers from seeing ads for lower-priced products when shopping for contacts online.

**Sherman Antitrust Act, 15 U.S.C. §2**

> “Every person who shall monopolize, or attempt to monopolize, or combine with other persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony.”

Section 2 prohibits conduct by a single firm that unreasonably restrains competition by improperly creating or maintaining monopoly power.

Most Section 2 claims involve the conduct of a firm with a leading market position, although Section 2 of the Sherman Act also bans attempts to monopolize and conspiracies to monopolize.

**Pricing Issues**

**Price Discrimination:** Robinson-Patman Act, 15 U.S.C. §13, prohibits price differences in the sale of identical goods that cannot be justified on the basis of cost savings or meeting a competitor’s prices.
Resale Price Maintenance: Previously, resale price maintenance policies were per se violations of the Sherman Act; now, still controversial but no longer per se violations under federal law following Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007), but state law varies. Resale price maintenance policies should be unilateral with procompetitive benefits and carefully scrutinized before implementing.

Other Resources

FTC’s Competition Policy Guidance

DOJ Guidelines and Policy Statements

Questions?

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COMPETITION COUNTS
HOW CONSUMERS WIN WHEN BUSINESSES COMPETE

FEDERAL TRADE COMMISSION
THE FTC’S BUREAU OF COMPETITION: PROTECTING FREE ENTERPRISE AND AMERICAN CONSUMERS

What if there were only one grocery store in your community? What if you could buy a phone from only one retailer? What if only one dealer in your area sold cars?

Without competition, the grocer may have no incentive to lower prices. The phone shop may have no reason to offer a range of choices. The car dealer may have no motivation to keep its showroom open at convenient hours or offer competitive financing.

Competition in America is about price, selection, and service. It benefits consumers by keeping prices low and the quality and choice of goods and services high. Competition also encourages businesses to offer new and better products.

Competition makes our economy work. By enforcing antitrust laws, the Federal Trade Commission helps to ensure that our markets are open and free. The FTC promotes free and open competition and challenges anticompetitive business practices to make sure that consumers have access to quality goods and services at competitive prices, and that businesses can compete on the merits of their work. The FTC does not choose winners and losers – you, as the consumer, do that. Rather, our job is to make sure that businesses are competing fairly within a set of rules.

Through its Bureaus of Competition and Economics, the FTC puts its antitrust resources to work, especially where consumer interest and spending are high: in matters affecting energy, health care, food, pharmaceuticals, professional services, computer technology and databases, medical devices, and funeral services.
WHAT IS ANTITRUST?

The word “antitrust” dates from the late 1800s, when powerful companies dominated industries, working together as “trusts” to stifle competition. Thus, laws aimed at protecting competition have long been labeled “antitrust.” Fast forward to the 21st century: you hear “antitrust” in news stories about competitors merging or companies conspiring to reduce competition.

The FTC enforces antitrust laws by challenging business practices that could hurt consumers by resulting in higher prices, lower quality, or fewer goods or services. We monitor business practices, review potential mergers, and challenge them when appropriate to ensure that the market works according to consumer preferences, not illegal practices.

What kinds of business practices interest the Bureau of Competition? In short, the very practices that affect consumers the most: mergers, agreements among competitors, restrictive agreements between manufacturers and product dealers, and attempts by monopolists to thwart new competitors. The FTC reviews these and other practices, looking at the likely effects on consumers and competition. We ask: Would they lead to higher prices, inferior service, or fewer choices for consumers? Would they make it more difficult for other companies to enter the market?

“Antitrust laws...are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.”

U.S. Supreme Court Justice Thurgood Marshall
HERE ARE SOME BUSINESS PRACTICES THE FTC MONITORS:

Mergers
Many mergers benefit consumers by allowing firms to operate more efficiently. Other mergers, however, may result in higher prices, fewer choices, or lesser quality. The challenge for the FTC is to analyze the likely effects of a merger on consumers and competition – a process that can take thousands of hours of investigation and economic analysis. In one FTC case, a major baby food maker wanted to buy one of its two competitors. Based on evidence that the merger would lead to higher prices for consumers, the FTC went to court and successfully blocked the deal.

Agreements Among Competitors
It’s illegal for business rivals to act together in ways that can limit competition, lead to higher prices, or hinder other businesses from entering the market. In one FTC case, a group of auto dealers threatened to stop advertising in a newspaper if it printed money-saving tips for car shoppers. The FTC challenged the dealers because it is illegal for businesses to act together in ways that can deprive consumers of important information about products they want to buy.

Agreements among business rivals about price or price-related matters like credit terms are among the most serious business practices the
FTC considers. That’s because price is usually the principal basis for competition and consumer choice. Price fixing – companies getting together to set prices – is illegal. But that does not mean that all price similarities, or price changes that occur about the same time, are the result of price fixing. On the contrary, they often result from normal market conditions. For example, prices of commodities such as wheat are often identical because the products are virtually identical, and the prices that farmers charge all rise and fall together without any agreement among them. If a drought causes the supply of wheat to decline, the price to all affected farmers will increase. Uniformly high prices for a product in limited supply also can result from an increase in consumer demand: Just ask any shopper hunting for a “must have” children’s toy.

Agreements Between Manufacturers and Product Dealers
Many “package deals” create efficiencies that are beneficial to consumers: for example, automobile dealers sell tires with their cars because it makes sense. You might prefer a different kind of tire, but shipping and selling cars without tires is not practical. On the other hand, some “tie-in” agreements are illegal because they restrict competition without providing benefits to consumers. For example, the antitrust laws likely would not permit a drug manufacturer to require customers to buy a patient monitoring system they don’t want along with the prescription drugs they do want.
Monopoly
A monopoly exists when one company controls a product or service in a market. If a company gains a monopoly because it offers consumers a better product at a better price, that’s not against the law. But if it creates or maintains a monopoly by unreasonably excluding other companies, or by impairing other companies’ ability to compete against them, that conduct raises antitrust concerns. For example, a newspaper with a monopoly in a small town could not refuse to run advertisements from businesses that also advertised on a local television station.

Other Anticompetitive Conduct
Business strategies that reduce competition may be illegal if they lack a reasonable business justification. For example, a pharmaceutical company’s exclusive contracts with suppliers of a key ingredient kept generic drug makers from getting that ingredient. Without competition from generics, the pharmaceutical company was able to raise prices 3,000 percent: a $5 prescription would have cost consumers $150. The FTC, 32 states, and the District of Columbia challenged the contracts, which resulted in a $100 million court settlement for injured consumers.

The FTC enforces antitrust laws by challenging business practices that could hurt consumers by resulting in higher prices, lower quality, or fewer goods or services.
KEEPING MARKETS COMPETITIVE

By challenging anticompetitive business practices, the FTC helps to ensure that consumers have choices in price, selection, and service. To learn about competition problems, the FTC often receives information from consumers like you. If you suspect illegal behavior, please notify the FTC or your state’s Attorney General (visit naag.org).

CONFIDENTIALITY

The FTC cannot act on behalf of an individual consumer or business, but the information you provide can help expose illegal behavior.

With few exceptions, FTC investigations are not public. If you ask us about an investigation, you may be told that we cannot discuss it, or even confirm or deny its existence. But we can receive your information and make sure it gets to appropriate FTC staff.

HOW YOU CAN HELP

If you have an antitrust problem or complaint, or if you wish to provide information that may be helpful in an investigation, contact the FTC.

E-mail: antitrust@ftc.gov

If you wish to submit confidential information, send it by mail and mark it “Confidential.”

Mail: Federal Trade Commission
      Bureau of Competition-H374
      Washington, D.C. 20580

Telephone: 1-202-326-3300
WHEN YOUR COMPETITOR CROSSES THE LINE
POM Wonderful LLC—POM Wonderful® Pomegranate Juice.


Back reference: [nlcite][3020][nl/cite].

[NAD Headnotes]

Advertisers making health-related claims in food advertising should present claims in a manner that ensures consumers understand the extent of the scientific support for the claim.

The nature and extent of claims made by an advertiser should mirror the precision and specificity of the data relied on as substantiation.

[Summary]

Industry Self-Regulation—Health Claims—Beverage—Pomegranate Juice.—With respect to advertising claims that POM Wonderful pomegranate juice contained “more antioxidants than any other drink,” the National Advertising Division recommended the advertiser modify the claim to narrow the scope of its superior antioxidant content claim to more accurately reflect the basis of comparison (i.e., specific testing of antioxidant content of specific drinks) or discontinue the claim. Similarly, NAD also recommended that the advertiser discontinue its claim that POM Wonderful “has more antioxidant power than any other drink.”

NAD further determined that the advertiser went beyond the realm of puffery and hyperbole and made objectively provable claims requiring substantiation by presenting headlines such as “Outlive Your Spouse,” “Cheat Death,” “Life Preserver,” “Life Guard,” “Relax You’ll Live Longer,” “Forever Young,” and “The New Shape of Protection” accompanied by assertions that POM Wonderful prevented or reduced the risk of heart disease, Alzheimer’s, stroke, heart disease, premature aging, cancer, etc. with its free radical fighting antioxidants. NAD recommended that these claims be modified or discontinued. Likewise, NAD determined that the claim “The Antioxidant Superpower,” when accompanied by the above assertions or language touting the superior antioxidant power of POM Wonderful to other drinks, was objectively provable, required substantiation, and should be modified or discontinued. Nothing in this decision precluded the advertiser from using these headlines in isolation (i.e., sans accompanying body copy regarding the benefits of its free-radical fighting antioxidants with respect to heart disease, premature aging, stroke, Alzheimer’s, cancer, etc.)

NAD further recommended that the advertiser’s claims regarding POM Wonderful and its cardiovascular benefits be substantially modified to clearly disclose the limitations of the scientific findings—in particular, the emerging nature of the scientific findings as they concern the role of its pomegranate juice in one’s diet and the association between antioxidants and heart health. The advertiser claimed that daily consumption of eight ounces of POM Wonderful could reduce the risk or otherwise prevent heart disease, reduce plaque build up, lower cholesterol and/or blood pressure, increase blood flow, and other heart-related benefits conferred by pomegranate juice. NAD determined that the studies submitted were insufficient to support the advertiser’s broad claims as promoted in the subject advertising.

Likewise NAD recommended that, in the context in which they appear, the advertiser discontinue its claims, either express or implied, that drinking eight ounces of POM Wonderful daily could reduce one’s risk of cancer, Alzheimer’s disease, stroke, premature aging, or prolongs life or that consumers can “Cheat Death” with respect to any of these diseases by drinking POM Wonderful daily. To the extent that the advertiser sought to inform the public as to the preliminary nature of scientific findings as they concerned the role of diet in the association between antioxidants and disease, NAD recommended that in future advertising, the advertiser clearly disclose the limitations of the scientific findings.

The advertiser stated that it agreed to take into account NAD’s findings and to discontinue or modify certain claims in future advertising.

Full text of the decision is available in NAD/CARU Case Reports, Vol. 36, No. 5, May/June 2006. For further information, contact the National Advertising Division, 70 West 36th Street, 13th Floor, New York, New York 10018; http: www.nadreview.org.

Abstracts drafted by Commerce Clearing House, Inc. (CCH)
For information about CCH please visit, http://www.cch.com
Mercedes Benz—Mercedes GL Class.


Back reference: [[nlcite]¶3020[[nl/cite]].

[NAD Headnote]

NAD appreciates that humor can be an effective and creative means for an advertiser to highlight its product attributes and performance capabilities. However, humor does not relieve an advertiser of its obligation to support implied performance messages reasonably implied from humorous depictions.

[Summary]

Industry Self-Regulation—Product Performance—Demonstrations—Humor—Motor Vehicle—Safety.—

Automobile manufacturer Mercedes-Benz provided a reasonable basis for its claim that, with respect to the new GL Class sports utility vehicle, Mercedes “gave it more safety and strength,” the National Advertising Division determined. However, NAD concluded that a crash-sled demonstration in a television commercial overstated the actual crash-resistance and driver/passenger safety performance of the Mercedes GL and recommended that the commercials be modified to discontinue this sequence.

Although NAD determined that the advertiser had provided a reasonable basis for its claim that with respect to the GL Class SUV, Mercedes “gave it more safety and strength,” the humorous intent of the crash-sled sequence did not relieve the advertiser of its obligation to support reasonably implied messages conveyed by its advertising, particularly when they related to consumer safety. NAD observed. NAD determined that the crash-sled scene mimicked what consumers had become accustomed to seeing in actual crash testing of automobiles and concluded that a reasonable consumer could reasonably take away the unsupported message that the Mercedes GL, when struck from the side, offers extraordinary crash-resistance as well as physical safety and protection.

The advertiser stated that it would appeal to the National Advertising Review Board NAD’s finding that the crash-sled scene constituted an implied claim of actual product safety and performance or overstatement of product safety and performance.

Full text of the decision is available in NAD/CARU Case Reports, Vol. 36, No. 8, September 2006. For further information, contact the National Advertising Division, 70 West 36th Street, 13th Floor, New York, New York 10018; http://www.nadreview.org.

Abstracts drafted by Commerce Clearing House, Inc. (CCH)
For information about CCH please visit, http://www.cch.com
TAKARI INTERNATIONAL, INC.—Danisa Traditional Butter Cookies.


Back reference: ¶3020.

[NAD Headnote]

An advertiser is responsible for all reasonable interpretations of its claims, not simply the messages it intended to convey.

[Summary]

Industry Self-Regulations – Express Claims – Labeling – Cookies.—The National Advertising Division (NAD) recommended that Takari International, Inc. discontinue unsupported claims made on its website and Danisa Traditional Butter Cookies packaging. Campbell Soup Company, on behalf of Kelsen, Inc. manufacturer of premium Danish butter cookies, alleged that the labeling claim that the cookies were “Traditional Butter Cookies” was in explicit violation of the FDA’s definition of the term “Butter Cookies.” The FDA considers the use of the word butter in conjunction with the product name as false and misleading unless all of the shortening ingredient is butter. NAD determined that consumers could reasonably interpret the claim “Traditional Butter Cookies” as meaning that butter is the sole shortening ingredient in the product. Therefore, NAD recommended that Takari discontinue any and all such claims.

Industry Self-Regulation – Express Claims – Product Origin Claims – Cookies.—Takari International, Inc. was unable to support the claims that its Danisa Traditional Butter Cookies were “Produced and packed in Denmark,” an “Original Danish Recipe,” or “Baked following the original recipe from Denmark.” Campbell Soup Company, on behalf of Kelsen, Inc. manufacturer of premium Danish butter cookies, alleged that Takari’s products falsely claimed to follow the “Original Danish Recipe” and were falsely advertised and labeled as having been made in Denmark, when they were, in fact, made in Indonesia. These statements, along with imagery of the Danish crown and scenes of people clothed in traditional Danish costumes, skating, dancing, singing, etc. in Scandinavian settings, could be reasonably understood by consumers as meaning that the origin and production of the Danisa cookies is Denmark, when that is not the case. Therefore, NAD recommended Takari discontinue use of the statements and imagery referring to Denmark.

Although Takari’s objected to the findings, it agreed to comply with NAD’s ruling.

Full text of the decision is available in NAD/CARU Case Reports, Vol. 45, No. 3, March 2015. For further information, contact the National Advertising Division, 112 Madison Avenue, 3rd Floor, New York, New York 10016; http: www.asrcreviews.org.

[NAD Headnote]

In the absence of reliable consumer perception evidence, NAD uses its own expertise to determine the messages reasonably conveyed by an advertisement.

[Summary]

Industry Self-Regulation – Implied Claims – Health & Safety Claims - Trash Bags.— The National Advertising Division recommended that Glad Products Company modify the front panel of its Glad Tall Kitchen drawstring trash bags packaging to (1) more accurately convey the truthful message that this product contains an antimicrobial agent to control drawstring odor as outlined in the EPA Treated Articles Exemption and (2) increase the font size of this claim so as not to be overshadowed by the presence of the Clorox logo. Reynolds Consumer Products LLC provided a consumer perception survey it argued demonstrated that the challenged claim conveyed the unsupported message that Glad trash bags provide protection against food-borne or disease-causing bacteria or germs. However, the survey was insufficiently reliable to support Reynolds’ position regarding the takeaway of the challenged claim. Based on its own expertise, NAD concluded that the combined design elements, in the context in which they are found on the front panel of Glad’s product packaging, reasonably conveys a confusing, if not inaccurate, message as to the specific antimicrobial protection offered by Glad trash bags and has the potential to convey an inaccurate message as to the nature of Glad’s partnership with The Clorox Company.

Industry Self-Regulation – Implied Claims – Health & Safety Claims - Trash Bags.— NAD further recommended that the side panel of the product discontinue the depiction of the advertised Glad Bags alongside the featured Clorox disinfecting products.

Industry Self-Regulation – Implied Claims – Health & Safety Claims - Trash Bags.— With respect to a FSI/coupon, NAD recommended that, in addition to the modification outlined above the advertiser discontinue its use of the phrase, “now with Clorox.”

Industry Self-Regulation – Implied Claims – Environmental Claims - Trash Bags.— NAD recommended that The Clorox Company modify its claim, “Antimicrobial Protection of the Drawstring from Odors”, so that it comports with these permissible claims outlined by Environmental Protection Agency. Notwithstanding Glad’s intentions, its main claim did not convey its intended message that the antimicrobial control benefit offered by Glad trash bags was
limited to odors on the drawstring or that this antimicrobial agent is built-in to protect the drawstring.

Clorox will take NAD's recommendations into account when developing future advertising. Clorox is a long-time supporter of the self-regulatory system and appreciates NAD's time and effort in deciding this matter.

Full text of the decision is available in NAD/CARU Case Reports, Vol. 46, No. 4, April/May 2016. For further information, contact the National Advertising Division, 112 Madison Avenue, 3rd Floor, New York, New York 10016; http: www.asrcreviews.org.

WALKER & COMPANY BRANDS, INC.—Bevel® Shaving System.


Back reference: ¶3020.

[NAD Headnote]

While manufacturers should certainly be permitted, and even encouraged, to educate consumers about their product innovations, it is equally important that such claims be truthful, accurate and not misleading.

[Summary]

Industry Self-Regulation – Express Claims – Comparative Performance Claims – Razors.—NAD concluded that the outside scientific studies and literature presented by Walker & Company Brands, Inc. provided a reasonable basis for its claims that use of a single-blade razor is, in general, better tolerated (and suggested) for use by “pseudofolliculitis barbae (PFB) sufferers as opposed to multi-blade razors that can exacerbate, or may lead to, this condition.

NAD similarly concluded that this evidence provided a reasonable basis for conditional claims that single-blade razors (such as the Bevel razor) can “help prevent razor bumps”, result in less ingrown hairs, and therefore decreased PFB”, “can help reduce razor bumps or hinder the occurrence of irritation and related PFB”, and similarly tempered claims. However, NAD concluded that the evidence in the record was insufficient to provide a reasonable basis for the advertiser’s “clinically proven” and “proven” claims premised on the results of the objective portion of the Pre-Market Evaluation provided and recommended that they be discontinued.

With respect to Bevel’s claims concerning multi-blade razors, NAD recommended that the advertiser modify any and all claims not already modified to avoid language that speaks in definitive, absolute terms (i.e., employ more tempered, conditional language) as noted above.

NAD further recommended that the advertiser avoid making any claim that might reasonably convey the message that the Bevel user can obtain as close a shave as (or a closer shave than) a multi-blade razor. At the same time, NAD concluded that the evidence provided a reasonable basis for a monadic claim that, for individuals suffering from PFB, razor burn and irritation, Bevel—being a single-blade razor—can provide a close shave and that, with regular use, the presence of irritation, ingrown hairs/razor bumps (PFB) can (or may) be improved.

NAD also concluded that the perception-based portion of its study the Pre-Market Evaluation presented to the NAD was insufficient to support specific claims as referenced above (i.e., on the advertiser’s website, including those already modified) and recommended any claims based on this portion of this study, be discontinued.

As for the advertiser’s “Dermatologist Approved” claim, NAD concluded that the advertiser provided a reasonable basis for this claim but cautioned the advertiser ensure that each time this claim is made, it accompany these claims with the identifying qualification that the referenced dermatologist is Dr. Michelle Henry and avoid any implication that the claimed “approval” extends beyond Dr. Henry. At the same time, NAD recommended that the advertiser discontinue its “Dermatologist Tested” claim.
Lastly, on this record, NAD found that the advertiser had a reasonable basis for a more accurately tempered claim that “Bevel is the first and only end to end shaving system specifically designed to help reduce and prevent razor bumps and irritation. It is a 5 part system including a designed from the ground up single blade safety razor to help reduce your razor bumps and prevent irritation in those with coarse, curly hair.”

Full text of the decision is available in NAD/CARU Case Reports, Vol. 46, No. 6, July 2016. For further information, contact the National Advertising Division, 112 Madison Avenue, 3rd Floor, New York, New York 10016; http: www.asrcreviews.org.

Rubbermaid Inc.—FreshWorks Produce Saver Containers.


Back reference: ¶3020.

[NAD Headnote]

The nature and extent of the claims should be directly analogous to the precision and specificity of the data used to substantiate them.

[NAD Summary]

Industry Self-Regulation – Express Claims – Performance Claims – Containers.—Rubbermaid Inc. provided a reasonable basis for its claim that its FreshWorks Produce Saver containers’ “Revolutionary FreshVent technology creates an optimal environment for fruits and vegetables by regulating the flow of oxygen and carbon dioxide in and out of the produce container” and “FreshVent technology regulates flow of oxygen and carbon dioxide for the ideal environment.” OXO International, Ltd. challenged point-of-sale, Internet, and television advertisements for Rubbermaid’s produce containers. However, NAD rejected OXO argument that Rubbermaid’s characterization of its FreshWorks containers as making for an “optimal” and “an ideal environment” for fruits and vegetable storage was a comparative superiority claim with respect to competitive commercially available storage containers. Although there is no one environment that will be “ideal” or “optimal” for all types of produce, this does not undermine the consumer relevant benefits provided by FreshWorks’ attributes described above or the fact that the advertiser’s product provides all three components in one container. Consequently, NAD concluded that Rubbermaid provided a reasonable basis for its claims.

Industry Self-Regulation – Express Claims – Performance Claims – Containers.—NAD recommended that Rubbermaid discontinue its specifically quantified claims that FreshWorks containers “keeps produce fresh up to 80% longer,” and “keep produce fresh up to 80% Longer—a difference you can see.” Rubbermaid’s testing submitted in support of the claims did not provide support that the 80% Longer claim was true for most or all produce purchased at a variety of locations at a variety of times in the year. There was simply not a “good fit” between the message conveyed and the evidence offered in support of the claim.

Industry Self-Regulation – Express Claims – Performance Claims – Containers.—Comparative 21-day strawberry photographs on product packaging and in the time-lapse demonstration on the advertiser’s website were not supported. There was no evidence in the record that the photographs of individual strawberries are representative of all of the strawberries tested. The photographs were taken from a front-facing angle and there is no evidence in the record of what the strawberries looked like from other angles and whether other sides of the strawberries were bruised or spoiled. Finally, the testing offered by Rubbermaid in support of its “keep produce fresher up to 80% longer” claim was insufficient to support the message reasonably conveyed by the photographs that strawberries in general stay fresh for 21 days in the FreshWorks packaging.

Industry Self-Regulation – Express Claims – Performance Claims – Containers.—Rubbermaid also failed to support the advertising claim that its product keeps produce “nearly as fresh as they day it was
picked." NAD acknowledged that FreshWorks container does provide consumer relevant benefits for the storage of produce over traditional store packaging. Nothing precluded Rubbermaid from promoting the three features concerning the freshness-extending mechanics of the FreshWorks containers and the general benefits offered by them.

Rubbermaid will appeal NAD’s finding that Rubbermaid’s testing fails to support certain claims quantifying the benefit conferred by its FreshWorks container.

*Full text of the decision is available in NAD/CARU Case Reports, Vol. 47, No. 8, August 2017. For further information, contact the National Advertising Division, 112 Madison Avenue, 3rd Floor, New York, New York 10016; http: www.asrcreviews.org.*

Sanderson Farms, Inc.—Sanderson Farms Chicken.


Back reference: ¶3020.

[Summary]

Industry Self-Regulation – Express Claims – Labeling Claims – Chicken.—Sanderson Farms, Inc. provided a reasonable basis for its express, literally truthful claims that (1) “[n]one of the chicken you buy in the grocery store has antibiotics in it. By federal law, all chicken must be clear of antibiotics before they leave the farm” and (2) “[t]he truth is—none of the chicken you buy in the grocery store has antibiotics in it. By federal law, all chicken must be clear of antibiotics before they leave the farm.” NAD requested substantiation for certain health and safety claims made by Sanderson Farms in television and Internet advertisements for its Sanderson Farms chicken. Producers of chicken who administer antibiotics to their animals must adhere to a strict federally-mandated waiting, or withdrawal, period, before processing those chickens, to ensure that the antibiotics have cleared the birds’ bodies. Further, the FDA confirms producers’ compliance with these federal legal requirements via regular inspections. However, although a claim may be literally true, the context in which it is presented may still cause it to convey a message that is false or misleading to consumers.

Industry Self-Regulation – Implied Claims – Health Claims – Chicken.—Given the lack of any consensus in the scientific community over the safety of consuming meat from animals raised using antibiotics, the National Advertising Division recommended that Sanderson Farms, Inc. discontinue from its advertising any language characterizing the “raised without antibiotics” labels on competitive chicken producers’ products as a “marketing gimmick,” “just a trick to get you to pay more money,” a claim that is ““full of hot air and doesn’t say much,” “a phrase [that marketers] invented to make chicken sound safer...and it doesn’t mean much.” and similar language. The claims oversimplified the scientific debate surrounding the use of antibiotics in the raising of farm animals (here, chickens), particularly in light of the fact that, as the advertiser acknowledges, the questions regarding the outcome of the use of antibiotics in raising chickens and whether this practice can be linked to the presence of antibiotic-resistant bacteria in animal meat and, correspondingly, to the presence of antibiotic-resistant bacteria in humans is, “fiercely unsettled among scientists.”

Although Sanderson Farms respectfully disagrees with portions of NAD’s findings and determinations, Sanderson Farms agrees to comply with these recommendations in future advertising.

Full text of the decision is available in NAD/CARU Case Reports, Vol. 47, No. 8, August 2017. For further information, contact the National Advertising Division, 112 Madison Avenue, 3rd Floor, New York, New York 10016; http: www.asrcreviews.org.

Reckitt Benckiser, Inc.—Mucinex Fast Max Cold, Flu, and Sore Throat.


Back reference: ¶3020.

[NAD Headnote]

An advertiser is responsible for all reasonable interpretations of its claims, not simply the messages it intended to convey.

[Summary]

Industry Self-Regulation – Implied Claims – Performance Claims – OTC Medication.—The National Advertising Division recommended that Reckitt Benckiser, Inc. either discontinue a commercial for Mucinex Fast Max Cold, Flu, and Sore Throat or modify it to remove the language that it treats “pretty much every symptom” of the cold and flu and, in future advertising, avoid the implication that this one product is sufficient to treat the most common symptoms associated with the cold or flu. The challenged commercial explicitly states that Mucinex treats “9” symptoms and that “Mucinex Fast Max is powerful enough to handle pretty much any symptom.” The Procter & Gamble Company argued that RB’s commercial conveyed the unsubstantiated message that Mucinex treats all cold and flu symptoms. One of the messages reasonably conveyed is that, at the very least, Mucinex replaces other OTC medications that treat the most commonly experienced symptoms of a cold or flu. The challenged commercial explicitly states that Mucinex treats “9” symptoms and that “Mucinex Fast Max is powerful enough to handle pretty much any symptom.” The National Advertising Division (NAD) concluded that the brief appearance of the names of the symptoms treated by RB’s product is insufficient to adequately qualify the broader net impression conveyed by the commercial as a whole.

Industry Self-Regulation – Express Claims – Line Claims – OTC Medication.—NAD recommended Reckitt Benckiser either discontinue this commercial or modify it to expressly limit the “9-symptom relief” claim to the advertised “Mucinex Fast-Max Cold, Flu and Sore Throat” product. A line claim reasonably communicates that the performance promised is true for all of the products in the line. The commercial makes only a general brand reference to “Mucinex Fast Max.” There is no mention of the specific variant, “Mucinex Fast-Max Cold, Flu and Sore Throat.” Where an advertisement makes general brand references without qualifying the claim to limit its applicability to the one product shown in the advertisement, NAD has found that it is likely to convey the message that the benefits or attributes touted extend to the entire Fast-Max product line. NAD rejected RB’s argument that consumers could distinguish between the trade dress of its Mucinex Fast-Max Cold, Flu and Sore Throat product from other variants and that the “9 symptom relief” claim applies specifically to this product.

RB will comply with NAD’s recommendations and modify its advertising to address all of NAD’s concerns.

Full text of the decision is available in NAD/CARU Case Reports, Vol. 48, No. 1, January 2018. For further information, contact the National Advertising Division, 112 Madison Avenue, 3rd Floor, New York, New York 10016; http: www.asrcreviews.org.
Industry Self-Regulation – Implied Claims – Pricing Claims – Television Service.—Comcast Cable Communications, LLC improperly implied in a television commercial that customers of its competitor DIRECTV would be subjected to unavoidable, substantial, and undisclosed built-in price increase. AT&T Services, provider of DIRECTV CHOICE programming, challenged a television commercial in which Comcast implied that DIRECTV CHOICE customers will be “caught off guard” by undisclosed, built-in price increases. The promotional price for its DIRECTV CHOICE programming package of 185+ channels is $60 per month for the first year and then $115 per month for the second year. Both prices are clearly and conspicuously disclosed. Customer that sign up for the promotional package are then offered the opportunity to sign up for optional add-on features. The customer is alerted to the fact that, in order to avoid to being charged the full retail price for the channels, they must cancel before the expiration of the free trials. Consumers are under no obligation whatsoever to enroll in either of the add-on free-trial offers or to continue with either offer after the end of the free-trial period. NAD concluded that the challenged commercial communicated the unsupported message that the $60 price will automatically increase after three months, as well as the message that the price increases are automatic or hidden. Nothing precludes Comcast from advertising the full cost of an AT&T promotional “deal” over the course of a two year contract, as long as the basis for the final total arrived at is communicated in a truthful and accurate manner and does not reasonably convey an unsupported message that the prices of the offers presented to customers by AT&T as “hidden,” “undisclosed,” or “unavoidable.”

Comcast agrees to comply with NAD’s recommendations.

Full text of the decision is available in NAD/CARU Case Reports, Vol. 48, No. 3, March 2018. For further information, contact the National Advertising Division, 112 Madison Avenue, 3rd Floor, New York, New York 10016; http: www.asrcreviews.org.

Industry Self-Regulation – Implied Claims – Native Advertising – Shopping Guides.—Statements included in an article on BuzzFeed, Inc. stating that St. Ives Renewing Collagen & Elastin Moisturizer was “A paraben-free facial moisturizer infused with collagen to hydrate your face and soften the appearance of wrinkles” and that the moisturizer would “have your skin looking smoother! The collagen and elastin proteins in this formula help reduce the appearance of fine lines” was not advertising, according to the National Advertising Division. BuzzFeed is a digital media outlet that creates and publishes a variety of news and entertainment content, including news reporting, pop culture quizzes, “listicles” and “shopping guides.” In the shopping guide that drew the attention of NAD, BuzzFeed writers and editors featured a St. Ives moisturizer in a list of “35 Skincare Products That Actually Do What They Say They Will.” BuzzFeed inserts web links to retailers for the recommended products and is sometimes compensated when a reader reaches a retailer site through a monetized link, called an “affiliate link,” and purchases the product. At the top of the page, BuzzFeed disclosed its use of affiliate links and its potential to earn revenue from sales made through those links. NAD questioned whether BuzzFeed’s embedding of affiliate links into a review of products for sale rendered the shopping guide “national advertising” that requires substantiation. However, in this case, BuzzFeed’s primary economic motivation driving the content was to attract page views and develop a readership, not to directly influence readers to purchase products through its affiliate links. NAD noted that the affiliate links were added to the “shopping guide” after the editorial content was completed and the recommendations were not changed after the fact based on the availability of affiliate link revenue. Thus, NAD lacked jurisdiction because the content was not advertising.

Full text of the decision is available in NAD/CARU Case Reports, Vol. 48, No. 9, September 2018. For further information, contact the National Advertising Division, 112 Madison Avenue, 3rd Floor, New York, New York 10016; http: www.asrcreviews.org.

[NAD Headnote]

A consumer perception survey is not a perfect instrument for determining consumer takeaway but, rather, is simply one tool for helping to ascertain how consumers react to advertising.

[Summary]

Industry Self-Regulation – Implied Claims – Supply Claims – Television Services.—The National Advertising Division recommended that Charter Communications, Inc. discontinue or significantly modify a television commercial challenged by DIRECTV, LLC to limit the claim to the specific DIRECTV SELECT package and avoid conveying the message that all DIRECTV packages do not provide the sports channels/programming mentioned. In Charter’s “Bad Deal” commercial, a door-to-door DIRECTV salesman attempts to convince a homeowner to subscribe to DIRECTV. DIRECTV argued that the commercial implied that DIRECTV does not offer programming packages with any popular sports channels. Charter provided a consumer perception survey to support the claims. With respect to consumer perception surveys, open-ended questions are better indicators of how consumers interpret a commercial message because respondents’ answers are not colored by the suggestions contained in the questions themselves. NAD found that the study was fatally flawed and insufficiently reliable as a basis for evaluating consumer takeaway from the challenged commercial. NAD questioned whether the control commercial used could successfully determine whether the mention of a specific package sufficiently limited the challenged claim to a certain package or conveyed a line claim as to DIRECTV’s program offerings generally. Also, the structure of the closed-ended question may have biased the survey results. NAD recommended that the “Bad Deals” commercial be either discontinued or sufficiently modified to limit the claim to the specific DIRECTV SELECT package and avoid conveying the message that all DIRECTV packages do not provide the sports channels/programming mentioned.

Industry Self-Regulation – Implied Claims – Pricing Claims – Television Services. — The National Advertising Division concluded that reasonable consumers would not interpret a commercial from Charter Communications, Inc. to mean that DIRECTV customers will incur a $99 charge for simply contacting DIRECTV’s customer service to troubleshoot a service issue or for any service issue whatsoever, no matter how trivial. Rather, the commercial conveyed the message that, per the DIRECTV customer contract, customers will incur a $99 charge if the technician is dispatched to the home (“if someone shows up”) to resolve a service issue—a claim that is supported by the evidence in the record.

Charter will comply with NAD’s decision.
Full text of the decision is available in NAD/CARU Case Reports, Vol. 48, No. 11, November 2018. For further information, contact the National Advertising Division, 112 Madison Avenue, 3rd Floor, New York, New York 10016; http: www.asrcreviews.org.

Mead Johnson & Company—Enfamil NeuroPro™ Infant Formulas.


Back reference: ¶3020.

[NAD Headnote]

When extrapolating from test results conducted on other products or specific ingredients, it is incumbent upon the advertiser to demonstrate that any differences between the tested product and the advertised product would not have any bearing on the results.

[Summary]

Industry Self-Regulation – Express Claims – Ingredient Claims – Infant Formula.—Mead Johnson & Company had a reasonable basis for extrapolating findings from multiple studies’ findings to support compositional claims regarding the Milk Fat Globule Membrane (MFGM) in its NeuroPro Infant formulas, the National Advertising Division found. MFGM is the layer of membrane that encapsulates milk-fat globules released from milk-generating cells in mammals that contains a wide variety of proteins and fats (lipids). Preclinical studies suggest that MFGM and the associated fats and proteins thereon can play a role in brain and intestinal development. In a challenge brought by competitor Abbott Laboratories, NAD examined Mead’s evidence comparing the compositional similarities between NeuroPro Infant Formula and the test formulas in several studies, including, but not limited to, the MFGM and the components thereof, to determine if extrapolation of the results of these studies is appropriate to the ingredients in the advertiser’s formula. When product performance claims are not supported by testing on the specific product itself, but based on testing of a certain ingredient in the product, NAD has recognized that an advertiser can “extrapolate” and use the accepted research to make claims about a product that contains essentially the same ingredients. Based on a review of the studies presented by Mead, NAD found that Mead provides a reasonable basis for compositional claims for its Enfamil NeuroPro formulas.

Industry Self-Regulation – Express Claims – Health Claims – Infant Formula.—Mead Johnson & Company supported claims made on its product packaging, website, and advertisements for its Enfamil NeuroPro formulas, the National Advertising Division found. Mead advertised that “Enfamil NeuroPro has a fat-protein blend of MFGM and DHA, previously found only in breast milk* (*in amounts supported by clinical research,” “MFGM and DHA for Brain Building,” “MFGM Brain Building nutrition inspired by breast milk,” and “Brain-building nutrition inspired by breast milk.” Claims of an infant formula’s compositional similarity to breast milk can be supported so long as the claims are clearly compositional in nature and there is no implication that the compositional similarity gives rise to superior performance benefit over competitive infant formulas. It is essential that claims comparing infant formula to breast milk avoid any implication that the infant formula at issue is nutritionally equivalent to breast milk in terms of overall health benefit or performance. NAD rejected Abbott’s contention that the claims conveyed a message of nutritional equivalency to breast milk in terms of cognitive development or were otherwise comprised solely of qualified general cognitive benefits stemming from the inclusion of the MFGM ingredient in the product.

Industry Self-Regulation – Express Claims – Health Claims – Infant Formula.—The National Advertising Division recommended that Mead Johnson & Company modify product packaging for its Enfamil NeuroPro formulas to avoid any implication that the statement “backed by decades of clinical research and multiple
clinical studies” pertains to its research with respect to the Milk Fat Globule Membrane (MFGM) supplementation in its infant formulas, and to avoid any overstatement as to the extent of the research upon which it relies in support of the specific MFGM supplementation in its formulas. The packaging stated that “Enfamil offers brain-building nutrition inspired by breast milk backed by decades of clinical research and multiple clinical studies.” NAD recommended that the statement be moved to a stand-alone context, sufficiently separated and apart from other surrounding claims such that the message conveyed to consumers is more accurately limited to the research underlying the Enfamil brand of infant formulas (and not the MFGM-supplemented NeuroPro formula itself).

Industry Self-Regulation – Express Claims – Health Claims – Infant Formula.—Mead Johnson Company’s consumer-directed claim, “[e]merging evidence from a recent clinical study showed MFGM in formula supports cognitive development similar to breast milk” was a carefully qualified claim ensuring that consumers understand the extent of the support for the advertiser’s claim and that the basis for this claim is a single study showing that the ingredient MFGM in formula (not NeuroPro formula itself) supports cognitive development similar to breast milk. At no place on the product label does Mead expressly claim that NeuroPro itself has been shown (clinically or otherwise) to support cognitive development similar to breast milk. Rather, NAD concluded, the label sets forth that brain-building benefits are conferred by the added MFGM and DHA ingredients in the product and that testing has shown that MFGM, when added to formula, supports cognitive development similar to breast milk.

Industry Self-Regulation – Express Claims – Health Claims – Infant Formula.—The National Advertising Division recommended that Mead Johnson Company modify its website claim “NOURISH THE BRAIN FIRST. Enfamil NeuroPro is the first formula that has an MFGM & DHA blend for brain-building benefits similar to those of breast milk,* (**in amounts supported by clinical research. As measured by cognitive scores.**)” to make clear that any cognitive development support (brain-building) benefit similar to those of breast milk is limited to the ingredients MFGM and DHA that help support cognitive development and avoid any implication that the cognitive benefit conferred by the formula itself is like that conferred by breast milk.

Industry Self-Regulation – Express Claims – Health Claims – Infant Formula.—The National Advertising Division recommended that Mead Johnson Company either discontinue its website claim “MFGM has been clinically shown to help close the cognitive gap between formula fed and breastfed infants,” or modify this claim to reflect the emerging nature of the science and, for example, track the most recent 2017 conclusion of a study that “MFGM supplementation of infant formula may be an important step toward narrowing the gap between formula fed and breastfed infants with respect to neurodevelopment.”

Industry Self-Regulation – Express Claims – Health Claims – Infant Formula.—A chart on Mead Johnson Company’s website labeled “Discover Important Components of Enfamil” properly details certain key ingredients in its Enfamil NeuroPro™ Infant Formulas, according to the National Advertising Division. NAD also found that the chart properly stated the ingredients’ respective intended functions, that MFGM is an important component of breast milk, and that a single recent clinical study showed that the component MFGM in formula was shown to support cognitive development similar to breast milk.

Industry Self-Regulation – Express Claims – Health Claims – Infant Formula.—The National Advertising Division recommended that Mead Johnson Company discontinue or modify a consumer-directed commercial by removing a bar graph entirely, limiting statements concerning the “brain-building” benefits to the ingredients MFGM and DHA, and avoiding the implication that these benefits are tied to NeuroPro formula itself or that NeuroPro has been shown to close the cognitive gap between formula-fed and breastfed infants.
To the extent that Mead wants to reference the emerging science regarding MFGM-supplementation, NAD recommended that the company modify its “clinically shown” language claim to reflect the emerging nature of the science by, for example, and track the Timby 2017 language (i.e., that “a recent clinical study has shown,” or “based on a recent clinical study...” “MFGM supplementation of infant formula may be an important step toward narrowing the gap between formula fed and breastfed infants ...”

**Industry Self-Regulation – Express Claims – Health Claims – Infant Formula.**—The National Advertising Division recommended that Mead Johnson Company modify the claim “[a] revolutionary brain-first formula that provides cognitive outcomes like breastmilk* (*As measured by Bayley cognitive scores)” in its healthcare provider-directed advertising be modified to state, “NeuroPro—A revolutionary brain first blend of MFGM and DHA, nutrients shown in a clinical study to help support cognitive outcomes similar to breast milk* as measured by Bayley cognitive scores.”

**Industry Self-Regulation – Express Claims – Health Claims – Infant Formula.**—The National Advertising Division recommended that a bar graph appearing in a brochure directed to healthcare providers be modified (1) to change the label “Other Studied Formula” to more accurately read “Formula without MFGM,” and (2) the claim, “help narrow the cognitive gap between formula-fed and breastfed infants” be modified to reflect the emerging nature of the science and, for example, more closely align with the language in the Timby authors’ 2017 abstract, that, “MFGM supplementation of infant formula may be an important step toward narrowing the gap between formula fed and breastfed infants with respect to neurodevelopment...”

**Industry Self-Regulation – Express Claims – Health Claims – Infant Formula.**—The National Advertising Division recommended that Mead Johnson & Company stop making a video directed to health-care providers available online through its website (or elsewhere) to general consumers. Should Mead wish to publish this video on its website or elsewhere, NAD recommended that it establish a secure portal through which only health care professional can gain access to this video. With respect to the language, “and we also know that formulas that are supplemented with MFGM provide specific cognitive and health benefits to the infant similar to those of breastfed infants,” in the video, NAD recommended it be modified so the claim reflects the emerging nature of the science. Also, NAD recommended that Mead modify its voiceover claim in the video that, “[a] revolutionary brain-first formula that provides cognitive outcomes like breastmilk* (*As measured by Bayley cognitive scores)” to more clearly and accurately state, “NeuroPro—A revolutionary brain first blend of MFGM and DHA, nutrients shown in a clinical study to help support cognitive outcomes similar to breast milk* as measured by Bayley cognitive scores.”

Mead Johnson/RB is pleased with NAD’s decision and will comply with its recommendations.

*Full text of the decision is available in NAD/CARU Case Reports, Vol. 49, No. 3, March 2019. For further information, contact the National Advertising Division, 112 Madison Avenue, 3rd Floor, New York, New York 10016; http: www.asrcreviews.org.*


Bayer HealthCare LLC—Claritin-D.

National Advertising Division. NAD Case Reports No. 6269. Closed April 12, 2019.

Back reference: ¶3020.

[NAD Headnote]
While NAD accords great weight to FDA regulations, its role is not to enforce them but to consider such regulations when determining the truth and accuracy of advertising claims and making recommendations based on an analysis of the claims conveyed to consumers and the substantiation offered by the advertiser.

[Summary]
Industry Self-Regulation – Express Claims – Performance Claims – OTC Medication.—Bayer HealthCare LLC provided a reasonable basis for its claim that, based on a FDA-approved label, its Claritin-D product is indicated to relieve 8 symptoms of allergies (i.e., sneezing, runny nose, nasal congestion, itching of the nose, itchy eyes, watery eyes, itching of the throat, and sinus congestion and pressure) and the leading allergy spray (Flonase) is only indicated to relieve the first six of these symptoms (i.e., not sinus congestion and pressure or itchy throat.) GlaxoSmithKline Consumer Healthcare, L.P., maker of Flonase Allergy Relief and Flonase Sensimist Allergy Relief, challenged Bayer’s television commercials, print, and digital advertisements. The FDA’s Over-the-Counter Nasal Decongestant Monograph permits products containing pseudoephedrine to be labeled as a “nasal decongestant” and indicated as follows: “Temporarily relieves nasal congestion due to hay fever or other upper respiratory allergies (allergic rhinitis).” Also, the Monograph permits advertisers to include “additional complementary information” that further describes the effects of the product—but only as a supplement to the “nasal congestion” indication. Bayer argued, and NAD agreed, that the eight FDA-approved label indications for Claritin-D and six FDA-approved label indications for Flonase provide a reasonable basis for its claims and that, consistent with NAD precedent, it should be able to advise consumers of these differences in the FDA-approved labeling of the parties’ products. FDA granted Claritin-D an indication for the symptoms listed on its label, and its review included the reliability of the evidence to support indications for all symptoms listed on its label. In order to harmonize NAD’s review with FDA approval for the indications listed on the label, NAD accepts the FDA’s determination that the evidence was sufficiently reliable to support the indications on the label.

Industry Self-Regulation – Implied Claims – Performance Claims – OTC Medication.—The National Advertising Division found that Bayer HealthCare LLC’s advertising for its Claritin-D product conveyed the broader, unsupported message that GlaxoSmithKline Consumer Healthcare, L.P.’s Flonase does not provide relief from “sinus congestion and pressure” and “itchy throat.” The advertising declares “8 vs. 6. Get relief from more symptoms with Claritin-D.”
The commercials expressly inform the viewer that he or she will not find “relief” in the Allergy Sprays aisle (i.e., Flonase), that the leading allergy spray actually “relieves” only 6 symptoms, that “Claritin-D relieves the same 6 symptoms as the leading allergy spray plus relieves sinus congestion & pressure, and itchy throat” (in the super) and that, Claritin-D actually “relieves more” than Flonase. Consumers can reasonably take away a message beyond the supported “8 versus 6 FDA-approved indications” claim (i.e., that they will not find allergy relief medications that are FDA-indicated to relieve certain symptoms or that such FDA-indicated medications are found behind the pharmacy counter). Rather, NAD concluded that consumers can reasonably interpret the commercial to mean that Flonase does not merely lack the FDA-indications for these two additional symptoms, but that, in fact, Flonase cannot relieve “sinus congestion and pressure” and “itchy throat”—claims for which the advertiser provided no evidence. Consequently, NAD recommended that the challenged advertisements either be discontinued or sufficiently modified to strictly limit the message conveyed to a comparative “8 versus 6 FDA-approved indications” claim and avoid the implication that Flonase products do not or cannot relieve “sinus congestion and pressure” and “itchy throat.” Moreover, NAD recommended that the “8 versus 6 FDA-approved indications” distinction between the parties’ products should be made part of the main claim.

Bayer will comply with the NAD’s recommendations.

Full text of the decision is available in NAD/CARU Case Reports, Vol. 49, No. 4, April 2019. For further information, contact the National Advertising Division, 112 Madison Avenue, 3rd Floor, New York, New York 10016; http: www.asrcreviews.org.

Code of Advertising

These basic advertising standards are issued for the guidance of advertisers, advertising agencies and advertising media. It is impossible to cover fully the wide variety of advertising practices by specific standards in a code such as this, which is designed to apply to the offering of all goods and services in all forms of media.

BBB Code of Advertising - Summary

Each section of the BBB Code of Advertising is summarized here to help you select the parts of the Code that apply to your specific situations. Please click at the end of a paragraph to access the entire section in detail or click here to go directly to the full text version.

1. Basic Principles of the Code

Advertisements should be truthful, sincere offers to sell. Advertisers have a responsibility to have substantiation for all claims made and should be able to provide that substantiation upon request. All advertising that may mislead or deceive consumers should be avoided. Click here for specifics.

2. Comparative Price, Value and Savings Claims

When comparing prices to one's own former selling price, current price of others, list prices, wholesale prices, or to items which are imperfect, it is important to make sure that consumers have all the necessary information to make an informed purchase. In addition, when offering a price match guarantee, the offer should be made in good faith, include all necessary information to take advantage of it and not place an unreasonable burden on the consumer who wants to take advantage of the offer. Click here for specifics.

3. Comparison with own former selling price

When comparisons are made to a former selling price, it must be to a bona fide price that has been offered for a reasonable time. If no sales had been made at that price, the
advertiser must be sure that the markup on the higher priced product is similar to other products. Click here for specifics.

4. **Comparison with current price of identical products or services sold by others**

Advertisers must be reasonably certain that the compared to price does not appreciably exceed the price at which substantial sales for the identical product have been made. Click here for specifics.

5. **Comparison with current price of comparable products or services sold by the advertiser or by others**

Advertisers must be reasonably certain that the compared to price does not appreciably exceed the price at which substantial sales for the comparable product have been made. Click here for specifics.

6. **List Prices**

List prices comparisons may mislead the consumer where they are not to a price at which substantial sales of the product have occurred. An advertiser can use a list-price non-deceptively where it does not claim a savings, and includes certain disclosures. Click here for specifics.

7. **Imperfects, Irregulars and Seconds**

A price comparison to an imperfect product must include a clear disclosure, among others, that such comparison applies to the price of the product if perfect. Click here for specifics.

8. **"Factory to you," "factory direct," "wholesaler," "wholesale price"**

Such phrases are appropriate under certain circumstances. For example, the phrase “factory to you” can be used where the advertiser actually makes the product. The phrase “wholesale price” can be used if that price is comparable to the price charged by wholesalers. Click here for specifics.

9. **Sales**

Retailers can advertise “sales” where they are offering a significant reduction in price for a limited period of time. At the end of the sale period, retailers can, in good faith, convert the sale price to a new regular price if they no longer claim a savings. Click here for specifics.

10. **"Emergency" or "Distress" sales**

Emergency sales must be for a limited period of time, and only include products that are affected by the emergency. The reason given for the sale must be true. Advertisers stating they are closing out a particular product can do so where the advertiser will no longer carry that product. Click here for specifics.

11. **"Up to" price savings claims**


When advertising, for example, savings of "up to 40%," at least 10% of the items must be available at 40% off. Advertisers may want to include a disclosure of both the minimum and maximum savings available to provide more information to consumers. Click here for specifics.

12. Lowest Prices, Underselling claims

Advertisers should avoid making unqualified lowest prices claims. One appropriate qualification is to promise truthfully that the advertiser will meet or beat a lower price sold by others. Click here for specifics.

13. Price equaling, meeting competitors' prices

When advertisers offer a price match guarantee, the offer should be made in good faith, include all necessary information to take advantage of it, and not place unreasonable burdens on the consumer who wants to take advantage of the offer. Click here for specifics.

14. Free

Use of the word free includes a requirement, among others, that the “free” item actually is free. When offered with the purchase of another item, the free item should not be paid for by an increase in the regular price of the other item. Click here for specifics.

15. Trade-in Allowances

If an advertiser offers to accept a trade-in when a consumer purchases an item, the advertiser must disclose all terms for the offer clearly and conspicuously. Click here for specifics.

16. Credit

Offering credit to consumers comes with numerous requirements which must be met. In addition, if promising “easy credit,” or “guaranteed financing” or like terms, the consumer should receive what is promised. Click here for specifics.

17. Extra Charges

To avoid confusion, the existence of any extra charges (such as delivery, assembly, postage and handling, etc.) should be clearly and conspicuously disclosed in an advertisement in immediate conjunction with the price. Click here for specifics.

18. Negative Option Plans, Continuity Plans and Automatic Shipments

Advertisements for a product or service that include an offer to sell consumers additional goods or services under a negative option should disclose all material terms of the negative option. Advertisers should avoid making vague or unnecessarily long disclosures that might include contradictory language. Click here for specifics.
19. **Bait Advertising and Selling**

A “bait” offer is one where the advertiser does not intend to sell the product, but instead to lure the consumer in to switch them to another product, usually at a higher price. Advertisers should avoid such offers. [Click here for specifics.](https://www.bbb.org/code-of-advertising)

20. **Warranties or Guarantees**

When using the term “warranty” or “guarantee” the advertiser should clearly and conspicuously include a statement that the complete details of the warranty can be seen prior to the sale which could include putting it on the seller’s website. Advertisers should disclose any material limitations on a "satisfaction guarantee" or "money back guarantee" and define, for consumers, the meaning of claims such as "lifetime guarantee." [Click here for specifics.](https://www.bbb.org/code-of-advertising)

21. **Layout and Illustrations**

The illustrations and overall layout of advertising should enhance the consumer's understanding of the offers and accurately represent the featured products and services. [Click here for specifics.](https://www.bbb.org/code-of-advertising)

22. **Asterisks**

Asterisks can be used to provide additional information about the product or service. However, they should not be used to contradict or change the meaning of the original claim. [Click here for specifics.](https://www.bbb.org/code-of-advertising)

23. **Abbreviations**

Only commonly known abbreviations should be used in advertising. [Click here for specifics.](https://www.bbb.org/code-of-advertising)

24. **Use or Condition Disclosures**

Terms including “used,” “secondhand,” “rebuilt,” “reconditioned,” “as-is,” etc. have specific meaning. Advertisers should use them only in those circumstances and with appropriate disclosures. [Click here for specifics.](https://www.bbb.org/code-of-advertising)

25. **"As-Is"**

Advertisers must disclose clearly whenever they offer a product “as is.” [Click here for specifics.](https://www.bbb.org/code-of-advertising)

26. **"Discontinued"**

Advertisers must not describe products as “discontinued,” or by similar words unless the manufacturer has discontinued the product, or the retailer will discontinue offering it after clearing existing inventories. [Click here for specifics.](https://www.bbb.org/code-of-advertising)

27. **Superiority Claims – Comparatives – Disparagement**
Deceptively or falsely disparaging advertising of a competitor's products or services must not be used. Comparisons should fairly reflect all aspects of the products or services equally. [Click here for specifics.]

28. **Objective Superlative Claims**

Claims that relate to tangible qualities and performance values of a product or service can be used when the advertiser has substantiation. An example of a claim requiring substantiation would be "#1 car sales in the city." [Click here for specifics.]

29. **Subjective Claims – Puffery**

Expressions of opinion or intangible qualities of a product or service do not need to be substantiated. Such claims include “we try harder” or “best food in the world.” [Click here for specifics.]

30. **Testimonials and Endorsements**

Advertisers should ensure that testimonials and endorsement are not misleading and represent the current opinion of the endorser. A consumer endorser’s experience should reflect what users generally achieve, unless there is a clear and conspicuous disclosure of what the expected results will be. Advertisers should not include claims in testimonials that they themselves cannot make and support. [Click here for specifics.]

31. ** Rebates**

Rebates are payments of money after the sale. Advertisers should clearly and conspicuously state the before-rebate cost as well as the amount of the rebate and include key terms that consumers need to know. [Click here for specifics.]

32. **Business Name or Trade Style**

Business names or trade styles should not contain words that would mislead the public. Words like “factory” or “wholesaler” should only be used under appropriate circumstances. [Click here for specifics.]

33. **Contests and Games of Chance or Skill**

Advertisers should publish clear, complete and concise contest rules and provide competent impartial judges to determine the winners. Contests that include the three elements of prize, chance and consideration (payment) are considered lotteries in violation of state and federal laws. Canadian law contains similar prohibitions. [Click here for specifics.]

34. **Claimed Results**

Claims relating to performance and results should be backed up by reliable evidence. [Click here for specifics.]
35. Unassembled Products

Advertisers should disclose when merchandise requires partial or complete assembly by the consumer, e.g., "unassembled," "partial assembly required." Click here for specifics.

36. Environmental Benefit Claims

Advertisers should avoid broad, unqualified environmental claims such as “green,” or “eco-friendly.” Other claims such as “degradable,” “recycled,” and “non-toxic,” should only be used when substantiated and properly qualified. Environmental Certifications and seals of approval may be used if properly issued. Additional disclosures are needed if not issued by an independent third-party. Click here for specifics.

37. “Made in USA” Claims

"Made in USA," and similar terms used to describe the origin of a product must be truthful and substantiated. In general, all or virtually all of the product must be made in the USA. Qualified “Made in USA” claims can made be under certain circumstances and with appropriate disclosures. Click here for specifics.

38. “Product of Canada” and “Made in Canada” Claims

“Product of Canada,” "Made in Canada" and similar terms used to describe the origin of a product must be truthful and substantiated. To make “Product of Canada” claims, virtually all of the product must be made in Canada. Where goods are partially made in Canada, “Made in Canada” claims can be made if appropriately qualified. Click here for specifics.

39. Native Advertising (Deceptively Formatted Advertisements)

Native Advertisements are created to resemble the design, style, and functionality of the media in which they are disseminated, which could make it difficult to distinguish between advertising and non-commercial content. Click here for specifics.

BBB Code of Advertising - Full Text

BBB promotes honest advertising by working with businesses to help ensure ethical and truthful advertising. Contact your BBB at bbb.org for answers to advertising questions.

These basic advertising standards are issued for the guidance of advertisers, advertising agencies and advertising media.

The Better Business Bureau (BBB) Code of Advertising (Code) applies to the offering of all goods and services. If BBB has developed specific industry advertising codes, it is recommended that industry members adhere to them.
For example, if specific questions arise which involve advertising directed to children, advertisers should review The Children's Advertising Review Unit Self-Regulatory Program for Children's Advertising at caru.org/guidelines/guidelines.pdf.

In all instances, advertisers, agencies and media should also be sure that they are in compliance with local, state, federal and provincial laws and regulations governing advertising.

These standards apply to advertising placed in all forms of media, including print, broadcast, online and mobile formats.

Adherence to the general principles and specific provisions of this Code will be a significant contribution toward effective self-regulation in the public interest.

1. **Basic Principles of the Code**

   1.1 The primary responsibility for truthful and non-deceptive advertising rests with the advertiser. Advertisers should be prepared to substantiate any objective claims or offers made before publication or broadcast. Upon request, they should present such substantiation promptly to the advertising medium or BBB.

   1.2 Advertisements which are untrue, misleading, deceptive, fraudulent, falsely disparaging of competitors, or insincere offers to sell, shall not be used.

   1.3 An advertisement as a whole may be misleading by implication, although every sentence separately considered may be literally true.

   1.4 Misrepresentation may result not only from direct statements, but by omitting or obscuring a material fact.

2. **Comparative Price, Value and Savings Claims**

BBB recognizes that truthful price information helps consumers make informed purchasing decisions and that comparative price advertising plays an important role in promoting vigorous competition among retailers. At the same time, misleading or unsubstantiated pricing claims injure both consumers and competitors. The following examples offer guidance on ensuring that pricing claims are truthful and not misleading.

   2.1 Advertisers may offer a price reduction or savings by comparing their selling price with:

      2.1.1 Their own former selling price;

      2.1.2 The current selling price of identical products or services sold by others in the trade area (the area in which the company does business or
where the advertisement appears) (e.g., “selling elsewhere at $______.”); or

2.1.3 The current selling price of a comparable product or service sold by the advertiser or by others in the trade area (e.g., “comparable value,” “compares with products or services selling at $______,” “equal to products or services selling for $______.”).

2.2 In each case, the advertisement must clearly and conspicuously disclose which basis of comparison is being used.

2.3 When these comparisons are made in advertising, the claims must be based on the provisions in Sections 3 - 7.

3. Comparison with own former selling price

3.1 The former price must be the actual price at which the advertiser has openly and actively offered the product or service for sale, for a reasonably substantial period of time, in the recent, regular course of business, honestly and in good faith.

3.2 Where the former price is genuine, the bargain being advertised is a true one. If, on the other hand, the former price being advertised is not bona fide, the bargain being advertised is a false one.

3.2.1 For example, where an artificial, inflated price was established for the purpose of enabling the subsequent offer of a large reduction, the consumer is not receiving the usual value expected. In such a case, the “reduced” price is, in reality, probably just the seller’s regular price.

3.3 Offering prices, as distinguished from actual former selling prices, may be used to deceptively imply a savings. In the event few or no sales were made at the advertised comparative price, the advertiser must make sure that the higher price does not exceed the advertiser’s usual and customary retail markup for similar products or services.

3.4 Descriptive terminology often used by advertisers includes: “regularly,” “was,” “you save $______,” and “originally.” If the word “originally” is used and the original price is not the last previous price, that fact must be clearly and conspicuously disclosed by stating the last previous price, or that intermediate markdowns may have taken place, for example, “originally $400, formerly $300, now $250,” “originally $400, intermediate markdowns taken, now $250.”

4. Comparison with current price of identical products or services sold by others
Advertisers should be reasonably certain that the comparative price does not appreciably exceed the price at which substantial sales of identical products or services have been made in the trade area for which the claim is made for a reasonably substantial period of time, in the recent, regular course of business. Such comparisons must be substantiated by the advertiser prior to making any advertised comparisons. Descriptive terminology often used by advertisers includes: “selling elsewhere at $______.”

5. Comparison with current price of comparable products or services sold by the advertiser or by others
   5.1 Advertisers should be reasonably certain that the comparative price does not appreciably exceed the price at which substantial sales of comparable products or services have been made in the trade area for which the claim is made for a reasonably substantial period of time, in the recent, regular course of business. Such comparisons must be substantiated by the advertiser prior to making any advertised comparisons. Descriptive terminology often used by advertisers includes: “comparable value,” “compares with products or services selling at $______,” “equal to products or services selling for $______.”

   5.2 In all such cases, the advertiser must make certain that the comparable products or services are similar in all material and significant respects.

6. List prices
   6.1 “List price,” “manufacturer’s list price,” “reference price,” “suggested retail price,” and similar terms, hereinafter collectively referred to as “list price,” may be used deceptively to state or imply a savings which was not, in fact, the case. To the extent that a list price does not in fact correspond to the price at which substantial sales of the product in question have been made, the advertisement of a reduction may mislead the consumer. Such a comparison must be substantiated by the advertiser prior to making any advertised comparison.

   6.2 An advertiser, however, can also reference a list price non-deceptively where the advertiser:

       6.2.1 Does not describe the difference as a “savings,” or use any other words of similar meaning; and

       6.2.2 Clearly and conspicuously discloses that the list price may not necessarily be the price at which the product or service is sold. This disclosure may be unnecessary in situations where consumers generally know that the list price may not necessarily be the price at which the product
or service is sold. This may be the case, for example, when an automobile dealer references, in its ad, a new car’s Monroney Sticker price.

7. Imperfects, irregulars and seconds

7.1 No comparative price should be used in connection with an imperfect, irregular or second product unless it is accompanied by a clear and conspicuous disclosure that such comparative price applies to the price of the product, if perfect.

7.2 The advertisement must also clearly and conspicuously disclose which basis of comparison is being used. The comparative price advertised must be based on:

7.2.1 The price currently charged by the advertiser for the product without defects; or

7.2.2 The price at which substantial sales of the product have been made in the trade area for the product without defects.

8. “Factory to you,” “factory direct,” “wholesaler,” “wholesale price”

8.1 The terms “factory to you,” “direct from maker,” “factory direct,” “factory outlet” and the like can be used where all advertised products are actually manufactured by the advertiser or in factories owned or controlled by the advertiser.

8.2 The terms “wholesaler,” “wholesale outlet,” “distributor” and the like can be used where the advertiser actually owns and operates or directly and completely controls a wholesale or distribution facility which primarily sells products to retailers for resale.

8.3 The terms “wholesale price,” “at cost” and the like can be used where they are the current prices which retailers usually and customarily pay when they buy such products for resale.

8.3.1 For example, where the advertiser buys its products from a manufacturer, a claim that it sells at “wholesale prices” can be used if its prices are comparable to those charged by wholesalers in its trade area.

9. Sales

9.1 The unqualified term “sale” may be used in advertising only if there is a significant reduction from the advertiser's usual and customary price of the products or services offered and the sale is for a limited period of time. If the sale
exceeds thirty (30) days, advertisers should be prepared to substantiate that the offering is indeed a valid price reduction and has not become their regular price.

9.2 Time limit sales must be observed.

9.2.1 For example, products or services offered in a “one-day sale,” “three-day sale” or “this week only sale” should, as a general rule, be taken off “sale” and revert to the regular price immediately following expiration of the stated time.

9.3 Introductory sales must be limited to a stated time period, and the selling price should, as a general rule, be increased to the advertised regular price immediately following termination of the stated period.

9.4 Advertisers may currently advertise future increases in their own prices on a subsequent date provided that they do, in fact, increase the price to the stated amount on that date and maintain it for a reasonably substantial period of time thereafter.

9.5 If the advertiser, in good faith, decides at the end of the sale period to convert its sale price to a new regular price, it may do so if it no longer claims any savings.

9.6 The advertiser, in good faith, may decide to extend a time limit or introductory sale for a stated period. However, if that extension is for more than a short period of time, the advertiser must be prepared to substantiate that the offering is still a valid price reduction and has not become its regular price.

10. “Emergency” or “distress” sales

10.1 Emergency or distress sales, including but not limited to bankruptcy, liquidation and going-out-of-business sales, must:

10.1.1 Not be advertised unless the stated or implied reason is a fact;

10.1.2 Be limited to a stated period of time; and

10.1.3 Offer only such products or services as are affected by the emergency.

10.2 Where the advertiser states that it is going out of business or closing down, it must actually be going out of business or closing down. Where the advertiser is not going out of business or closing down, it can advertise that it is “selling out” a product or “closing out” particular merchandise, as long as that advertiser will no longer carry that product or merchandise.

10.3 The unqualified term “liquidation sale” means that the advertiser’s entire business is in the process of actually being liquidated prior to actual closing.
10.4 If such sales exceed ninety (90) days, advertisers must be prepared to substantiate that the offering is indeed a valid emergency or distress sale.

11. “Up to” price savings claims
11.1 Where a savings claim (for example, “save up to 40%”) covers a group of items with a range of savings, the number of items available at the maximum savings must comprise a significant percentage, at a minimum 10%, of all the items in the offering, unless local, state or provincial law requires otherwise.

11.2 To avoid confusion or any possible deception, an advertiser should consider including a disclosure of both the minimum and maximum savings available under the offer. In such an instance, the advertiser must avoid any undue or misleading display of the maximum.

12. Lowest prices, underselling claims
Despite an advertiser's best efforts to ascertain competitive prices, the rapidity with which prices fluctuate and the difficulty of determining prices of all sellers at all times preclude an absolute knowledge of the truth of unqualified underselling/lowest price claims.

12.1 Advertisers must have proper substantiation for all claims prior to dissemination.

12.2 Unqualified underselling claims must be avoided.

12.3 Advertisers can lessen the potential for consumer confusion by appropriate qualifications to any underselling/lowest price claim, such as by stating, if truthful, that the advertiser will meet or beat a lower price. In such circumstances, the advertiser must comply with Section 13.

13. Price equaling, meeting competitors’ prices
13.1 Advertisements which set out company policy of matching or bettering competitors' prices may be used, provided that:

13.1.1 The offer is made in good faith;

13.1.2 The offer clearly and conspicuously discloses fully any material and significant conditions which apply including, if applicable, what evidence a consumer must present to take advantage of the offer; and

13.1.3 The terms of the offer are not unrealistic or unreasonable for the consumer.
13.2 Advertisers should be aware that such claims, unless appropriately qualified, may create an implicit obligation to adjust prices generally for specific products or services. This may be the case where the advertiser's price for a product or service is not as low as or lower than a competitor's price.

14. “Free”

14.1 An advertiser may use the word “free” in advertising whenever the advertiser is offering an unconditional gift. If receipt of the “free” product or service is conditional on a purchase:

14.1.1 The advertiser must clearly and conspicuously disclose this condition with the “free” offer (not simply by placing an asterisk or symbol next to “free” and referring to the condition(s) in a footnote); and

14.1.2 The advertiser must not have increased the normal price of the product or service to be purchased nor reduced its quantity or quality.

14.2 The “free” offer should be temporary; otherwise, consumers may view it as a continuous combination offer, no part of which is free. Thus, where it would otherwise confuse consumers, a product or service must not be advertised with a “free” offer in a trade area for more than six (6) months in any 12 month period. At least thirty (30) days must elapse before another such offer is promoted in the same trade area.

14.3 In a negotiated sale, no “free” offer of a product or service should be made where it would likely mislead consumers, such as where:

14.3.1 The product or service to be purchased usually is sold at a price arrived through bargaining, rather than at a regular fixed price; or

14.3.2 There may be a regular price but other material factors such as quantity, quality or size are arrived at through bargaining.

14.4 Offers of “free” products or services which do not meet the provisions of this section may not be corrected by the substitution of such similar words such as “gift,” “given without charge,” “bonus,” “complimentary” or other words which can convey the impression to the consumer that a product or service is “free.”

14.5 Because the consumer continually searches for the best buy and regards the offer of “free” products or services to be a special bargain, all such offers must be made with extreme care so as to avoid any possibility that consumers will be misled or deceived. Representative language frequently used in such offers includes:

- “Free”
- “Buy 1-Get-1 Free”
• “2-for-1 Sale”
• “50% off with Purchase of Two”
• “$1 Sale”
• “1/2 Off”
• “Gift with Purchase”

Literally, of course, the advertiser is not offering anything “free” (for example, an unconditional gift), or 1/2 free or 2 for 1 when making such an offer, since the consumer is required to purchase a product or service in order to receive the “free” or “2 for 1” item.

14.6 Whenever such an offer is made advertisers must make clear at the outset all the terms and conditions of the offer.

15. Trade-in Allowances

15.1 Any advertised trade-in allowance must be an amount deducted from the advertiser’s current selling price without a trade in. That selling price must be clearly and conspicuously disclosed in the advertisement.

15.2 Advertisers should also avoid offering a fixed or arbitrary trade-in allowance regardless of the size, type, age, condition or value of the product traded in. Such an offer may be misleading if it would disguise the true retail price or create the false impression that a reduced price or a special price is obtainable only by such trade in.

16. Credit

16.1 Whenever a specific credit term is advertised, it must actually be available to all consumers. The federal Truth in Lending Act, as well as applicable state and provincial laws set requirements for clearly and conspicuously disclosing credit terms in the advertisement.

16.2 In the United States, advertisers should carefully review the Truth in Lending Act and Regulation Z, which implements the Act, as well as Regulation M, which covers consumer leasing. They contain important provisions that affect any advertising to aid or promote the extension of consumer credit.

16.3 Open-end credit in the U.S.

16.3.1 The requirements for advertising open-end credit under Regulation Z are complex. Therefore, advertisers are advised to consult Section 226.16 of the Regulation (12 CFR 1026.16) for details, including prescribed terminology
and information that must be disclosed. Examples of open-end credit include credit cards and other forms of “revolving credit.”

16.4 Closed-end credit in the U.S.

16.4.1 Advertisers are advised to consult Section 226.24 (12 CFR 1026.24) of Regulation Z for details of closed-end credit advertising. Examples of closed-end credit include installment loans and many automobile loans.

16.4.2 If an advertisement of closed-end credit contains any of the following triggering terms, three specific disclosures must also be stated, clearly and conspicuously.

16.4.3 The triggering terms are:

- The amount or percentage of any down payment;
- The number of payments or period of repayment;
- The amount of any payment, expressed either as a percentage or as a dollar amount; or
- The amount of any finance charge.

16.4.4 The three disclosures are:

- The amount or percentage of the down payment;
- The terms of repayment; and
- The “annual percentage rate,” using that term spelled out in full or the abbreviation “APR.” If the rate may be increased after consummation of the credit transaction, that fact must be disclosed.

16.5 Fixed credit, lines of credit and credit cards in Canada

16.5.1 In Canada, federal requirements regarding advertising credit vary depending on the product. Advertisers should consult the Cost of Borrowing Regulations set out in the Trust and Loan Companies Act, Bank Act and Cooperative Credit Associations Act for specific requirements concerning disclosure, terminology and layout conditions. These regulations cover forms of closed-end credit, such as fixed credit loans for an automobile, as well as open-end credit, including credit cards and lines of credit.

16.6 “Easy credit”

16.6.1 The terms “easy credit,” “easy credit terms,” “liberal credit terms,” “easy pay plan” and other similar phrases must be used only when:

Consumer credit is also extended to consumers whose ability to pay or credit rating is below typical standards of credit worthiness;
The finance charges and annual percentage rate do not appreciably exceed those charged to consumers who meet generally accepted standards of credit worthiness; and

The consumer is dealt with fairly on all conditions of the transaction, including the amount of the down payment, the period of repayment and the consequences of a delayed or missed payment.

16.7 “No credit rejected”

16.7.1 The words “no credit rejected,” “guaranteed financing,” “all credit applications accepted” or words of similar import can imply that consumer credit will be extended to anyone regardless of the consumer's credit worthiness or financial ability to pay. They must only be used when all credit requests are approved.

17. Extra Charges
Whenever an advertiser mentions a price in advertising, the existence of any unavoidable or extra charges must be clearly and conspicuously disclosed in immediate conjunction with the price. This would include, for example, charges for delivery, installation, assembly, excise tax and postage and handling.

18. Negative Option Plans, Continuity Plans and Automatic Shipments

18.1 Any advertisement for a product or service that includes an offer to sell or provide consumers with additional goods or services under a negative option feature must include a clear and conspicuous disclosure of all material terms of the negative option feature.

18.2 Such material terms include:

18.2.1 The existence of the negative option feature;

18.2.2 The cost of the additional goods or services;

18.2.3 How consumers can cancel and avoid future shipments and charges; and

18.2.4 How consumers can return items that they do not want.

18.3 Advertisers must avoid making disclosures that are vague, unnecessarily long or which contain contradictory language.
18.4 Advertisers must not interpret the consumer’s silence, failure to take an affirmative action to reject goods or services, or failure to cancel the agreement, as consent to enroll the consumer in the negative option feature. Instead, they must ensure that the consumer affirmatively consents (either online, over the phone, or in person) to the negative option feature before enrolling the consumer in the plan.

A “bait” offer is an alluring but insincere offer to sell a product or service which the advertiser does not intend to sell. Its purpose is to switch consumers from buying the advertised product or service, in order to sell something else, usually at a higher price or terms more advantageous to the advertiser.

19.1 No advertisement should be published unless it is a bona fide offer to sell the advertised product or service.

19.2 An advertiser must not create a false impression about the product or service being offered in order to lay the foundation for a later “switch” to other, more expensive products or services, or products or services of a lesser quality at the same price. Subsequent full disclosure by the advertiser of all other facts about the advertised product does not preclude the existence of a bait scheme.

19.3 An advertiser must not use nor permit the use of the following bait scheme practices:

19.3.1 Refusing to show or demonstrate the advertised product or service;

19.3.2 Disparaging, for example, the advertised product or service, its warranty, availability, services and parts and credit terms;

19.3.3 Selling the advertised product or service and thereafter “unselling” the customer to make a switch to another product or service;

19.3.4 Refusing to take orders for the advertised product or service or to deliver it within a reasonable time;

19.3.5 Demonstrating or showing a defective sample of the advertised product; or

19.3.6 Having a sales compensation plan designed to penalize sales people who sell the advertised product or service.

19.4 An advertiser must have on hand a sufficient quantity of advertised products to meet reasonably anticipated demands, unless the advertisement clearly and conspicuously discloses the number of items available or states “while supplies last.” If items are available only at certain locations, sites or stores, the specific
locations, sites or stores must be disclosed. The use of “rain checks” is not a justification for inadequate estimates of reasonably anticipated demand.

19.5 Actual sales of the advertised product or service may not preclude the existence of a bait scheme since this may be merely an attempt to create an aura of legitimacy. A key factor in determining the existence of a “bait” offer is the number of times the product or service was advertised compared to the number of actual sales.

20. Warranties or Guarantees

20.1 When using the term “warranty” or “guarantee” in product advertising, the advertiser must clearly and conspicuously include a statement that the complete details of the warranty can be seen prior to sale at the advertiser's location, viewed on the advertiser’s website or, in the case of mail or telephone order sales, made available free on written request.

20.2 Advertisers should only use “satisfaction guarantee,” “money back guarantee,” “free trial offer,” or similar representations in advertising if the seller or manufacturer refunds the full purchase price of the advertised product or service at the consumer's request.

20.3 When “satisfaction guarantee” or similar representations are used in advertising, any material limitations or conditions that apply to the guarantee must be clearly and conspicuously disclosed.

20.4 When advertising “lifetime” warranties or guarantees or similar representations, the advertisement must clearly and conspicuously disclose its intended meaning of the term “lifetime.”

20.5 Sellers or manufacturers should advertise that a product or service is warranted or guaranteed only if the seller or manufacturer promptly and fully performs its obligations under the warranty or guarantee.

21. Layout and Illustrations

21.1 The composition and layout of advertisements should be such as to minimize the possibility of misunderstanding by the reader.

21.1.1 For example, prices, illustrations or descriptions must not be so placed or displayed in an advertisement as to give the impression that the price or terms of featured products or services apply to other products or services in the advertisement, when such is not the case.
22. Asterisks
An asterisk may be used to impart additional information about a word or term which is not in itself inherently deceptive. The asterisk or other reference symbol must not be used as a means of contradicting or substantially changing the meaning of any advertising statement. Information referenced by asterisks must be clearly and conspicuously disclosed.

23. Abbreviations
   23.1 Commonly known abbreviations may be used in advertising. However, abbreviations not generally known or understood by the average consumer must be avoided.

   23.1.1 For example, “deliv. extra” is understood to mean that there is an extra charge for delivery of the product or service. “New cellular telephone (smartphone), $150 W.T.,” is not generally understood to mean “with trade-in.”

24. Use or Condition Disclosures
   24.1 A product previously used by a consumer must be clearly and conspicuously described as such, for example, “used,” “secondhand,” “pre-owned,” “repossessed,” “rebuilt,” “reconditioned,” “refurbished” and “restored.”

   24.1.1 The term “rebuilt” should only be used to describe products that have been completely disassembled, reconstructed, repaired and refinished, including replacement of parts.

   24.1.2 The term “reconditioned” should only be used to describe products that have received such repairs, adjustments or finishing as were necessary to put the product in satisfactory condition without rebuilding.

   24.1.3 The terms “refurbished” or “restored” should only be used to describe products that have been restored to original working condition and/or appearance and, as applicable, meet all factory specifications.

   24.1.4 If the product is defective or rejected by the manufacturer because it falls below specifications, it must be clearly and conspicuously advertised by terms such as “second,” “irregular,” or “imperfect.”

25. “As is”
Advertisers must clearly and conspicuously disclose in any advertising and on the bill of sale when products are offered on an “as is” basis, for example, in the condition in which they are displayed at the place of sale. Such advertising and bill of sale should also clearly and conspicuously disclose, as appropriate, that the product is offered with no warranty. An advertiser may also describe the condition of the product if so desired.

26. “Discontinued”
Advertisers must not describe products as “discontinued,” “discontinued model,” or by using words of similar import unless the manufacturer has, in fact, discontinued its manufacture of the product, or the retail advertiser will discontinue offering it entirely after clearance of existing inventories. If the discontinuance is only by the retailer, the advertising must clearly and conspicuously disclose that fact, for example, “we are discontinuing stocking these items.”

27. Superiority Claims-Comparatives-Disparagement

27.1 Advertisers must not deceptively or falsely disparage a competitor or competing products or services in their advertising. Truthful comparisons using factual information may help consumers make informed buying decisions, provided:

27.1.1 All representations are consistent with the general rules and prohibitions against false and deceptive advertising;

27.1.2 All comparisons that claim or imply, unqualifiedly, superiority to competitive products or services are not based on a selected or limited list of characteristics in which the advertiser excels while ignoring those in which the competitor excels;

27.1.3 The advertisement clearly and conspicuously discloses any material or significant limitations of the comparison; and

27.1.4 The advertiser can substantiate all claims made.

28. Objective Superlative Claims
Superlative statements in advertisements about the tangible qualities and performance values of a product or service are objective claims for which the advertiser must possess substantiation as they can be based upon accepted standards or tests. As statements of fact, such claims, like “#1 in new car sales in the city,” can be proved or disproved.

29. Subjective Puffery Claims
29.1 Expressions of opinion or personal evaluation of the intangible qualities of a product or service are likely to be considered puffery. Such claims are not subject to the test of truth and accuracy and would not need substantiation.

29.2 Puffery may include statements such as “best food in the world” and “we try harder” as well as other individual opinions, statements of corporate pride, exaggerations, blustering and boasting statements upon which no reasonable buyer would be justified in relying. Puffery also includes general claims of superiority over comparable products that are so vague that it can be understood as nothing more than a mere expression of opinion.

29.3 Ultimately, whether any particular statement or claim is puffery will depend upon the context in which it is used in the advertisement.

30. Testimonials and Endorsements

30.1 In general, advertising which uses testimonials or endorsements is likely to mislead or confuse if:

30.1.1 It is not genuine and does not actually represent the current opinion of the endorser;

30.1.2 The actual wording of the testimonial or endorsement has been altered in such a way as to change its overall meaning and impact;

30.1.3 It contains representations or statements which would be misleading if made directly by the advertiser;

30.1.4 While literally true, it creates deceptive implications;

30.1.5 The endorser has not been a bona fide user of the endorsed product or service at the time when the endorsement was given, where the advertiser represents that the endorser uses the product or service;

30.1.6 It is not clearly stated that the endorser, associated with some well-known and highly-regarded institution, is speaking only in a personal capacity, and not on behalf of such an institution, if such be the fact;

30.1.7 The advertising makes broad claims as to the endorsements or approval by indefinitely large or vague groups, for example, “the homeowners of America,” “the doctors of America;”

30.1.8 The endorser has a financial interest in the company whose product or service is endorsed and this is not made known in the advertisement;

30.1.9 An expert endorser does not possess the qualifications that give the endorser the expertise represented in the advertisement;
30.1.10 The advertiser represents, directly or by implication, that the endorser is an “actual consumer” when such is not the case and the advertisement fails to clearly and conspicuously disclose that fact;

30.1.11 A consumer’s experience represented in an advertisement is not the typical experience of those using the product or service, unless the advertisement clearly and conspicuously discloses what the expected results will be;

30.1.12 Endorsements placed by advertisers in online blogs or on other third-party websites do not clearly and conspicuously disclose the connection to the advertiser and comply with each of the provisions in this Code; and

30.1.13 Advertisers compensate consumers for leaving feedback on third-party online blogs or websites but fail to ensure that consumers disclose such facts on those blogs or websites.

In the U.S., advertisers should consult the Federal Trade Commission Guides on Testimonials and Endorsements for detailed guidance. In Canada, advertisers should review the Competition Bureau’s publication on Untrue, Misleading or Unauthorized Use of Tests and Testimonials for specific guidance.

31. Rebates

31.1 The terms “rebate,” “cash rebate,” or similar terms may be used only when:

31.1.1 Payment of money will be made by the retailer or manufacturer to a consumer after the sale; and

31.1.2 The advertising makes clear who is making the payment.

31.2 In addition, advertisements that include rebate promotions must clearly and conspicuously state the before rebate cost, as well as the amount of the rebate. Rebate promotions also must clearly and conspicuously disclose any additional terms and conditions that consumers need to know, including the key terms of any purchase requirements, additional fees, and when consumers can expect to receive their rebate.

32. Business Name or Trade Style

32.1 Business names or trade styles must not contain words that would mislead consumers either directly or by implication.
32.1.1 For example, a business name or trade style can use the words “factory” or “manufacturer” where:

- The advertiser actually owns and operates or directly and completely controls the manufacturing facility that produces the advertised products; or
- The term would not likely mislead consumers in the specific context in which it is used.

32.1.2 Similarly, a business name can use the term “wholesale” or “wholesaler” where:

- The advertiser actually owns and operates or directly and completely controls a wholesale or distribution facility which primarily sells products to retailers for resale; or
- The term would not likely mislead consumers in the specific context in which it is used.

33. Contests and Games of Chance or Skill

33.1 If contests are used, the advertiser must publish clear, complete and concise rules and provide competent impartial judges to determine the winners.

33.2 Contests, drawings or other games of chance that involve the three elements of prize, chance and consideration constitute lotteries, in violation of U.S. federal and state statutes and must not be conducted. Canadian law contains similar prohibitions.

34. Claimed Results

Claims relating to performance, energy savings, safety, efficacy or results for a product or service should be based on recent and competent testing or other objective data.

35. Unassembled Products

When an advertised product requires partial or complete assembly by the consumer, the advertising must clearly and conspicuously disclose that fact, by using words such as “unassembled” or “partial assembly required.”

36. Environmental Benefit Claims

36.1 General Principles
36.1 Advertisers should not make broad, unqualified general environmental benefit claims like “green” or “eco-friendly.”

36.1.1 Advertisers should not make broad, unqualified general environmental benefit claims like “green” or “eco-friendly.”

36.1.2 Advertisers must qualify general claims with specific environmental benefits.

36.1.3 Advertisers must possess competent and reliable evidence (often scientific evidence) to support all environmental benefit claims. Qualifications for any claim must be clear, conspicuous and understandable.

36.1.4 When an advertiser qualifies a general claim with a specific benefit, the benefit should be significant. Advertisers must not highlight small or unimportant benefits.

36.1.5 Unless clear from the context, any environmental claim must specify clearly and conspicuously whether the claim applies to the product, the product’s packaging, a service or just to a portion of the product, package or service.

36.2 Degradable

36.2.1 Advertisers may make an unqualified degradable claim if they have competent and reliable scientific evidence that the entire product or package will completely break down and return to nature within a reasonably short period of time after customary disposal. For items entering the solid waste stream, advertisers should substantiate that the items completely decompose within one year after customary disposal.

36.2.2 Advertisers must qualify, clearly and conspicuously, degradable claims to the extent necessary to avoid confusion about the product’s or package’s ability to degrade in the environment where it is customarily disposed or the rate and extent of degradation.

36.3 Recycled content

36.3.1 Advertisers must not claim that a product or package is recyclable unless it can be collected, separated or otherwise recovered from the waste stream through an established recycling program for use or reuse in manufacturing or assembling another product.

36.3.2 Advertisers must clearly and conspicuously qualify such claims where necessary, so as to not mislead or confuse consumers as to the availability of recycling facilities in the trade area.

36.3.3 Advertisers must not claim that a product or package contains recycled content unless it is composed of materials that have been
recovered or otherwise diverted from the waste stream, either during the manufacturing process or after consumer use.

36.3.4 Advertisers must clearly and conspicuously qualify claims for any products or packages made partly from recycled material, for example, made from 30% recycled material.

36.4 Non-toxic

36.4.1 Non-toxic claims likely convey that a product, package or service is non-toxic both for humans and for the environment generally. Thus advertisers must either possess competent and reliable scientific evidence that this is the case or clearly and conspicuously qualify the claim to avoid confusion.

36.5 Certifications and Approvals

36.5.1 An advertiser’s unqualified use of environmental certifications and seals of approval may imply to consumers that the certificate or seal was awarded by an independent third party. If that certification or seal was not, in fact, awarded by an independent third party, the advertisement must clearly and conspicuously disclose that fact.

36.5.2 In addition, environmental certifications and seals that do not clearly convey the basis for the certification are likely to convey general environmental benefits. Because claims making general environmental benefits should not be used (see section 36.1) advertisers must clearly and conspicuously disclose the specific and limited benefits to which the certificate or seal applies.


37. “Made in USA” Claims

37.1 “Made in USA” and similar terms used to describe the origin of a product must be truthful and substantiated.

37.2 An advertiser must not express or imply that a product or product line is exclusively “Made in USA” unless all or virtually all of the product is made in the U.S. 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.
37.3 Advertisers can refer to products that are manufactured with foreign components as “Assembled in USA,” if the product's principal assembly and last substantial transformation was completed in the U.S.

37.4 Qualified “Made in USA” claims, for example, “60% U.S. content,” “Made in U.S. of U.S. and imported parts,” are appropriate for products that are manufactured or have been substantially assembled domestically. However, advertisers must avoid making these claims if a significant amount of assembly or material of the product was not completed in the U.S. Qualified “Made in USA” claims, like unqualified claims, must be truthful and substantiated.

38. “Product of Canada” and “Made in Canada” Claims
Advertisers claiming a good to be a “Product of Canada” or “Made in Canada” must meet certain standards:

- If an advertiser makes a “Product of Canada” claim, the good must be composed of at least 98% Canadian content; and
- If an advertiser makes a “Made in Canada” claim, the good must be at least 51% Canadian content and the advertisement must include a qualifying statement indicating that the product contains imported content.

In both cases, the last substantial transformation of the product must have occurred in Canada.

39. Native Advertising (Deceptively Formatted Advertisements)
Native Advertisements are created to resemble the design, style, and functionality of the media in which they are disseminated, which could make it difficult to distinguish between advertising and non-commercial content. Native ads may appear on a page next to non-advertising content on news or content aggregator sites, social media platforms, or messaging apps. In other instances, native ads are embedded in entertainment programming, such as professionally produced and user-generated videos on social media. In still other instances native ads appear in email, infographics, images, animations, and video games.

39.1 Advertisers must not mislead consumers as to the nature or source of native ads they place, or cause to be placed, in any medium, including social media. This includes native ads or links to native ads that appear to be news or public interest stories, but are actually materials promoting products or services. The more a native ad is similar in format and topic to the non-commercial content on a site, the more likely it is to mislead a consumer and require a disclosure to prevent deception.
39.1.1 In instances where it is not otherwise apparent that the native ad is a paid commercial message, the advertiser must ensure that such material promoting its products and services is clearly and conspicuously\(^2\) labeled as a “paid ad,” “paid advertisement,” “sponsored advertising content” or other similar words that state expressly that the material is an advertisement.

39.1.2 In other circumstances, where an advertiser sponsors content that does not promote its own product or service (e.g., a running shoe company sponsors an article on vacation spots for fitness enthusiasts that does not discuss its product), it should consider including a disclosure such as “sponsored by ___” or “brought to you by ___” to avoid confusion.

39.2 Statements in NATIVE ADS about the performance, efficacy, price, desirability or superiority of the advertiser’s product or service will likely be considered content promoting that product or service.

39.3 Advertisers should maintain disclosures when native ads are republished by others in non-paid search results, social media, email, or other media.

\(^1\)Comparative price advertising compares alternative brands on price, and identifies the alternative brand by name, illustration or other distinctive information. It is subject to the same standards of truthfulness and substantiation as any other price claim made for a single product.

\(^2\)Where disclosures are required to prevent an advertisement from being misleading, the disclosure must be clear and conspicuous. The Federal Trade Commission (FTC) has provided guidance on making disclosures in traditional media and online at [business.ftc.gov/documents/bus41-dot-com-disclosures-information-about-online-advertising](https://business.ftc.gov/documents/bus41-dot-com-disclosures-information-about-online-advertising). It is the responsibility of the advertiser to ensure that disclosures are noticed and understood by consumers.

\(^3\)To be clear and conspicuous, such disclosures must, at a minimum, be prominent and visible enough for consumers to readily notice them.
THE ADVERTISING INDUSTRY’S PROCESS OF VOLUNTARY SELF-REGULATION

Policies and Procedures by
Better Business Bureaus (BBB) National Programs

Procedures for:

The National Advertising Division
(NAD)

The Children’s Advertising Review Unit
(CARU)

The National Advertising Review Board
(NARB)
1.1 Definitions

A. The term “national advertising” shall include any paid commercial message, in any medium (including labeling), if it has the purpose of inducing a sale or other commercial transaction or persuading the audience of the value or usefulness of a company, product or service; if it is disseminated nationally or to a substantial portion of the United States, or is test market advertising prepared for national campaigns; and if the content is controlled by the advertiser.

B. The term “advertiser” shall mean any person or other legal entity that engages in “national advertising.”

C. The term “advertising agency” shall mean any organization engaged in the creation and/or placement of “national advertising.”

D. The term “public or non-industry member” shall mean any person who has a reputation for achievements in the public interest.

2.1 NAD/CARU

A. Function and Policies
The National Advertising Division (NAD), and the Children’s Advertising Review Unit (CARU) of the Better Business Bureaus (BBB) National Programs shall be responsible for receiving or initiating, evaluating, investigating, analyzing (in conjunction with outside experts, if warranted, and upon notice to the parties), and holding negotiations with an advertiser, and resolving complaints or questions from any source involving the truth or accuracy of national advertising, or consistency with CARU’s Self-Regulatory Program for Children’s Advertising.

NAD, CARU and the National Advertising Review Board (NARB) are investigative or appellate units of the advertising industry’s system of voluntary self-regulation. Policies and procedures are established by BBB National Programs. A decision by NAD/CARU/NARB does not constitute a finding that the law has been violated. An advertiser’s voluntary participation in the self-regulatory process is not an admission and shall not be interpreted to constitute an admission by the advertiser or a finding that the law has been violated.

Any questions or concerns related to a pending case at NAD or CARU should be directed to the NAD or CARU Vice President. Questions or concerns regarding closed NAD or CARU cases should be directed to the BBB National Programs Executive Vice President, Policy and Program Development.

B. Advertising Monitoring
NAD and CARU are charged with independent responsibility for monitoring and reviewing national advertising for truthfulness, accuracy and, in the case of ARU, consistency with CARU’s Self-Regulatory Program for Children’s Advertising.

C. Case Reports
The BBB National Programs shall publish at least ten times each year the Case Reports, which will include the final case decisions of NAD, CARU and NARB, and summaries of any other matters concluded since the previous issue. Each final NAD, CARU and NARB case decision shall identify the advertiser, challenger, advertising agency, product or service, and subject matter reviewed. It shall also include a summary of each party’s position, NAD/CARU/NARB’s decision and its rationale, and a concise Advertiser’s Statement, if any (See Section 2.9).

CARU shall publish in the Case Reports a summary of CARU’s actions, other than formal cases, during the preceding month (Activity Report). Included in this Activity Report shall be the following:

(1) Inquiries—summaries of informal inquiries under CARU’s Expedited Procedures (see Section 2.13 below);

(2) Pre-Screening/Submissions—summaries of story-boards or videotapes of proposed advertising submitted to CARU for prescreening.

D. Guidance to the Public
From time to time, after consultation with the General Counsel:
NAD or CARU may inform the public, through the *Case Reports* and other media, of trends, principles and interpretations derived from previously published case decisions.

After consulting with the General Counsel, CARU may also inform the public of new interpretations of its guidelines that believes would provide appropriate advance notice of the application of CARU guidelines to existing industry practices maintained by multiple advertisers. Prior to publication of any such interpretation, CARU will prepare appropriate explanatory materials for the BBB National Programs and may publish the interpretation in the *Case Reports* and other media if, after 30 days, BBB National Programs has not scheduled a meeting to consider the matter. If such a meeting is scheduled, CARU may publish the interpretation after BBB National Programs’ consideration unless BBB National Programs revises CARU’s *Self-Regulatory Program for Children’s Advertising* in a manner that moots the interpretation.

### E. Confidentiality of NAD/CARU/NARB Proceedings

1. NAD, CARU, and NARB proceedings are confidential except for:
   - publication of final case decisions and summaries of other actions, as provided by these Procedures;
   - NAD, CARU, and NARB press releases announcing final case decisions and summaries;
   - referrals by NAD, CARU, or NARB to government agencies as provided by these Procedures; and
   - actions taken by NAD or CARU under Sections 2.1(F)(2) and (F)(3) of these Procedures.

2. Published NAD, CARU, and NARB decisions are the only permanent records required to be kept as to the basis of an inquiry, the issues defined, the facts and data presented, and the conclusions reached by NAD/CARU/NARB.

3. By participating in a proceeding, parties agree:
   - to keep the proceedings confidential throughout the review process;
   - not to subpoena any witnesses or documents regarding the review proceeding from NAD, CARU, NARB, BBB National Programs or the BBB National Programs in any future court or other proceeding (except for the purposes of authentication of a final, published case decision); and
   - to pay attorney’s fees and costs if a subpoena is attempted in violations of Section (b) above

### F. Parties’ Agreement/Referrals to Law Enforcement Agencies

1. It is the policy of NAD, CARU, NARB, and BBB National Programs not to endorse any company, product, or service. Any decision finding that advertising has been substantiated should not be construed as an endorsement. Similarly, an advertiser’s voluntary modification of advertising, in cooperation with NAD/CARU/NARB self-regulatory efforts, is not to be construed as an admission of any impropriety.

2. By participating in a NAD, CARU, or NARB proceeding, parties agree:
(a) not to issue a press release regarding any decisions issued; and/or

(b) not to mischaracterize any decision issued or use and/or disseminate such decision for advertising and/or promotional purposes. NAD/CARU/NARB may take whatever action it deems appropriate if a party violates this provision, including the issuance of a public statement for clarification purposes.

(3) When NAD or CARU commences a review pursuant to Section 2.2 of these procedures, and the advertiser elects not to participate in the self-regulatory process, NAD/CARU shall prepare a review of the facts with relevant exhibits and forward them to the appropriate federal or state law enforcement agency. Reports of such referrals shall be included in the Case Reports.

G. Academic and Other Expert Advisors CARU may establish a panel of academic and other experts as needed from which CARU may obtain advice pertinent to advertising, cognitive ability, nutrition and other matters, and on the application of CARU’s Self-Regulatory Program for Children’s Advertising.

2.2 Filing a Complaint

A. Any person or legal entity may submit to NAD/CARU any complaint regarding national advertising, regardless of whether it is addressed to consumers, to professionals or to business entities. Likewise, NAD/CARU may initiate a proceeding as part of their monitoring responsibility pursuant to Section 2.1(B) of these Procedures. All complaints (except those submitted by consumers), including any supporting documentation, must be submitted in duplicate hard copy and in an electronic format (including evidentiary exhibits when possible.) Challengers should limit the length of their submissions to 20 typewritten pages (12 point type) excluding evidentiary exhibits, and must identify all express and implied claims to be considered by NAD/CARU. A challenger may further expedite the review of the contested advertising by waiving its right to reply (see Section 2.6(B)) or by requesting an “Expedited Review” pursuant to Section 2.11 of these Proceedings.

(1) **BBB National Partner Filing Fees**

   Competitive challenges before NAD by BBB National Partners shall be filed together with a check, made payable to BBB National Programs, the in the amount of $17,500 for companies that have been National Partners of BBB National Programs (or formerly the Council of Better Business Bureaus) for one year or less and $ 15,000 for companies that have been BBB National Programs, or formerly the Council of Better Business Bureaus for more than one year.

(2) **Non-National Partner Filing Fees**

   Competitive challenges before NAD by companies that are not National Partners shall be filed together with a check, made payable to BBB National Programs in the amount of:
   (a) $20,000, if the challenger’s gross annual revenue is less than $1 billion; (b) $25,000, if the challenger’s gross annual revenue is $1 billion or more.

   The filing fee shall be accompanied by a statement indicating the category into which the challenger’s revenues fall. In the case of a challenge filed by a subsidiary, the filing fee is determined by the gross annual revenue of the parent company.

(3) **CARU Filing Fees**

   Competitive challenges before CARU shall be filed together with a check made payable BBB National Programs, in the amount of $2,500 (for National Partners) or $6,000 (for non-National Partners or CARU Supporters).

(4) The Executive Vice President, Policy and Program Development of BBB National Programs shall have the discretion to waive or reduce the fee for any challenger who can demonstrate economic hardship. If an NAD or CARU case is administratively closed for any reason other than consent of the parties pursuant to Section 2.2(E), fifty percent of the filing fee will be refunded.
B. Upon receipt of any complaint, NAD/CARU shall promptly acknowledge receipt of the complaint and, in addition, shall take the following actions:

(1) If, at the commencement or during the course of an advertising review proceeding, NAD/CARU concludes that the advertising claims complained of are: (a) not national in character; (b) the subject of pending litigation or an order by a court; (c) the subject of a federal government agency consent decree or order; (d) permanently withdrawn from use prior to the date of the complaint and NAD/CARU receives the advertiser’s assurance, in writing, that the representation(s) at issue will not be used by the advertiser in any future advertising for the product or service; (e) of such technical character that NAD/CARU could not conduct a meaningful analysis of the issues; or (f) without sufficient merit to warrant the expenditure of NAD/CARU’s resources, NAD/CARU shall advise the challenger that the complaint is not, or is no longer, appropriate for formal investigation in this forum. Upon making such a determination, NAD/CARU shall advise the challenger that a case will not be opened, or in the event that an advertising review proceeding has already been commenced, shall administratively close the case file and report this action in the next issue of the Case Reports. When it can, NAD/CARU shall provide the challenger with the name and address of any agency or group with jurisdiction over the complaint.

(2) If the complaint relates to matters other than the truth or accuracy of the advertising, or consistency with CARU’s Self-Regulatory Program for Children’s Advertising, NAD/CARU shall so advise the challenger, as provided above, and where a significant national advertising issue is raised, shall forward a copy of the complaint to the BBB National Programs Executive Vice President, Policy and Program Development who, in consultation with the NARB Chair, shall consider whether the complaint is appropriate for a consultive panel.

(3) If, in its discretion, NAD/CARU determines that a complaint is too broad or includes too many issues or claims to make resolution within the time constraints prescribed by these Procedures feasible, NAD/CARU may request that the challenger limit the issues or claims to be considered in the review proceeding, or, in the alternative, advise the challenger that the matter will require an extended schedule for review.

(4) If a complaint challenges advertising for more than one product (or product line), NAD/CARU may return the complaint to the challenger and request that separate complaints be submitted for each of the advertised products.

(5) If the complaint relates to the truth or accuracy of a national advertisement, or consistency with CARU’s Self-Regulatory Program for Children’s Advertising, NAD/CARU shall promptly forward the complaint by facsimile, overnight or electronic mail to the advertiser for its response.

(6) Complaints regarding specific language in an advertisement, or on product packaging or labels, when that language is mandated or expressly approved by federal law or regulation; political and issue advertising, and questions of taste and morality (unless raising questions under CARU’s Self-Regulatory Program for Children’s Advertising), are not within NAD/CARU’s mandate. If the complaint, in part, relates to matters other than the truth and accuracy of the advertising, or consistency with CARU’s Self-Regulatory Program for Children’s Advertising, NAD/CARU shall so advise the challenger.

(7) NAD/CARU reserves the right to refuse to open or to continue to handle a case where a party to an NAD/CARU proceeding publicizes, or otherwise announces, to third parties not directly related to the case the fact that specific advertising will be, is being, or
has been, referred to NAD/CARU for resolution. The purpose of this right of refusal is to maintain a professional, unbiased atmosphere in which NAD/CARU can affect a timely and lasting resolution to a case in the spirit of furthering voluntary self regulation of advertising and the voluntary cooperation of the parties involved.

C. Complaints originating with NAD shall be considered only after the General Counsel of the NARB has reviewed the proposed complaint and has determined that there is a sufficient basis to proceed. Complaints originating with CARU that would apply a new interpretation or application of CARU’s Self-Regulatory Program for Children’s Advertising shall be considered only after the General Counsel of NARB has reviewed the proposed interpretation or application and has determined that there is a sufficient basis to proceed.

D. In all cases, the identity of the challenger must be disclosed to NAD/CARU who shall advise the advertiser of the identity of the challenger.

E. NAD/CARU will administratively close a case if, prior to NAD/CARU providing a copy of its decision to the advertiser, the challenger and advertiser consent in writing to closure of the case. Cases closed based on consent of the parties will be reported in the NAD/CARU Case Reports as “Administratively Closed on Consent of Parties.” If a case is administratively closed based on consent of the parties, NAD/CARU shall not be precluded from filing a complaint based on the same or similar claims as part of NAD/CARU’s monitoring responsibility pursuant to Section 2.1(B).

2.3 Parties to NAD/CARU/NARB Proceedings

A. Except as provided in Section 2.3(B), the parties to the proceeding are (i) NAD/CARU acting in the public interest, (ii) the advertiser acting in its own interest, and (iii) the challenger(s), whose respective rights and obligations in an NAD/CARU/NARB proceeding are defined in Sections 2.2, 2.4, 2.5, 2.6, 2.7, 2.8, 2.9, 2.10, 2.11, 2.12, 3.1, 3.2, 3.3, 3.5, and 4.1 of these Procedures.

B. NAD/CARU shall not be a party to an NARB proceeding except in cases where NAD/CARU filed the complaint as part of its monitoring responsibility. When NAD/CARU is not a party to an NARB proceeding, NAD/CARU representatives may attend the NARB hearing to answer questions from the panel when requested by the NARB Panel Chair.

2.4 Information in NAD/CARU Proceedings

A. All information submitted to NAD/CARU by the challenger and the advertiser, pursuant to Sections 2.4 through 2.11 of these Procedures shall be submitted in duplicate hard copy and in an electronic format (including evidentiary exhibits when possible). Upon receipt of a filing by any party, NAD/CARU shall forward a copy to the other party by messenger, facsimile, electronic or overnight mail. All transmittals by NAD/CARU during the course of an advertising review proceeding shall be paid for by the challenger, unless the challenger is a consumer or otherwise demonstrates economic hardship, in which case all transmittals shall be paid for by NAD/CARU.

B. Time periods for all submissions to NAD, CARU and NARB shall commence on and include the first day of business following the date of delivery of the triggering document and shall not include Saturdays, Sundays or Federal holidays.

C. NAD/CARU shall not consider any data submitted by a challenger that has not been made available to the advertiser, and any materials submitted by a challenger on condition that they not be shown to the advertiser shall promptly be returned. In the case of studies, tests, polls and other forms of research, the data provided should be sufficiently complete to permit expert evaluation of such study, test, poll or other research. NAD/CARU shall be the sole judge of whether the data are sufficiently complete to permit expert evaluation. If a party initially submits incomplete records of data that is then in its possession, and later seeks to supplement the record, NAD/CARU may decline to accept the additional data if it determines that the party’s failure to submit complete information in the first instance was without reasonable justification.

D. An advertiser may submit trade secrets and/or proprietary information or data (excluding any consumer perception communications data regarding the advertising in question) to
NAD/CARU with the request that such data not be made available to the challenger, provided it shall:

1. clearly identify those portions of the submission that it is requesting be kept confidential in the copy submitted for NAD/CARU’s review;

2. redact any confidential portions from the copy submitted by the advertiser to the challenger;

3. provide NAD with both a redacted and unredacted copy of the submission;

4. provide a written statement setting forth the basis for the request for confidentiality;

5. affirm that the information for which confidentiality is claimed is not publicly available and consists of trade secrets and/or proprietary information or data; and

6. attach as separate exhibit to NAD/CARU’s and the challenger’s copy of the submission a comprehensive summary of the proprietary information and data (including as much non-confidential information as possible about the methodology employed and the results obtained) and the principal arguments submitted by the advertiser in its rebuttal of the challenge. Failure of the advertiser to provide this information will be considered significant grounds for appeal of a decision by a challenger. (See Section 3.1)

E. Prior to the transfer of data to the advertiser or challenger, NAD/CARU shall obtain assurances that the recipients agree that the materials are provided exclusively for the purpose of furthering NAD/CARU’s inquiry; circulation should be restricted to persons directly involved in the inquiry, and recipients are required to honor a request at the completion of the inquiry that all copies be returned.

F. Whenever CARU has consulted an expert from the panel established under Section 2.1(G), or otherwise, in connection with the filing of a complaint, consideration of a complaint, or pre-screening, the expert’s opinion shall be in writing, or summarized in writing by CARU. The expert’s opinion and a brief description of the expert’s qualifications shall be made available to the parties promptly. The advertiser or challenger may respond to the expert’s opinion in any submission under Sections 2.5, 2.6, 2.7 or 2.8. When furnished to the advertiser or challenger, CARU shall inform the parties that there has been no final determination by CARU on any matter contained in the expert’s opinion.

2.5 The Advertiser’s Substantive Written Response

The advertiser shall, within 15 business days after receipt of the complaint, submit to both NAD/CARU and the challenger, one hard copy and one electronic format copy (including exhibits when possible), of its written response that provides substantiation for any advertising claims or representations challenged, any objections it may have to the proceedings on jurisdictional grounds, as defined in Sections 2.2(B)(1), together with copies of all advertising, in any medium, that is related to the campaign that includes the challenged advertising. Where the written response prepared by the advertiser for the challenger shall have any material designated as confidential redacted, it shall include, as a separate exhibit, a comprehensive summary of the redacted information in the manner set forth in Section 2.4(D) above. NAD is to receive both the redacted and unredacted versions of the written response as well as the separate comprehensive summary.

The advertiser may not include a counter challenge (i.e., a request that NAD/CARU review advertising claims made by the challenger) in its response. Such a request must be filed as a separate complaint as described in Section 2.2 of these Procedures. Advertisers should limit the length of their response to 20 typewritten pages (12 point type), excluding evidentiary exhibits. Advertiser responses addressed to the issue of NAD/CARU jurisdiction should be submitted as soon as possible after receipt of the complaint, but in any event, must be submitted no later than 15 business days after the advertiser receives the initial complaint. (See also Section 2.10 Failure to Respond.)
2.6 The Challenger’s Reply

A. Within ten business days of receipt of the advertiser’s response, the challenger may submit to both NAD/CARU and the advertiser, one hard copy and one electronic format copy (including exhibits when possible), of its reply, if any. Challengers should limit the length of their reply to 20 typewritten pages (12 point type), excluding evidentiary exhibits. If the challenger does not submit a reply, NAD/CARU shall proceed to decide the challenge upon the expiration of the challenger’s time to reply, subject to a request by NAD/CARU for additional comments or data under Section 2.8(A).

B. Expediting Review by Waiving the Reply
After the challenger has reviewed the advertiser’s first substantive written response; the challenger may notify NAD/CARU in writing that it elects to waive its right to add to the record, thereby expediting the proceeding. In the event that a challenger waives its right to reply, additional information from either party may be submitted only upon request from NAD/CARU and shall be treated in the same manner as requests for additional comments or data under Section 2.8(A) of these Procedures and any meetings with the parties will be held at the discretion of NAD/CARU pursuant to Section 2.8(B) of these Procedures.

2.7 Advertiser’s Final Response
Within ten business days after receipt of the challenger’s reply, the advertiser shall submit a response, if any, to both NAD/CARU and the challenger, one hard copy and one electronic format copy (including exhibits when possible). Advertisers should limit the length of their response to 20 typewritten pages (12 point type), excluding evidentiary exhibits.

2.8 Additional Information and Meetings with the Parties

A. In the event that NAD/CARU deems it necessary and requests further comments or data from an advertiser or challenger, the written response must be submitted within six business days of the request. NAD/CARU will immediately forward the additional response to the advertiser or challenger, who will be afforded six business days to submit its own response to the submission. Unless NAD/CARU requests further comments or data under this paragraph, no additional submissions will be accepted as part of the case record, and any unsolicited submissions received by NAD/CARU will be returned.

B. NAD/CARU, in its discretion, may, in addition to accepting written responses, participate in a meeting, either in person or via teleconference, with either or both parties. In the event that NAD/CARU participates in a meeting in which only one party participates, NAD/CARU shall notify the other party that a teleconference or meeting has been scheduled to take place. Where feasible, upon request, an advertiser shall be afforded the opportunity to schedule its meeting with NAD/CARU after the date of the challenger’s meeting. All meetings with the parties shall be held within 15 business days of NAD’s receipt of the Advertiser’s Final Response (Section 2.7).

C. Except upon request by NAD, as provided in Section 2.8(A) of these Procedures, no new evidence may be submitted for inclusion in the record at these meetings. Any non-requested information provided during a meeting that is not already in the submissions of the party (including visual demonstrations, summaries and other documentary evidence) will not be included in the record and will not be considered by NAD/CARU in making its decision or by an NARB Panel in reviewing NAD’s decision on appeal.

D. The period of time available for all communications, including meetings and written submissions, shall not exceed the time limits set forth in Sections 2.4 through 2.8 above except upon agreement of NAD/CARU and the parties.

2.9 Decision

A. The Final Case Decision
Within 20 business days of its receipt of the last document authorized by Sections 2.5 to 2.8 above, or, if the parties elect to meet with NAD/CARU, upon completion of the final meeting, NAD/CARU will formulate its decision on the truth and accuracy of the claims at issue, or consistency with CARU’s Self-Regulatory Program for Children’s Advertising; prepare the final case decision; provide a copy to the advertiser; and invite the advertiser to
add an Advertiser’s Statement within five business days of receipt.

B. Advertiser’s Statement
In the event that NAD/CARU decides some or all of the advertising claims at issue are not substantiated, the advertiser shall, within five business days of receipt of the decision, submit an Advertiser’s Statement that initially states whether the advertiser:

(1) agrees to comply with NAD/CARU’s recommendations, or

(2) will appeal all or part of NAD/CARU’s decision to the NARB as specified in Section 3.1.

The Advertiser’s Statement may include a concise supporting statement, no longer than one-half of one double-spaced typewritten page (12 point type), which does not reargue the merits of the case, mischaracterize the decision, or contain new facts. NAD/CARU reserves the right, following consultation with the advertiser, to edit for length or inappropriate material. In the event that the advertiser fails to submit an Advertiser’s Statement as required by this Section, NAD/CARU may refer the matter to an appropriate government agency for review and possible law enforcement action.

C. Publication of the Decision
Upon receipt of the final version of the Advertiser’s Statement, NAD/CARU shall provide copies of the final case decision to the advertiser and the challenger, by facsimile, electronic or overnight mail or messenger, and make the decision available to the public through press announcements and publication of the decision in the next Case Reports.

D. Case Report Headings
NAD/CARU’s decisions in the Case Reports shall be published under the headings:

- Advertising Substantiated
- Advertising Referred to NARB
- Advertising Modified or Discontinued
- Advertising Substantiated/Modified or Discontinued
- Administrative Closing
- Advertising Referred to Government Agency

E. Annual Summary
The first issue of the Case Reports each calendar year shall include a summary, prepared by NAD/CARU, which includes the number, source and disposition of all complaints received and cases published by NAD/CARU during the prior year.

2.10 Failure to Respond
A. If an advertiser fails to file a substantive written response within the period provided in Section 2.5 above, NAD/CARU shall release to the press and the public a “notice” summarizing the advertising claims challenged in the complaint, and noting the advertiser’s failure to substantively respond.

B. If the advertiser fails to file a substantive written response within an additional 15 business days, NAD/CARU may refer the file to the appropriate government agency and release information regarding the referral to the press, the public, and the media in which the advertising at issue has appeared, and shall report the referral in the next issue of the Case Reports.

C. If a challenger fails to file a reply within the time provided by Section 2.6, or an advertiser fails to file a response within the time provided in Section 2.7, the untimely document shall not be considered by NAD/CARU, or by any panel of the NARB.

2.11 Expedited Proceeding
A challenger may, with the consent of the advertiser, request that NAD/CARU engage in an expedited review of the contested advertising. This request must be made in the challenger’s initial challenge letter to NAD/CARU, which shall not exceed four double-spaced typewritten pages. Based on the complexity of the challenge, NAD/CARU shall determine whether the matter is appropriate for an expedited review. If a challenger’s request for an expedited proceeding is accepted, the challenger automatically waives its right to reply to the Advertiser’s substantive written response. The
advertiser will have 15 business days in which to respond to NAD/CARU’s inquiry. NAD/CARU will forward the advertiser’s response to the challenger. Thereafter, NAD/CARU may, in its discretion, request additional information from either party. NAD/CARU will issue a summary decision within 15 business days after the close of the evidentiary record. If NAD/CARU determines that the advertising should be modified or discontinued, the advertiser may then request a full review (with any additional submissions permitted by these Procedures) and a detailed decision. In such a case, the advertiser will be required to discontinue the challenged advertising until the final decision is issued. In an expedited proceeding, the parties’ rights to appeal (as described in Sections 3.1(A) and 3.1(B) of these Procedures) attach only in the event that the advertiser requests a full review and after a detailed decision is issued on the merits.

2.12 Requests for Product

When CARU’s monitoring identifies an advertisement which may raise concerns under the Guidelines, but only physical inspection of the product or packaging can determine whether such concerns exist, CARU will request a sample of the product from the advertiser. If the advertiser complies with CARU’s request within five business days, and inspection of the product reveals no questions of non-compliance with the Guidelines, no inquiry will be opened.

2.13 CARU Expedited Proceeding

Notwithstanding Sections 2.2 through 2.11 above, in instances of incorrect commercial placement or technical error, if the advertiser responds within five business days of receipt of an inquiry regarding non-compliance with CARU’s Guidelines and the advertising is substantiated, or if within an additional five business days any violation of the Guidelines is remedied, no formal case will be opened, and the results will be published in the CARU Activity Report.

3.1 Appeal

A. When an advertiser does not agree to comply with NAD/CARU’s decision on one or more issues involved in a case, the advertiser shall be entitled to panel review by the NARB. To appeal an NAD/CARU decision, an advertiser shall make a request for a referral to the NARB and specify any and all issues for its appeal in the Advertiser’s Statement it prepares in response to NAD/CARU’s decision pursuant to Section 2.9(B). All advertiser requests for an appeal to NARB shall be submitted together with a check made payable to BBB National Programs in the amount of $20,000. In such cases, NAD/CARU shall publish its decision and the Advertiser’s Statement in the next Case Reports under the heading “Advertising Referred to NARB”. The Executive Vice President, Policy and Program Development of BBB National Programs shall have the discretion to waive or reduce the fee for any appellant who can demonstrate economic hardship.

B. Within ten business days after the date of receipt of a copy of NAD/CARU’s final case decision, the challenger may request review by the NARB by filing a letter, not to exceed 20 double-spaced pages plus any relevant attachments from the NAD/CARU case record, explaining its reasons for seeking review. The letter shall include a non-refundable review fee of $5,000 in a check made payable to BBB National Programs, which will be credited toward the filing fee required by Section 3.1(C) if the review is granted, and should be addressed to the Chair, National Advertising Review Board (NARB), 112 Madison Ave., 3rd Floor, New York, NY 10016. The challenger shall send a copy of this letter to the advertiser and to NAD/CARU. Within ten business days after receipt of the copy of the request for review, the advertiser may and NAD/CARU shall submit a response to the NARB Chair, not to exceed 20 double-spaced pages plus any relevant attachments from the NAD/CARU case record. A copy of the advertiser’s and NAD/CARU’s responses shall be sent by the advertiser and NAD/CARU, respectively, to the other parties, except that portions of the case record that were submitted to NAD/CARU on a confidential basis shall not be sent to the challenger unless the advertiser consents. No other submissions shall be made to the NARB Chair. These letters, together with the relevant sections of the case record provided by the parties, will be reviewed by the NARB Chair, who within
ten business days after the time for the last submission under this rule has expired shall proceed to appoint a review panel as outlined in Section 3.3 if the Chair determines there is a substantial likelihood that a panel would reach a decision different from NAD/CARU’s decision. The NARB Chair shall return the record to NAD/CARU after (s)he makes his or her determination.

C. When an advertiser appeals to the NARB pursuant to Section 3.1(A), or if the NARB Chair grants a challenger’s request for NARB review pursuant to Section 3.1(B), the appellant shall pay a filing fee by check made payable to BBB National Programs in the amount of $20,000. The Executive Vice President, Policy and Program Development of BBB National Programs shall have the discretion to waive or reduce the fee for any appellant who can demonstrate economic hardship. NAD/CARU shall prepare the relevant portions of the case record and forward them to the NARB within five business days of the issuance of the press release. The NARB shall thereafter make copies of and mail the case record to the parties, except that portions of the case record that were submitted to NAD/CARU on a confidential basis shall not be sent to the challenger unless the advertiser consents. The appellant shall pay for all NARB copying and transmittal costs incurred as a result of an appeal or request for appeal pursuant to Sections 3.1 through 3.6 of these Procedures. Where the advertiser and the challenger both appeal, these costs shall be divided equally between them. In any event, the NARB shall pay these costs for any party that can demonstrate economic hardship.

D. In the event that the advertiser shall exercise its right to an appeal under Section 3.1(A), the challenger shall have the right to appeal any additional issues considered by NAD/CARU that have not been appealed by the advertiser. In the event that a challenger’s request to appeal is granted by the NARB Chair under Section 3.1(B), the advertiser may appeal any additional issues considered by NAD/CARU that have not been appealed by the challenger, notwithstanding that its time to file an appeal as of right has expired. The challenger or advertiser may exercise the right to appeal under this paragraph by submitting a letter to the NARB at the address listed in Section 3.1(B), requesting the appeal and specifying the additional issues it wishes to appeal. The cross-appellant shall pay a filing fee by check made payable to BBB National Programs in the amount of $20,000. Executive Vice President, Policy and Program Development of BBB National Programs shall have the discretion to waive or reduce the fee for any cross-appellant who can demonstrate economic hardship. In the case of the challenger, the letter shall be due within five business days of receipt of the final case decision with the advertiser’s statement indicating the advertiser’s election to appeal; in the case of the advertiser, the letter is due within five business days of the date of receipt of the NARB Chair’s determination granting the challenger’s request to appeal. Copies of these letters shall be sent by the issuing party to all of the other parties.

E. Submission Schedule

(1) Submissions when there is no cross-appeal. The party appealing shall, within ten business days of receipt of the case record prepared by NAD/CARU, submit to the NARB Chair, addressed as indicated in Section 3.1(B) with a copy to NAD/CARU, a letter not to exceed 30 double-spaced pages explaining its position. The appellant shall send a copy of the letter to the opposing party who shall have ten business days after its receipt to submit a response, not to exceed 30 double-spaced pages, to the NARB Chair with copies to the other party and also to NAD/CARU. No other submissions shall be made.

(2) Submissions when there is a cross-appeal. Each party shall, within ten business days of receipt of the case record prepared by NAD/CARU, submit to the NARB Chair, addressed as indicated in Section 3.1(B) with a copy to NAD/CARU, a letter not to exceed 15 double-spaced pages explaining its position with respect to its appeal. Each party shall send a copy of the letter to the opposing party who shall have ten business days after its receipt to submit a response, not to exceed 15 double-spaced pages, to the NARB Chair with copies to the other party and also to NAD/CARU. No other submissions shall be made.
3.2 Content of Submissions to NARB

The written submissions to the NARB may contain new arguments and cite to applicable legal precedent, including NAD, CARU, or NARB precedent, even if it was not cited in submissions to NAD or CARU. The written submissions to NARB may not contain any evidence or facts that are not in the case record forwarded to NARB pursuant to Section 3.1(C) of these Procedures. In the event that the NARB Chair, after consultation with the parties, determines that a party has included evidence or facts outside this record in its submission to NARB, the Chair may, in his/her discretion:

(a) return the brief to the party with a request that it redact any information that NARB has identified as outside the record and resubmit its brief within three business days. If the party fails to submit a properly redacted brief within three days, it shall be deemed to have defaulted on its appeal; or

(b) remand the matter to NAD/CARU for a determination on whether the additional information constitutes “newly discovered evidence” sufficient to warrant reopening of the case under the “extraordinary circumstances” provisions of Section 3.8 of these Procedures. If NAD or CARU determines that it is not appropriate to reopen the case, NAD/CARU shall return the brief to the NARB Chair who shall handle any information outside the record in the manner provided by Section 3.2(a) above.

3.3 Appointment of Review Panel

The NARB Chair, upon receipt of an appeal by an advertiser, or upon granting a request to appeal by a challenger, shall appoint a panel of qualified NARB members and designate the panel member who will serve as panel Chair.

3.4 Eligibility of Panelists

An “advertiser” NARB member will be considered as not qualified to sit on a particular panel if his/her employing company manufactures or sells a product or service which directly competes with a product or service sold by the advertiser involved in the proceeding. An “agency” NARB member will be considered as not qualified if his/her employing advertising agency represents a client that sells a product or service which directly competes with the product or service involved in the proceeding. A NARB member, including a non-industry member, shall disqualify himself/herself if, for any reason arising out of past or present employment or affiliation, (s)he believes that (s)he cannot reach a completely unbiased decision. In addition, the NARB Chair shall inform the parties of their right to object, for cause, to the inclusion of individual panel members, and to request that replacement members be appointed. Requests will be subject to approval by the NARB Chair. If the NARB Chair is unable to appoint a qualified panel, (s)he shall complete the panel by appointing one or more alternate NARB member(s).

3.5 Composition of Review Panel

Each panel shall be composed of one “public” member, one “advertising agency” member, and three “advertiser” members. Alternates may be used where required. The panel will meet at the call of its Chair, who will preside over its meetings, hearings and deliberations. A majority of the panel will constitute a quorum, but the concurring vote of three members is required to decide any substantive question before the panel. Any panel member may write a separate concurring or dissenting opinion, which will be published with the majority opinion.

3.6 Procedure of Review Panel

A. As soon as the panel has been selected, the NARB Chair will inform all parties as to the identity of the panel members. At the same time, (s)he will mail copies of all submissions under Section 3.1(C) to each of the panel members, and will, in like manner, send them any response or request submitted by any other party or parties. Within ten days after receiving copies of the appeal, the panel members shall confer and fix the time schedule that they will follow in resolving the matter.

B. The panel, under the direction of its Chair, should proceed with informality and speed. If any
party to the dispute before NAD/CARU requests an opportunity to participate in the proceedings before the panel, (s)he shall be accommodated. All parties to a matter before the panel shall be given ten days notice of any meeting at which the matter is to be presented to the panel. Such notice shall set out the date and place of the meeting, and the procedure to be followed.

C. The case record in NAD, CARU and/or NARB proceedings shall be considered closed upon the publication of the final case decision as described in Section 2.9. No factual evidence, arguments or issues will be considered within the case record if they are introduced after that date.

D. NARB Decision

(1) The decision of the panel will be based upon the portion of the record before NAD/CARU which it has forwarded to the panel, the submissions under Section 3.1(E), and any summaries of the record, facts and arguments based thereon which are presented to the panel during its meeting with the parties. A party may present representatives to summarize facts and arguments that were presented to NAD/CARU, and members of the panel may question these persons. If the advertiser has declined to share any of its substantiation with the challenger, the panel will honor its request for confidentiality, even though the challenger may have instituted the appeal. The challenger will therefore be excluded from the meeting during the time when such confidential substantiation is being discussed by the panel with NAD/CARU and the advertiser.

(2) The panel will consider no evidence or facts if they are outside the evidence and facts presented to NAD/CARU. In making its decision, the panel shall exercise its own independent judgment on the issues presented and shall not give deference to NAD or CARU’s findings and recommendations.

3.7 Timing and Reporting of Panel Decisions

A. When the panel has reached a decision, it shall notify the NARB Chair of its decision and the rationale behind it in writing and shall endeavor to do so within 15 business days. The Chair, upon receipt of a panel’s decision, shall transmit such decision and rationale to NAD/CARU and then to the advertiser. The advertiser shall, within five business days of receipt of the decision, submit an Advertiser’s Statement that initially states whether or not the advertiser agrees to comply with the panel’s recommendations. The Advertiser’s Statement may include a concise supporting statement, no longer than one-half of one double-spaced typewritten page (12 point type), which may not reargue the merits of the case, mischaracterize the decision, or contain new facts. The NARB Chair reserves the right, following consultation with the advertiser, to edit for length or inappropriate material. Thereafter, the Chair shall notify other parties to the case of the panel’s decision, incorporating therein the response from the advertiser, and make such report public.

B. In the event that a panel has determined that an advertising claim has not been substantiated or is untruthful and/or inaccurate, and the advertiser fails to indicate that the specific advertisement(s) will be either withdrawn or modified in accordance with the panel’s findings within a time period appropriate to the circumstances of the case, the Chair will issue a Notice of Intent to the advertiser that the full record on the case will be referred to the appropriate government agency. If the advertiser fails to respond or does not agree in writing to comply with the decision of the panel within ten days of the issuance of the Notice of Intent, the Chair shall so inform the appropriate government agency by letter, shall offer the complete NARB file upon request to such government agency, and shall publicly release his/her letter. The Chair of the NARB shall report to the NARB at its annual meeting on, among other things, the number, source and disposition of all appeals received by NARB.

3.8 Closing a Case

When a case has been concluded with the publication of a NAD/CARU decision or, when a panel has turned over a decision to the NARB Chair, and when the Chair has executed the procedures in Section 3.7 of these Procedures, except as provided for in Section
3.9, the case will be closed and, absent extraordinary circumstances, no further materially similar complaints on the claim(s) in question shall be accepted by NAD/CARU.

3.9 Reopening a Case

A. A closed NAD or NARB case may be reopened if the NAD Director, in his/her sole discretion, determines that extraordinary circumstances warrant the reopening. In making this determination, the NAD Vice President shall take into account (1) the advertiser’s compliance with any recommendations by NAD or NARB relating to the claims at issue; (2) if the reopening is requested based on new evidence, whether there is a satisfactory showing that the new evidence was not reasonably available to the party at the time the NAD record was closed; (3) if the reopening is requested based on new evidence, whether the new evidence would have likely changed the NAD or NARB decision in a material way; and (4) whether the request has sufficient merit to warrant the expenditure of NAD resources.

B. A petition requesting that a case be reopened may be submitted by either party to the underlying proceeding to the NAD Vice President together with a non-refundable initial petition to reopen fee of $5,000.

C. If the NAD Vice President grants the petition to reopen, the petitioning party shall pay an additional nonrefundable filing fee equal to the applicable NAD Challenge Fee minus the $5000 initial petition to reopen fee. NAD will send notice to any parties to the prior case of NAD’s decision to reopen, together with any supporting evidence. Fee waivers can be submitted to the BBB National Programs Executive Vice President, Policy and Program Development pursuant to 2.2 (A) (4).

D. Any reopened case will proceed as though a challenge was filed on the reopened claims in accordance with Sections 2.2 – 3.8 of these procedures, beginning with a submission from the challenger in the original case and concluding with a final case decision (as provided in Section 2.9) that may be appealed as set out in Sections 3.1-3.8 of these procedures. Should a challenger elect not to participate in the reopened case, the case will proceed as though NAD opened the matter on its own initiative. The petition requesting that a case be reopened will not be incorporated into the newly reopened case record.

4.1 Compliance

After an NAD, CARU or NARB panel decision requesting that advertising be “Modified or Discontinued” is published, together with an Advertiser’s Statement indicating the advertiser’s willingness to comply with NAD, CARU or the NARB panel’s recommendations, or an advertiser agrees to modify or discontinue advertising pursuant to Section 2.13 CARU Expedited Proceeding, NAD/CARU or the NARB, either on its own or at the behest of a challenger or a third party, may request that the advertiser report back, within ten business days, on the status of the advertising at issue and explain the steps it has taken to bring the advertising into compliance with the decision. Any evidence that NAD/CARU or the NARB relies on as a basis for its request for a report on compliance shall be forwarded to the advertiser together with the request for a status report.

In response to a request that the advertiser report on its compliance with a NAD or NARB decision, as described in the preceding paragraph, an advertiser may file a petition to reopen the case under Section 3.9 of these procedures and providing notice to any party in the case sought to be reopened that a petition to reopen has been filed. If a petition to reopen is filed, the compliance inquiry shall be suspended until the NAD Vice President makes a determination as to whether the case will be reopened. If the petition to reopen is denied, the compliance inquiry shall resume and a response to the compliance inquiry shall be provided within ten business days after the request to reopen is denied. If the petition to reopen is granted, the compliance inquiry shall be terminated and the termination shall be reported in the NAD/CARU Case Reports.

A. Compliance with NAD/CARU decisions. If, after reviewing the advertiser’s response to a request for a status report on compliance with an NAD/CARU decision, and after reviewing the current advertising, NAD/CARU determines that:
(1) The advertising is in compliance with NAD/CARU recommendations, NAD or CARU shall make a determination that no further action is required and close the compliance inquiry and shall continue to monitor for compliance;

(2) The advertiser, after a reasonable amount of time, has not made a bona fide attempt to bring its advertising into compliance with NAD/CARU recommendations and/or the representations made in the Advertiser’s Statement, or the advertiser fails to respond to the compliance inquiry, NAD or CARU shall refer the file to the appropriate government agency, release information regarding the referral to the press and the public, and report the referral in the Case Reports. The amount of time considered reasonable to modify or discontinue the advertising in question will vary depending on the advertising medium involved;

(3) The advertiser has made a reasonable attempt to comply with a NAD/CARU decision, but NAD/CARU remains concerned about the truthfulness and accuracy of the advertising as modified, NAD or CARU will notify the advertiser, in writing, detailing these concerns and making further recommendations. The advertiser will have five business days to respond.

(a) If NAD/CARU finds that the advertiser has accepted and agreed to promptly implement the recommendations, NAD or CARU shall determine that no further action is required, close the compliance inquiry, and report this in the Case Reports and continue to monitor for compliance;

(b) If NAD/CARU finds that the advertiser has not agreed to promptly implement the recommendations, after notification to the advertiser, NAD or CARU shall refer the file to the appropriate government agency, release information regarding the referral to the press and the public, and report the referral in the Case Reports.

B. Compliance with NARB decisions. After reviewing the advertiser’s response to a request for a status report on compliance with an NARB decision, and after reviewing the current advertising, NAD/CARU shall submit to the NARB Chair the file relating to compliance along with NAD/CARU’s recommendations. If the NARB Chair determines that:

(1) The advertising is in compliance with the NARB panel’s recommendations, the NARB Chair shall make a determination that no further action is required and close the compliance inquiry;

(2) The advertiser, after a reasonable amount of time, has not made a bona fide attempt to bring its advertising into compliance with the NARB panel’s recommendations and/or the representations made in the Advertiser’s Statement, or the advertiser fails to respond to the compliance inquiry, the NARB Chair shall refer the file to the appropriate government agency, release information regarding the referral to the press and the public, and report the referral in the NAD/CARU Case Reports. The amount of time considered reasonable to modify or discontinue the advertising in question will vary depending on the advertising medium involved;

(3) The advertiser has made a reasonable attempt to comply with an NARB panel decision, but the NARB Chair remains concerned about the truthfulness and accuracy of the advertising as modified, the NARB Chair will notify the advertiser, in writing, detailing these concerns and making further recommendations. The advertiser will have five business days to respond.

(a) If the NARB Chair finds that the advertiser has accepted and agreed to promptly implement the NARB Chair’s recommendations, the NARB Chair shall determine that no further action is required, close the compliance inquiry, and report this in the NAD/CARU Case Reports.
(b) If the NARB Chair finds that the advertiser has not agreed to promptly implement the NARB Chair’s recommendations, after notification to the advertiser, the NARB Chair shall refer the file to the appropriate government agency, release information regarding the referral to the press and the public, and report the referral in the NAD/CARU Case Reports.

GENERAL PROVISIONS

5.1 Amendment of Standards

Any proposals to amend any advertising standards which may be adopted by the NARB may be acted on by a majority vote of the entire membership of the NARB at any special or regular meeting, or by written ballot distributed through the United States mail, provided that the text of the proposed amendment shall have been given to the members 30 days in advance of the voting date. Once the NARB voting is completed and tallied, the BBB National Programs Executive Vice President, Policy and Program Development shall take it to the BBB National Programs Board of Directors for approval.

5.2 Use of Consultive Panels for Matters Other Than Truth and Accuracy, or Consistency with CARU’s Self-Regulatory Program for Children’s Advertising

From time to time, the NARB may be asked to consider the content of advertising messages in controversy for reasons other than truth and accuracy, or consistency with CARU’s Self-Regulatory Program for Children’s Advertising, or BBB National Programs or the NARB may conclude that a question as to social issues relative to advertising should be studied. In such cases, the procedures in Sections 5.3 through 5.8 shall be employed to deal with such issues.

5.3 Consultive Panels

The NARB Chair may consult regularly with the BBB National Programs Executive Vice President, Policy and Program Development, the BBB National Programs Board of Directors or with the NARB to determine whether any complaints have been received, or any questions as to the social role and responsibility of advertising have been identified, which should be studied and possibly acted upon. If so, a consultive panel of five NARB members shall be appointed, in the same proportions as specified for adjudicatory panels in Section 3.5 above.

5.4 Panel Procedures

Consultive panels shall review all matters referred to them by the NARB Chair and may consult other sources to develop data to assist in the evaluation of the broad questions under consideration. No formal inquiry should be directed at individual advertisers.

5.5 Confidentiality

All panel investigations, consultations and inquiries shall be conducted in complete confidence.

5.6 Position Paper

If a consultive panel concludes that a position paper should be prepared to summarize its findings and conclusions for presentation to the full NARB, the paper shall be written by one or more members of the panel, or by someone else under its direction. The contents of the paper should reflect the thinking of the entire panel, if possible, but any panel member may write a separate concurring or dissenting opinion, which will be published with the panel report, if it is published.

5.7 Voting on Publication

Any such report prepared by a consultive panel will be submitted to the NARB Chair, who will distribute copies to the full NARB for its consideration and possible action. The members of the NARB will be given three weeks from the date of such distribution within which to vote whether to publish the report or not. Their votes will be returned to the Chair of the NARB. If a majority of the NARB members vote for its publication, the report will be distributed to BBB National Programs for its review and will be published only if a majority of BBB National Programs Board of Directors votes for its publication.
Via Overnight Delivery

28 May 2011

Newegg Inc.
16839 East Gale Avenue
City of Industry, California 91745

Re: Use of GEEK ON Logo (Our Ref No. 11-43667)

Dear [Name]

I write on behalf of BBY Solutions, Inc. and its parent company Best Buy Co., Inc. (collectively, “Best Buy”) regarding two concerns: your disparagement of our employees and infringement of our valuable trademark rights.

As you are likely aware, Best Buy is one of the nation’s largest consumer electronics retailers. In connection with Best Buy’s retail services, Best Buy and its predecessor Geek Squad, Inc. have offered consumer electronics installation, repair and related services under the GEEK SQUAD mark and orange-and-black Geek Squad trade dress (“the Geek Squad Trade Dress”) since 1994. Since 2006, Best Buy has also used its GEEK SQUAD mark in connection with a power button design with a necktie forming the vertical line (the “Tie and Power Button Design”). The Tie and Power Button Design is used in connection with Best Buy’s GEEK SQUAD Black Tie Protection plans for products purchased at Best Buy stores and via Best Buy’s website.

Best Buy’s Geek Squad services have been extensively promoted using the GEEK SQUAD mark, Geek Squad Trade Dress, and the Tie and Power Button Design, and these services have received nationwide recognition. In addition to the extensive use of these marks and trade dress on Best Buy’s Geek Squad website at www.geeksquad.com, these marks and trade dress are prominently featured in Best Buy’s print and television advertising, in-store signage, and on branded apparel and other promotional items.

Best Buy has spent many years building goodwill in its distinctive GEEK SQUAD Mark, Geek Squad Trade Dress, and Tie and Power Button Design. As a result, these marks and trade dress have come to identify Best Buy’s Geek Squad services to consumers around the country. Given Best Buy’s substantial investment over the years in building equity in these marks and trade dress, Best Buy cannot permit activities which place that valuable goodwill at risk. To protect its rights, Best Buy has obtained several federal trademark registrations for the GEEK SQUAD mark and a federal trademark registration for its Tie and Power Button Design. Illustrative copies of these registrations are attached for your reference as Exhibit A.
We recently learned that Newegg is using a stylized GEEK ON design in orange-and-black font, with the "O" in "ON" depicted as a power button (the "Geek On Logo") with a new marketing campaign for Newegg's consumer electronics retail services. We understand Newegg is using this design on its website, its Facebook site, and in connection with promotional items for Newegg's services such as t-shirts. An illustrative use of the Geek On Logo is attached as Exhibit B.

Given Best Buy's long-standing prior use of the GEEK SQUAD mark, Geek Squad Trade Dress, and Tie and Power Button Design, Best Buy is concerned that Newegg's use of the Geek On Logo is likely to create confusion among consumers and to dilute the distinctive quality of the GEEK SQUAD mark in violation of Best Buy's trademark rights. Best Buy is particularly concerned because the Geek On Logo features the GEEK component of Best Buy's GEEK SQUAD mark, is depicted in the same orange-and-black color scheme as Best Buy's Geek Squad Trade Dress, features a power button design that is very similar to the Geek Squad Tie and Power Button Design, and is used to promote Newegg's competing consumer electronics retail services.

We also recently learned that Newegg is running a commercial on television and YouTube (http://www.youtube.com/watch?v=a1X0dfQrz3uc&feature=youtu.be) depicting a blue-shirted salesperson in a store with a similar layout/color scheme to a Best Buy store, so as to represent a Best Buy employee. The fake Best Buy employee is depicted as being slovenly and uninformed about computer products, in contrast to your employees who are portrayed as "experts."

Your misuse of our valuable trademarks and your negative portrayal of our employees violate our trademark rights and misleads consumers about our services, in violation of federal and state law. While we welcome fair competition, we cannot tolerate unfair competition that disparages our employees, confuses our customers and damages our valuable trademarks and the goodwill associated with those marks. We take great pride in our employees and the high quality of customer service they offer and find your company's focus on our employees in this advertising campaign to be particularly offensive. We expect that you would be equally offended if the tables were turned and a competitor launched an advertising campaign portraying your employees as slovenly and uninformed.

In light of the above, Best Buy respectfully demands that Newegg:

1. Promptly and permanently cease all use of the Geek On Logo and any other mark combining the word "GEEK" with an orange color scheme or a power button design; and

2. Promptly and permanently cease all use of the advertising in question as well as any other advertising purporting to show Best Buy employees.

Provided Best Buy receives Newegg's prompt cooperation in this matter, Best Buy is willing to consent to a reasonable period for Newegg to phase-out use of the design and commercial. Please confirm in writing no later than Monday, 6 June that Newegg agrees to the above terms.

We appreciate your cooperation in respecting Best Buy's trademark rights.
BY EMAIL AND FEDERAL EXPRESS

December 23, 2016

Deborah P. Majoras
Chief Legal Officer
The Procter & Gamble Company
1 P&G Plaza
Cincinnati, Ohio 45202

Re: Welcome Back Campaign

Dear Ms. Majoras,

I am writing on behalf of Harry’s, Inc. to express our gratitude for the publicity that Gillette is generating for us through its Welcome Back ad campaign. Gillette’s ad campaign further validates the significant impact Harry’s is having on the shaving and men’s grooming industries.

Although we appreciate the spirit behind the Welcome Back campaign, we thought we should point out a typo in the ad’s central claim that “most guys leave Harry’s after trying it.” Fortunately, correcting the claim would require only the following minor edit:

“Most guys leave stay with Harry’s after trying it.”

One advantage of being an e-commerce company is that we maintain direct relationships with our customers and, therefore, have the real data underlying their retention rates. Thankfully — at least for us at Harry’s — it is not true that most guys leave Harry’s after the first try.

In fact, 60.5% of first-time customers during the Nov. 2013–Oct. 2014 period that Gillette cited in the ad’s fine print re-ordered from Harry’s within the 24-month period referred to in the ad. The retention rates are even higher if one looks at a more recent and less misleading period, which is not surprising given the continuous improvements we make to our product offering, informed by the great feedback we receive directly from our customers. For example, 67.0% of first-time customers during 2016 have re-ordered and, of the more than 375,000 customers who have tried Harry’s for free during the May 2016–Oct. 2016 period, 81.1% have already purchased additional products.

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1 As explained by P&G’s Vice President of Investor Relations to analysts touting the new ad campaign, the precise claim is that most guys leave Harry’s after the first try. This claim was apparently repeated in a recent article in the Wall Street Journal, which reported that “P&G said its data that ‘most guys’ quit Harry’s after the first try comes from market research firm Slice Intelligence.”

2 This period roughly coincides with the launch of our next generation razor.
We assume that the false claim in Gillette’s ad is an innocent mistake and that Gillette would not intentionally mislead consumers. We are happy for Gillette to continue to run the ad campaign with the corrected statement that most guys “stay with” Harry’s. We have no pride of authorship – “re-order from,” “stick with,” “abandon their old razor after trying” and “swear by” would all work equally well. Any of these revisions would be consistent with the values that P&G has articulated on its website, which include operating within the letter and spirit of the law and being data-based and intellectually honest.

Please do not take this letter as a threat of litigation. Our practice at Harry’s is to compete on the merits and not by filing lawsuits, and we know that you will do the right thing now that the mistake has been called to your attention.3

We wish you and the Gillette team a joyful holiday season, and we look forward to a new year of friendly and fair competition.

Sincerely,

[Signature]

Jack Sarno
General Counsel

P.S. I am enclosing a Harry’s “Everything But the Bathroom Sink” limited-edition holiday set as a token of our appreciation for the publicity from the Welcome Back campaign. Although the sets are sold out, I was able to score one from the personal stash of one of our founders. In the interest of my job security, please do not tell him.

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3 By the way, the Welcome Back campaign refers consumers to retailer.com for alleged substantiation for one of Gillette’s claims regarding Harry’s products. Unfortunately, none of us at Harry’s could access the site, apparently because the site is classified as malware by Cisco’s OpenDNS services. Gillette might want to look into this.
Dear Seven Stills Distillery & Brewery,

We at In-N-Out Burger & Dairy are writing to inform you of our efforts to protect our trademark and prevent use of our marks, which includes our full name and our logo registrations in these marks. As you may expect, we take trademark protection very seriously in order to prevent further misuse of our marks.

In case you are not already aware, In-N-Out owns several marks in connection with its In-N-Out Burger business, In-N-Out logo, and In-N-Out brand name. We have also taken steps to prevent the unauthorized use of our marks in connection with your business.

Please understand that use of our marks by third parties may lead to legal action. We hope that this letter serves as a means for us to resolve this issue without litigation. We have been in touch with you and others regarding this matter.

Accordingly, we request that you refrain from further use of In-N-Out’s marks by not selling or promoting items featuring our logo or social media pages and continue to ferment. Thank you for your time and consideration, and we look forward to resolving this in good spirits.

Regards,

Legal Counsel

Can you find the PUNS?!?
August 23, 2017

Emporium Arcade Bar
% Danny and Doug Marks
2363 N. Milwaukee Ave
Chicago, IL 60647

Via email

Danny and Doug,

My walkie talkie is busted so I had to write this note instead. I heard you launched a Stranger Things pop-up bar at your Logan Square location. Look, I don’t want you to think I’m a total wastoid, and I love how much you guys love the show. (Just wait until you see Season 2!) But unless I’m living in the Upside Down, I don’t think we did a deal with you for this pop-up. You’re obviously creative types, so I’m sure you can appreciate that it’s important to us to have a say in how our fans encounter the worlds we build.

We’re not going to go full Dr. Brenner on you, but we ask that you please (1) not extend the pop-up beyond its 6 week run ending in September, and (2) reach out to us for permission if you plan to do something like this again. Let me know as soon as possible that you agree to these requests.

We love our fans more than anything, but you should know that the demogorgon is not always as forgiving. So please don’t make us call your mom.

Thanks,

[Name]
Director/Senior Counsel - Content & Brand IP
INTEGRITY AND CIVILITY IN LITIGATION
Civil behavior is a core element of attorney professionalism. As the guardians of the Rule of Law that defines the American social and political fabric, lawyers should embody civility in all they do. Not only do lawyers serve as representatives of their clients, they serve as officers of the legal system and public citizens having special responsibility for the quality of justice. To fulfill these overarching and overlapping roles, lawyers must make civility their professional standard and ideal.

What Exactly Is “Civility”? 

The concept of civility is broad. The French and Latin etymologies of the word suggest, roughly, “relating to citizens.” In its earliest use, the term referred to exhibiting good behavior for the good of a community. The early Greeks thought that civility was both a private virtue and a public necessity, which functioned to hold the state together. Some writers equate civility with respect. So, civility is a behavioral code of decency or respect that is the hallmark of living as citizens in the same state.

It may also be useful at the outset to dispense with some widely held misconceptions about civility, likening it to: (1) agreement, (2) the absence of criticism, (3) liking a person, and (4) good manners. These are all myths.

Civility is not the same as agreement. The presence of civility does not mean the absence of disagreement. In fact, underlying the codes of civility is the assumption that people will disagree. The democratic process thrives on dialogue and dialogue requires disagreement. Professor Stephen Carter of Yale Law School has stated, in one of his many writings on civility, “[a] nation where everybody agrees is not a nation of civility but a nation without diversity, waiting to die.”

Civility is not the absence of criticism. Respect for the other person or party may in fact call for criticism. For example, a law firm partner who fails to point out an error in a young lawyer’s brief isn’t being civil – that partner isn’t doing his or her job.

Civility is not the same as liking someone. It is a myth that civility is more possible in small communities where everyone knows each other. Knowing or liking the other person is not a prerequisite for civility. Civility compels us to show respect even for strangers who may be sharing our space, whether in the public square, in the office, in the courtroom, or in cyberspace.

Civility should not be equated with politeness or manners alone. Although impoliteness is almost always uncivil, good manners alone are not a mark of civility. Politely refusing to serve someone at a lunch counter on the basis of skin color, or cordially informing a law graduate that the firm does not hire women, is not civil behavior.
Civility is a code of decency that characterizes a civilized society. But how is that code reflected in the practice of law?

**Civil Conduct is a Condition of Lawyer Licensing**

A civility imperative permeates bar admission standards. The legal profession is largely self-governing, with ultimate authority over the profession resting with the courts in nearly all states. Courts typically set the standards for who becomes admitted to practice in a state and prescribe the ethical obligations that lawyers are bound, by their oath, to fulfill.

Candidates for bar admission in every state must satisfy the board of bar admissions that they are of good moral character and general fitness to practice law. The state licensing authority’s committee on character and fitness will recommend admission only where the applicant’s record demonstrates that he or she meets basic eligibility requirements for the practice of law and justifies the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them. Those eligibility requirements typically require applicants to demonstrate exemplary conduct that reflects well on the profession.

Capacity to act in a manner that engenders respect for the law and the profession – in other words, civility – is a requirement for receiving a law license and, in some jurisdictions, for retaining the privilege of practicing law. It follows that aspiring and practicing lawyers should be disabused of the notion that effective representation ever requires or justifies incivility.

**Beyond Client Representation: Lawyer as Public Citizen**

Notions of a lawyer’s core civility duty also are rooted in ethical principles informing and defining the practice of law. Those principles, having evolved over the centuries to lend moral structure and a higher purpose to a life in the law today, speak plainly to a lawyer’s dual duties as officer of the legal system and public citizen, beyond the role client advocate. At the very top of the lawyer’s code of ethics – in the Preamble to the Model Rules of Professional Conduct – we read of those larger civic duties binding every practicing lawyer.

Civility concepts suffuse the hortatory language of the Preamble. For example, the Preamble makes clear that even in client dealings, counsel is expected to show respect for the legal system in his or her role as advisor, negotiator, or evaluator (Preamble Cmt. 5). In addition, lawyers should resolve conflicts inherent in duties owed to client, the legal system, and the lawyer’s own interest through the exercise of discretion and judgment “while maintaining a professional, courteous, and civil attitude toward all persons involved in the legal system” (Preamble Cmt. 9, emphasis added).

**Tension Between Zealous Advocacy and Civility**

Even for the most ethically conscientious lawyers, there is seemingly ubiquitous tension between the duty of zealous advocacy and the duty to conduct oneself civilly at all times. Model Rule 1.2 compels zealous advocacy, and Comment 1 to the Rule speaks to the depth of that duty, noting that a lawyer...
should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to a lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf. (Rule 1.2 Cmt. 1)

The distorted image in popular culture of lawyer as a partisan and combative zealot would seem to preclude civil behavior as the preferred approach to legal practice. Not so. That same comment goes on to explain:

A lawyer is not bound, however, to press for every advantage that might be realized for a client. . . . The lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect. (Rule 1.3 Cmt. 1)

Thus, there are firm limits to the lawyer’s duty to act with zeal in advocacy, but the precise location of those limits is not always easy to discern. Therein lies the tension. Appropriate zeal, however, never extends to offensive tactics or treating people with discourtesy or disrespect.

The individual lawyer is the guardian of the tone of interactions that will serve both the client and the legal system well. Clients may not understand these limits. Many clients are under the misconception that because they hired the lawyer, they have the power to dictate that lawyer’s conduct. It falls to the lawyer to manage and correct that expectation and to let the client know the lawyer is more than a “hired gun.” In practice, that often means refusing a client’s demand to act uncivilly or to engage in sharp or unethical practices with other parties in a case or matter.

The rules themselves make it clear, of course, that the lawyer is not just a hired gun. Model Rule 1.16(b)(4) of the ABA Model Rules of Professional Conduct provides that a lawyer may withdraw if the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has fundamental disagreement, and Rule 3.1 provides that a lawyer cannot abuse legal procedure by frivolously bringing or defending a proceeding, or asserting or defending an issue. Egregious forms of uncivil behavior in a court proceeding also may constitute conduct prejudicial to the administration of justice, within the meaning of Rule 8.4(d).

The Problem of Declining Civility in the Legal Profession

Although civility is central to the ethical and public-service bedrock of the American legal profession, substantial evidence points to a steady rise in incivility within the American bar. It is problematic to pin down the incidence of incivility and unprofessional conduct because incivility, without some associated violation of the ethical rules, historically has not been prosecuted by the regulatory authorities. Thus there is no good systemic data on incivility’s prevalence. There have been countless writings, however, about widespread and growing dissatisfaction among judges and established lawyers who bemoan what they see as the gradual degradation of the practice of law, from a vocation graced by congenial professional relationships to one stigmatized by abrasive dog-eat-dog confrontations.
Discussion of the problem tends to dwell on two areas: (1) examples of lawyers behaving horribly, from which most of us easily distinguish ourselves; and (2) possible causes and justifications of that behavior – rather than possible solutions. Traditional media and social media carry countless accounts of lawyers screaming, using expletives, or otherwise being uncivil. Lawyers who reflect on the trend generally pin the cause on any of a combination of factors, including the influence of outrageous media portrayals; inexperienced lawyers who increasingly start their own law practices without adequate mentoring; and the impact of modern technology that isolates lawyers and others behind their computers, providing anonymous platforms for digital expression.

The scattered data that is available tends to confirm that uncivil lawyer conduct is pervasive. A 2007 survey done by the Illinois Supreme Court Commission on Professionalism, for example, took a close look at specific behaviors of attorneys across the state and concluded that the vast majority of practicing lawyers experience unprofessional behavior by fellow members of the bar. Over the prior year, 71 percent had reported experiencing rudeness – described as sarcasm, condescending comments, swearing, or inappropriate interruption. An even higher percentage of respondents reported being the victim of a complex of more specific behaviors loosely described as “strategic incivility,” reflecting a perception that opposing counsel strategically employed uncivil behaviors in an attempt to gain the upper hand, typically in litigation. The complained-of conduct included, for example, deliberate misrepresentation of facts, not agreeing to reasonable requests for accommodation, indiscriminate or frivolous use of pleadings, and inflammatory writing in briefs or motions.

Whatever the causes, the first step toward a real remedy to the incivility pandemic is recognition of the deeply destructive impact of uncivil conduct on individual lawyers who engage in it, on those subjected to it, on the bar as a whole, and ultimately on the American system of justice. It begins with recognition that civility is, and must be, the cornerstone of legal practice.

Benefits of Civility

Aside from the most obvious reasons that lawyers should act civilly – that is, that the profession requires it of them and it’s just the right thing to do – a number of tangible benefits accrue from civil conduct in terms of reputational gain and career damage avoidance, as well as strategic advantage in a lawyer’s engagement.

Lawyers who behave with civility also report higher personal and professional rewards. Conversely, lawyer job dissatisfaction is often correlated with unprofessional behavior by opposing counsel. In the 2007 Survey on Professionalism of the Illinois Supreme Court Commission, 95 percent of the respondents reported that the consequences of incivility made the practice of law less satisfying.

Other research shows that lawyers are more than twice as likely as the general population to suffer from mental illness and substance abuse. Law can be a high-pressure occupation, and it appears that needless stress is added by uncivil behavior directed to counsel. “Needless” is used as a descriptor here because the consequences of incivility, as acknowledged by over 92 percent of the survey respondents, often add nothing to the pursuit of justice or to service of client
interests. Consequences include making it more difficult to resolve our clients’ matters, increasing the cost to our clients, and undermining public confidence in the justice system. They are the exact opposite of the goals we should strive to accomplish as lawyers.

Moreover, judges are not fond of being asked to decide disputes between opposing counsel extraneous to deciding the merits of the respective clients’ case. Judges will tell you that mediating bickering between counsel is the least tasteful part of their job. Even if a judge avoids wading into a dispute between counsel, the fact that a lawyer was disrespectful or used bad behavior cannot help but register on the judge’s consciousness. Then, if there is a close call on a motion or other issue, and the judge has a choice between ruling in favor of the client whose lawyer was civil and professional or in favor of the client whose lawyer has been a troublemaker, the Judges-Are-Human rule may well control. Similarly, juries also report being negatively affected by rude behavior exhibited by trial attorneys. In sum, lawyer conduct can and does affect the results lawyers deliver to their clients, and ultimately the success of their practices.

It naturally follows that a lawyer’s reputation for professional conduct is part and parcel of his or her reputation for excellence in practice. Before the advent of the Internet, evaluations of attorneys were conducted and disseminated largely by and for lawyers and published yearly in books with entries listing an attorney’s achievements by name, geographic region, and specialty. Now, any person who has contact with an attorney may rate and comment on the attorney’s performance and professionalism on websites devoted to rating and ranking attorneys or through general social media channels. In the realm of the Internet, one uncivil outburst may haunt an attorney for years; and reputations may be built and destroyed quickly. Even a cursory search of some of these websites shows that clients regularly comment (especially if they are displeased) about an attorney’s communication style and respect for his or her clients and the system of justice.

Not surprisingly, research shows that clients evaluate a lawyer who exhibits civility and professionalism as a more effective lawyer. If clients evaluate their lawyers as being effective, they stay with them; if they see their lawyers as ineffective, they will go elsewhere for legal services, particularly in a climate in which the supply of lawyers exceeds the demand for legal services. Research also shows that superior service, in which relationship abilities are central, increases client retention rates by about one third. Effective client service and positive relationships, in turn, increase profit to the lawyers by about the same rate.

**Bad Behavior/Bad Consequences**

Historically, incivility per se has by and large not been prosecuted by attorney regulatory authorities. Since 2010, however, several attorneys have been suspended by their states’ high courts for uncivil conduct implicating a lawyer’s duty to uphold the administration of justice and other ethics rules.

The Supreme Court of South Carolina has disciplined several attorneys for incivility, citing not only ethics rules but that state’s Lawyer’s Oath, taken upon admission to the bar. The oath contains a pledge of civility. In Illinois, an attorney was prosecuted by disciplinary authorities for
oral and written statements made to judges and an attorney that violated various ethical rules, including Illinois Rule 8.4(a) (modeled after the corresponding ABA Model Rule).

Outside of the courtroom, much of the uncivil arrow-slinging between counsel historically has occurred during discovery disputes in litigation. However, the growing influence of technology in litigation, with its potential for marshaling exponentially more information and data at trial than ever, and the commensurate need to control and limit that information to what is relevant and manageable, suggests courts will grow even less tolerant of lawyers trying to manipulate the pre-trial fact discovery process or engaging in endless, contentious discovery disputes. Moreover, while never wise or virtuous, it is no longer profitable to play “hide the ball” in litigation as clients are demanding better results at reduced costs.

**Movement Toward Systemic Solutions to Incivility**

There have been programmatic efforts, largely led by judges, to address and curb spreading incivility in the legal profession. In 1996, the Conference of Chief Justices adopted a resolution calling for the courts of the highest jurisdiction in each state to take a leadership role in evaluating the contemporary needs of the legal community with respect to lawyer professionalism. In response, the supreme courts of 14 states have established commissions on professionalism to promote principles of professionalism and civility throughout their states.

Many more states have, either through their supreme courts or bar associations, formed committees that have studied professionalism issues and formulated principles articulating the aspirational or ideal behavior the lawyers should strive to exhibit. These professionalism codes nearly all state at the outset that they do not form the basis of discipline but are provided as guidance – attorneys and judges should strive to embody professionalism above the floor of acceptable conduct that is memorialized in the attorney rules of ethics. They also typically echo a theme found in the Preamble to the Model Rules of Professional Conduct: that lawyers have an obligation to improve the administration of justice.

In 2004, a relatively aggressive stance was taken by the Supreme Court of South Carolina. The South Carolina high court amended the oath attorneys take upon admission to the bar to include a pledge of civility and courtesy to judges and court personnel and the language “to opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications.” It also amended the disciplinary rules to provide that a violation of the civility oath could be grounds for discipline. Similar civility pledges were added to the lawyers’ oath of admission by the Supreme Court of Florida in 2011 and by the Supreme Court of California in 2014.

Some jurisdictions, in states including New Jersey, Georgia, Illinois, Florida, Arizona, and North Carolina, have taken the voluntary aspirational codes further and have adopted an intermediary or peer review system to mediate complaints against lawyers or judges who do not abide by the aspirational code. It is challenging to implement an enforcement mechanism in a way that inspires voluntary compliance with an aspirational code and the success of these mechanisms has been inconsistent.
Without question, the most effective ways of addressing incivility entail bringing lawyers together for training and mentoring. Mentoring programs are being offered by an increasing number of state commissions and bar associations. The American Inns of Court, modeled after the apprenticeship training programs of barristers in England, brings seasoned and newer attorneys together into small groups to study, present, and discuss some of the pressing issues facing the profession.

**Conclusion: A Time to Recommit to Civility**

The needed rebirth of civility, at a critical juncture in the evolution of the legal profession, should be seen by lawyers not as pain, but as gain. Technology and globalization are facilitating greater client influence and requiring increased transparency; civil behavior is more important than ever. As the research conclusively bears out, (1) civil lawyers are more effective and achieve better outcomes; (2) civil lawyers build better reputations; (3) civility breeds job satisfaction; and (4) incivility may invite attorney discipline. Not only does our profession require us to be civil, and it is simply the right thing to do, but professionalism among lawyers is required by the larger American society in order to preserve a great profession and survive as a civil society bound to the Rule of Law.

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