



Navigating Ethical Issues as Compliance Lawyers and Officers

Keeping up with Modern Practice and Technological Developments



Michael A. Munoz

Associate | +1 202.344.4090 | MAMunoz@Venable.com

VENABLE LLP

Agenda

Today we will cover:

- The Basics
 - Continuing to Understand Your Client and Your Role
 - Navigating Competing Legal and Business Interests
- Virtual Practice and Technology
 - Maintaining Competence
 - Maintaining Confidentiality
 - Maintaining Your Legal Team

The Fundamentals

Hypothetical No. 1

You wake up on Friday morning to an email from a government agency—it's a draft complaint naming the company and its officers as defendants. When you arrive in the office, an officer calls you into his or her office to ask for advice. The officer suggests that the company should capitulate to a settlement agreement so that the officer is not named in the complaint and not found individually liable.

- How do you respond to the officer?

Remember Who Your Client Is

A “law firm” includes lawyers employed in “the legal department of a corporate or other organization.” Rule 1.0(c).

- “A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.” Rule 1.13(a)
- Where interests of the company diverge from the interests of the constituents you're working with, you must make clear you represent the company, not them. Rule 1.13(f)

Also remember; “[I]t may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed.” Rule 1.0, Comment 3.

Hypothetical Nos. 2a and 2b

Your company has hired an outside marketing firm to develop a campaign for a new line of products. You ask outside counsel to advise on the legal risks of some of the copy that the marketing firm has developed. You then forward outside counsel's analysis to the marketing firm, simply saying, "Looks good."

- Is the communication to the marketing firm privileged?

Alternatively, the outside marketing firm sends you, and other officers, the copy for approval. The other officers make changes, after which you reply, "Looks good."

- Is this email exchange privileged?

Remember Your Role

What happens when your roles as legal advisor and business advisor have competing interests?

- The ethics rules still apply, even when you're acting in your "other capacity"
- Remember the duty of confidentiality under Rule 1.6 is much broader than the attorney-client privilege

What communications are privileged?

- The Predominant Purpose Test – For a communication to be privileged, the "primary" or "predominant" purpose must be legal advice. Legal advice must not be "incidental" to business advice



Ethically Navigating a Remote-Working World

Technological Competence

ABA Model Rule 1.1, Comment 8:

- “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology**, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject”

Hypothetical No. 3

You're working from home for a few days and you decide a change of scenery would be nice, so you decide to set up shop at your kitchen table. As you're about to join a meeting during which you'll be giving your company legal advice, you see out of the corner of your eye that smart home device you've had for a while. You remember from reading the news that the device has had some data security issues recently.

- What do you do?

ABA Formal Opinion 498 – Virtual Practice

ABA Formal Opinion 498 serves as a reminder to those practicing virtually the necessity to meet ethical obligations, especially focusing on:

- Competency (Rule 1.1)
- Diligence (Rule 1.3)
- Communication (Rule 1.4)
- Confidentiality (Rule 1.6)
- Supervision (Rules 5.1 and 5.3)

Confidentiality – Who (or What) is Listening?

With the proliferation of connected devices, as long as it has a microphone, assume it is listening to your confidential discussions.

- Connecting a cell phone to a car, whether it be rental or personal, can also transfer data and information that can be accessed by another user or the manufacturer
- Formal Opinion 498:
 - “[T]he lawyer should disable the listening capability of devices or services such as smart speakers, virtual assistants, and other listening-enabled devices while communicating about client matters”

Hypothetical No. 4

It's crunch time. You have to schedule back-to-back-to-back meetings with your COO, another company's counsel, and a regulator. Can you send them all the same conference dial-in or video conference link?

Competence and Diligence Go Hand in Hand

Duty of Diligence:

- Lawyers must “pursue a matter on behalf of a client despite opposition, **obstruction or personal inconvenience to the lawyer**, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor.” Rule 1.3, Comment 1

Hypothetical No. 5

You're working from home and it's a nice, sunny day. You realize that the new café downtown has outdoor seating, so you decide to go and use their free Wi-Fi for the afternoon.

- You receive an email from your CEO requesting legal advice. Should you respond from the café?

Maintaining Confidentiality in Public Spaces

Cal. Formal Opinion 2010-179 provides factors to consider before using public wireless to send privileged communication:

- Can you take reasonable precautions, such as using a personal firewall?
- Who is permitted to monitor information on the wireless? Look at user agreement and licensing agreements
- Degree of sensitivity of the information
- Possible impact of inadvertent disclosure on the client
- Urgency of the situation

Hypothetical No. 6

You and your partner are working from home together. It's generally a quiet day, so you decide to both work in a common area. You then get a video conference call where you'll be discussing confidential matters.

- What should you do?

Remember Rules 1.3 (Diligence) and 1.6 (Confidentiality)

If you're working from home or in a public space, be aware of your surroundings and who could be listening in on confidential communications.

- One court in New York granted a motion to compel plaintiff's principals' son to testify about communications that occurred with plaintiff's counsel, because the plaintiff failed to demonstrate that the son "was an agent or employee of the plaintiff corporation"

Practical Considerations for Working at Home

Some considerations that may be taken for granted in the office setting, but should be carefully considered when working virtually:

- Do you have a dedicated private space for work at home?
- Is your Wi-Fi and/or router secure?
- Are you using a VPN?
- Are you using a cloud service to maintain company information?
 - Is the data regularly backed up?
- Are your videoconferences secure?
- Are you using a secure FTP link to exchange documents and data?
- Are you practicing a “Clean Desk” or “Clean Screen” policy?

Don't Forget About the Metadata

What is it?

- “Data about data”
- Information embedded electronically in a document that isn't immediately visible to the viewer, including
 - Creation date
 - Date last edited
 - Author
 - Comments and tracked changes

Hypothetical No. 7

It's 4:59 p.m. on a sunny spring afternoon. You've just finished drafting a negotiation correspondence with a potential supplier, and you'd like to include an excel spreadsheet to demonstrate some calculations. You're about to hit send.

- Before you send the email, do you have an ethical obligation to scrub the spreadsheet of its metadata?

Duty to Protect Confidential Metadata

Compare ...

ABA Formal Opinion 06-442

- No explicit duty to protect metadata

With ...

N.Y. State Bar Ass'n Opinion 782

- Duty to “use *reasonable care* when transmitting documents by e-mail to prevent the disclosure of metadata containing client confidences or secrets”

Hypothetical No. 8

You've engaged in pre-suit settlement discussions with disgruntled customer's counsel. Counsel sends you an email attaching a settlement proposal.

- Can you review the metadata included in the settlement proposal?

Duty Not to Review Metadata

Compare ...

Florida Ethics Opinion 06-02

- “It is the recipient lawyer’s concomitant obligation, upon receiving an electronic communication or document from another lawyer, not to try to obtain metadata information relating to the representation of the sender’s client that the recipient knows or should know is not intended for the recipient”

With ...

Colorado Ethics Opinion 119

- “[A] receiving lawyer generally may ethically search for and review metadata embedded in an electronic document that the Receiving Lawyer receives from opposing counsel or other third party”
- **Unless** the recipient is notified by the sender before the recipient reviews the metadata that confidential information was inadvertently transmitted

Hypothetical No. 9

That same consumer's counsel sends you a document from their client listing the purported damages they've suffered. That document contains comments from their client.

- Are you obligated to tell counsel that he or she may have inadvertently sent you a document containing metadata?

Duty to Inform Sender of Metadata Disclosure

Compare ...

D.C. Opinion 341

- If the receiving lawyer has actual knowledge that transmission of metadata was inadvertent, the receiving lawyer must consult with the sending lawyer to determine whether the metadata includes privileged information and comply with the sender's instructions
- If the receiving lawyer is uncertain as to whether the sender intended to include metadata, she should ask the sending lawyer

With ...

Maryland Dkt. No. 2007-09

- Maryland Rules of Professional Conduct “do not require the receiving attorney to notify the sending attorney that there may have been an inadvertent transmittal of privileged materials”
- However, a Maryland attorney should communicate with her client concerning the pros and cons of notifying the sending attorney

E-Discovery Competence

In-house counsel should understand how to:

- Implement appropriate electronically stored information (ESI) preservation procedures
- Understand the client's ESI systems and storage
- Identify custodians of potentially relevant ESI

Hypothetical No. 10

You receive a letter from general counsel at a competitor company. The letter requests that you stop using your competitor's brand name in your marketing efforts. The letter further indicates that your competitor wants to resolve this without resorting to litigation.

- Do you have a duty to preserve potentially relevant documents?

When Is the Duty to Preserve Triggered?

- Once litigation becomes reasonably likely – before a lawsuit is filed for a plaintiff and, at the latest, when a lawsuit is served on a defendant
- When you receive a demand letter
- When you receive a cease-and-desist letter or cure notice that threatens potential litigation
- When you receive a records subpoena
- When an event occurs that typically results in litigation (i.e., your company's product injures a consumer or is recalled)

Document Preservation Best Practices

- Analyze and understand your company's ESI systems – talk to a company IT employee to determine: number of key players, locations, and nature of their data; whether metadata is available; and any record retention policy
- Issue a written litigation hold letter, which includes language to suspend any automatic delete function, and a request for written indication of understanding by a date certain
 - Ensure social media is covered in your litigation hold letter
- Maintain copies of the written responses
- Ensure the person responsible for implementing the record retention policy is aware of the litigation hold
- Routinely oversee compliance with a litigation hold
- Monitor your client's efforts to retain and produce relevant documents
 - Work with your outside counsel to identify vendors who can capture, maintain, and store social media information
- Determine whether third parties may be in possession, custody, or control of a client's potentially relevant information

Ethical Virtual Supervision

- When making reasonable efforts to ensure other lawyers conform to the Rules of Professional Conduct, supervisory attorneys must carry out “[s]uch policies and procedures [that] include those designed to . . . ensure that inexperienced lawyers are properly supervised.” Rule 1.5, Comment 2
- “A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product.” Rule 5.3, Comment 2

Virtual Supervision Practical Tips

- To comply with your ethical duty to supervise other attorneys and non-lawyers, consider:
 - Leading by example
 - Conducting routine training with your team
 - Routinely checking in with members of your team
- Formal Opinion 498 advises regular interaction and communication with lawyers and non-lawyers for whom the supervising lawyer is responsible
 - This includes routine oversight and training on ethical obligations
 - This is also advisable to discern the health and wellness of team members

Questions?

VENABLE_{LLP}



© 2022 Venable LLP.

This document is published by the law firm Venable LLP. It is not intended to provide legal advice or opinion. Such advice may only be given when related to specific fact situations that Venable has accepted an engagement as counsel to address.

VENABLE LLP



The Times They Are A-Changin' at the FTC

Reflecting on Recent Developments at the FTC and What's Yet to Come



Leonard L. Gordon

Partner | +1 212.370.6252 | LLGordon@Venable.com

Eric S. Berman

Partner | +1 202.344.4661 | ESBerman@Venable.com

Mary M. Gardner

Partner | +1 202.344.4398 | MMGardner@Venable.com

VENABLE LLP

Institutional Changes at the FTC

Leadership Changes at the FTC

The FTC is headed by five commissioners who serve seven-year terms. They are nominated by the president and confirmed by the Senate.

- Lina Khan: Chair appointed by President Biden in June 2021
- **Democratic Commissioners:**
 - Rebecca Slaughter: Appointed May 2018; term expires Sept. 26, 2022
 - Alvaro Bedoya: Appointed May 2022; term expires Sept. 2026
 - Replaced the now CFPB head, Rohit Chopra
- **Republican Commissioners:**
 - Christine Wilson: Appointed Sept. 2018; term expires Sept. 26, 2025
 - Noah Phillips: Appointed May 2018; resigning in Fall 2022

Chair Khan's Aggressive Expansion Efforts and Dissenting Voices

Khan's efforts to expand the FTC's consumer protection authority:

- New priorities: Partnership with the NLRB, and efforts to meld consumer protection and antitrust missions
- Increased emphasis on individual liability
- Willingness to litigate and bring novel cases
- Focus on so-called "dark patterns" as a consumer protection catch-all

Chair Khan and the Republican commissioners have frequently butted heads regarding their disparate views of the FTC's authority:

- Strategic vision: Pivoting to an increased focus on social justice issues, such as discrimination and financial equity
 - Commissioner Wilson dissented, advocating that the FTC should respect the limits of its Congressional mandate and focus on maximizing consumer welfare
- The FTC's request for an increased budget
 - Commissioners Wilson and Phillips dissented, arguing that "enforcement productivity" has declined under Khan's leadership despite increased budgets

Changes in the FTC's Tone and Tenor

The FTC was traditionally very consensus driven. The new regime is now directed by Chair Khan.

Chair Khan is less deferential to staff recommendations:

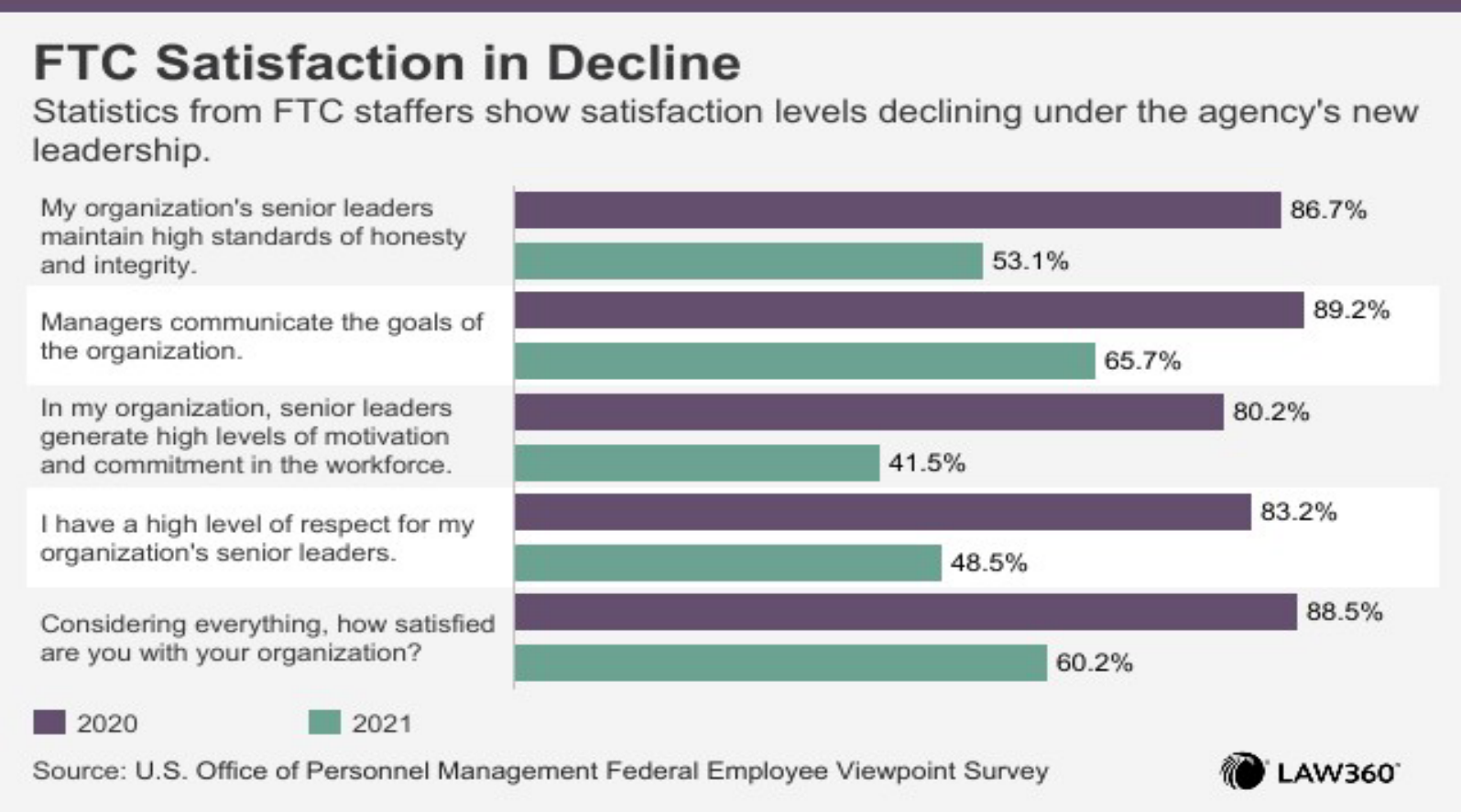
- Khan purportedly led a vote to sue Meta Platforms to block an acquisition—over staff's objections
- Conversely, staff may feel more shackled and less autonomous during negotiations

Chair Khan is vocally critical of her predecessors, which reflects on staff

- Conversely, minority commissioners are vocally critical of the chair

Reduction of institutional transparency (despite chair's characterizations)

Record Low Morale Among FTC Staff



Practical Changes at the FTC



The FTC's Increased Use of Its Rulemaking Authority

The FTC's Magnusson-Moss Rule-Making Authority

Section 18 of the FTC Act, 15 U.S.C. § 57a, also known as the Magnuson-Moss Warranty Federal Trade Commission Improvements Act (“Mag-Moss”), gives the FTC the authority to promulgate trade regulation rules.

To promulgate a rule under Mag-Moss, the FTC must:

1. make a finding that the conduct at issue is “prevalent,” and
2. conduct informal hearings allowing interested parties to cross-examine those making oral presentations

In the wake of *AMG*, the FTC first amended its rulemaking procedures to remove purported “extraneous and onerous procedures,” such as:

- Transferring the power of the rulemaking’s chief presiding officer from the chief ALJ to the FTC chair, and
- Eliminating the requirement for a staff report during the rulemaking process

Several commissioners have emphasized that these swift and sweeping revisions will result in hasty rules.

Proposed Earnings Claims Rule

February 2022: The FTC unanimously approved the issuance of an Advanced Notice of Proposed Rulemaking that addresses earnings claims in several ways:

- Primarily, in light of *AMG*, the rule would allow the FTC to recover funds for consumers harmed by deceptive earnings claims under Section 19 of the FTC Act, in addition to civil penalties under Section 5
- Though the FTC currently has rules regulating earnings claims in certain instances, such as the TSR, the scope of the proposed rule would be far broader

The ANPR called for public comment on 28 separate topics, and the comment period closed in May 2022.

Proposed Rulemaking Regarding the Telemarketing Sales Rule

April 2022: The Commission unanimously approved issuing a Notice of Proposed Rulemaking and Advance Notice of Proposed Rulemaking seeking public comment on the Telemarketing Sales Rule (TSR)

June 2022

- Advance Notice of Proposed Rulemaking seeking comments on:
 - Tech Support Scams
 - Click-to-Cancel Requirements
 - Robocalls and Other Telemarketing to Small Businesses
- Notice of Proposed Rulemaking seeking comments on:
 - Recordkeeping Requirements
 - Business-to-Business (B2B) Schemes

Commercial Surveillance and Privacy Rulemaking

August 2022: The Commission voted 3-2 on party lines to issue an Advance Notice of Proposed Rulemaking to create a Rule seeking to limit “commercial surveillance” and protect consumer privacy.

- Specifically, the FTC seeks comment regarding how businesses (1) collect, aggregate, protect, use, analyze, and retain consumer data as well as (2) transfer, share, sell, or otherwise monetize that data in ways that are unfair or deceptive
- The rulemaking seeks to create uniform privacy and data security requirements and provide the FTC the authority to seek financial penalties against first-time violations
- Comments are due October 21, 2022. The FTC also held a public forum on commercial surveillance on September 8
- There is bipartisan congressional pushback on the FTC’s announcement

Automotive Fees and Advertising Rulemaking

On June 23, the FTC announced that it was issuing a notice of proposed rulemaking (NPRM) to address “junk fees” and “bait-and-switch advertising tactics” with respect to automobile sales.

Specifically, the proposed rule has four substantive provisions:

1. Prohibiting misrepresentations regarding vehicle costs, terms of purchasing, financing, or leasing and the availability of vehicles at an advertised price
2. Requiring dealers to clearly and conspicuously disclose the offering price and any “add-on” products or services in any advertisement or communication with customers
3. Prohibiting dealers from charging for add-ons that provide no benefit, are undisclosed, or are not selected, such as duplicative warranty coverage. The rule also requires disclosure of an itemized list of add-ons
4. Requiring dealers to keep copies of all materially different marketing materials, purchase orders, and consumer complaints

The comment period for the NPRM closed on September 12, and the FTC is sure to take action soon after.



FTC Updates to Significant Guidance Documents and Policy Statements

Updates to FTC Endorsements Guides

- Proposed updates to Guides Concerning the Use of Endorsements and Testimonials in Advertising:
- (Announced May 2022)
 - Expand definition of “endorser” to include computer-generated influencers (i.e., not real people)
 - Tagging a brand in a social media post will be expressly considered to be an endorsement
 - Updated definition of “clear and conspicuous” disclosure:
 - Difficult to miss and easily understood by “ordinary people”
 - Disclosures in ads targeting specific audiences would be evaluated through the lens of that group
 - Additional guidance on material connections between advertisers and endorsers
 - Guidance re: endorsements in advertising directed to children
 - Guidance on when advertisers, endorsers, intermediaries, and platforms can be held liable under the FTC Act for misleading endorsements

Updates to the FTC's Dot.Com Disclosure Guidance

The FTC solicited public comment on how it should modernize its guidance for digital advertising and marketing (i.e., “Dot.Com Disclosures”).

The FTC is concerned that the current version of the guidance is used to “justify dark patterns and other forms of digital deception[.]”

- For example, companies that place disclosures behind a hyperlink

The FTC seeks public input on several issues, including:

- How to address the use of so-called “dark patterns” (potentially manipulative user interface designs)
- The appropriate use of hyperlinks
- The necessity of specific guidance for advertising on mobile devices
- Sponsored and promoted advertising on social media
- Advertisements embedded in games, virtual reality, and microtargeted ads
- Addressing multi-party selling arrangements in online commerce and affiliate marketing
- Adequacy of online disclosures when consumers must navigate multiple webpages

The FTC's Policy Statement Re: Negative Option Marketing

The FTC set forth three key requirements:

1. Required disclosures, including:
 - Any material terms related to the underlying product or service that are necessary to prevent deception, regardless of whether that term directly relates to the terms of the negative option offer
 - That consumers will be charged for the good or service, or that those charges will increase after any applicable trial period ends, and, if applicable, that the charges will be on a recurring basis, unless the consumer takes timely steps to prevent or stop such charges
 - Each deadline (by date or frequency) by which the consumer must act in order to stop the charges
2. Evidence of consumer's express informed consent prior to charge:
 - Obtaining the consumer's acceptance of the negative option feature offer separately from any other portion of the entire transaction
 - Not include any information that interferes with, detracts from, contradicts, or otherwise undermines the ability of consumers to provide their express informed consent to the negative option feature
 - A "pre-checked box" does not constitute affirmative consent. In addition, the seller should clearly disclose the name of the billing entity authorized by the consumer's consent

The FTC's Policy Statement Re: Negative Option Marketing

3. A “simple” cancellation mechanism:
 - Cancellation mechanisms that are at least as easy to use as the method the consumer used to initiate the negative option feature
 - Provide the cancellation mechanisms at least through the same medium (such as website or mobile application) the consumer used to consent to the negative option feature
 - A simple mechanism over the same website or web-based application the consumer used to purchase the negative option feature
 - If the seller also provides for telephone cancellation, it should provide, at a minimum, a telephone number, and answer all calls to this number during normal business hours, within a short time frame, and ensure the calls are not lengthier or otherwise more burdensome than the telephone call the consumer used to consent to the negative option feature
 - Marketers should not, among other things: hang up on consumers who call to cancel; place them on hold for an unreasonably long time; provide false information about how to cancel; or misrepresent the reasons for delays in processing consumers' cancellation requests

The FTC's Guidance on Consumer Reviews

In January 2022, the FTC released two guides related to consumer online reviews

- Soliciting and Paying for Online Reviews: A Guide for Marketers
 - Marketers should ensure that employees and friends and family disclose any material relationships
 - Marketers should ask for reviews from customers who have used the product or service and not only ask those who might give good reviews
 - FTC also provides tips on how to work with comparison websites, review platforms, and reputation management companies
- Featuring Online Customer Reviews: A Guide for Platforms
 - The FTC focuses on collection, moderation, and publication of customer reviews
 - Platforms should treat, scrutinize, and display “genuine” positive and negative reviews the same
 - Platforms should consider using reasonable processes/procedures to detect fake, manipulated, or deceptive reviews
 - Incentivized reviewers should clearly and conspicuously disclose that connection; platforms should clearly and conspicuously disclose how their overall ratings work and how they collect, process, and display reviews

Upcoming FTC Guidance Updates

The FTC announced that it intends to institute periodic reviews of the following Guidance Documents, beginning in 2022:

- Guides Against Deceptive Pricing
- Guides Against Bait Advertising
- Guides Concerning the Use of the Word “Free”
- Green Guides



Notable FTC Enforcement Practices

The FTC's Penalty Offense Authority

Resurgence of the FTC's Penalty Offense Authority

Post-AMG, the FTC has reinvigorated a long-dormant source of authority to seek civil penalties—Penalty Offense Authority—found in Section 5(m)(1)(B) of the FTC Act, 15 U.S.C. §45(m)(1)(B)

- The FTC can seek civil penalties if it proves that (1) the company knew the conduct was unfair or deceptive in violation of the FTC Act; and (2) the FTC had already issued a written decision that such conduct is unfair or deceptive
- The FTC is currently evaluating exercising its Penalty Offense Authority in the following areas:
 - Money-Making Opportunities
 - Business Opportunities
 - Debt Collection
 - Unordered Merchandise
 - Endorsements and Testimonials
 - Education
 - Auto rentals

Recent Settlements: Penalty Offense Authority

US v. Kohls (settled April 8, 2022)

- Alleges violations of the FTC Act and Textile Act and Rules, including:
 1. Falsely marketing rayon textiles as “bamboo”
 2. Making deceptive environmental claims that the “bamboo” textiles were made using an ecofriendly process
- Alleges that Kohl’s had prior knowledge via Warning Letters to defendants, which enclosed synopses of prior administrative decisions finding the same conduct was unfair or deceptive
- Settlement:
 - Kohl’s agreed to pay a \$2.5 million civil penalty
 - Agreed not to call products “bamboo” unless such products met the requirements of the Textile Act and Rules



The FTC's Increased Focus on Rule Violations

FTC Enforcement of the New Made in the USA Labeling Rule

US v. Lithionics Battery LLC

- The FTC's first resolved action under the new Made in the USA Labeling Rule
- Allegedly falsely advertised batteries as made in the USA, when the batteries contained foreign-sourced ion cells
- Settlement approved on May 4, 2022:
 - Pay a penalty of \$105,319.56 (three times the company's profits from illegal activity)
 - Notify affected consumers that the batteries were not made in the USA
 - Barred from claiming its products are Made in the USA, unless the Rule's requirements are satisfied

Lions Not Sheep Products, LLC

- Allegedly made false claims about its imported apparel by adding phony Made in USA labels to its clothing and accessories that were actually imported from China and other countries
- Settlement finalized on July 28, 2022:
 - Pay \$211,335
 - Notify affected customers that their apparel was imported
 - Must stop claiming that products are made in the United States unless they can show that the product's final assembly or processing—and all significant processing—takes place here and that all, or virtually all, ingredients or components of the products are made and sourced here

Made in the USA Labeling Rule Enforcement Actions

In the Matter of Resident Home LLC


- Allegedly made false, misleading, or unsupported advertising claims that their imported DreamCloud mattresses were “made with 100 percent USA-made premium quality materials,” when in fact all DreamCloud mattresses were finished overseas and, in some cases, were wholly imported or used significant imported materials.
- Settlement approved on June 22, 2022:
 - Pay \$753,000 monetary relief
 - Notify affected customers that their mattresses were not made in the USA
 - Barred from claiming its products are Made in the USA, unless the Rule’s requirements are satisfied
- The Commission voted 3-2 to approve the complaint and settlement order, with Commissioners Phillips and Wilson voting no
 - The majority cited the company’s “repeat offender” status for making false Made in USA claims in justifying the amount of monetary relief pursuant to a damages theory under Section 19 of the FTC Act
 - Dissent argued that the amount of monetary relief exceeded the bounds of the FTC’s Section 19 authority because it was punitive beyond addressing the actual amount of consumer injury that could be proved

FTC Enforcement of the Long-Dormant Franchise Rule

US v. Burgerim Group

The FTC sued franchisor, Burgerim, for violating the Franchise Rule—the first action of its kind since 2013.

- The Franchise Rule requires franchisors to provide consumers with material information in order to weigh the risks and benefits of purchasing a franchise
 - Under the Franchise Rule, franchisors must disclose required information in a Franchise Disclosure Document or “FDD”
- The FTC alleges that Burgerim failed to disclose required information in its FDD, such as: (i) the identities of Burgerim management personnel; (ii) the contact information of all former Burgerim franchisees that ceased operations during the previous fiscal year; and (iii) the revenue Burgerim received from franchisees
- The case is still pending



Heightened Attention to Purported “Dark Patterns”

Alleged Dark Patterns: Deceptive Reviews and Endorsements

FTC v. Roomster Corp. (S.D.N.Y. Aug 30, 2022)

- Roomster allegedly advertised that it had millions of “authentic” and “verified” listings, but in fact failed to verify listings or ensure their authenticity. After paying to access the listings, users allegedly found that many of the listings were bogus
- Roomster allegedly purchased over 20,000 fake reviews from AppWinn and engaged in “drip campaigns” that involved a “steady flow of reviews” to drive Roomster to the number one search result and draw potential users to Roomster’s paid platform
- The principal for AppWinn entered into a proposed stipulated final order (approved 5-0):
 - Pay \$100,000
 - Permanent ban from selling or misrepresenting consumer reviews or endorsements
 - Notify the Apple and Google app stores that Roomster paid him to post reviews on each platform and identify the fake reviews and approximate times they were posted
- The lawsuit by the FTC and six states against Roomster is still pending in the U.S. District Court for the Southern District of New York

Dark Patterns: Raising Online Roadblocks

FTC v. Intuit Inc., Docket No. 3:22-cv-01973 (N.D. Cal. Mar 28, 2022)

On March 28, 2022, the FTC filed an administrative complaint against Intuit alleging that the company's marketing of TurboTax as a free tax-filing service misleads consumers because the free service applies only to some.

- The FTC also alleged in its complaint that Intuit purposefully designed its platform to entice consumers looking for free tax filing services but made it difficult to locate the necessary webpages to actually file taxes for free

The FTC simultaneously filed a complaint for a temporary restraining order and preliminary injunction against Intuit in federal court in the Northern District of California seeking to immediately enjoin it from advertising its tax-filing product and service, TurboTax, as free.

- The request was denied

Even after Intuit settled with all 50 states and DC for \$141 million, the FTC elected to continue to pursue its administrative complaint.

Creative Redress Calculations for Dark Patterns

FTC v. Credit Karma

The FTC issued an administrative complaint against the credit services company, Credit Karma, for allegedly deploying dark patterns to misrepresent that consumers were “pre-approved” for credit card offers, when in reality, almost a third were denied.

- Specifically, the FTC alleged that Credit Karma knew (based on A/B testing) that telling consumers they were “pre-approved” had a higher success rate than telling consumers they had “excellent” odds of being approved. According to the FTC, when user interfaces are designed, including with the aid of A/B testing, to trick consumers into taking actions in a company’s interest and that lead to consumer harm, this is a “dark pattern”

The FTC issued a proposed consent order.

- This proposal will be published in the Federal Register and subject to public comment, after which the Commission will decide whether to make the proposed consent order final

As part of the proposed order, the FTC seeks \$3 million in consumer redress to compensate consumers who wasted significant time applying for credit card offers and/or had their credit scores lowered due to the “hard inquiry” on their credit reports, thereby harming their ability to secure other financial products in the future.



The FTC Is Watching Subscription Services

ROSCA Claims and Individual Liability

US v. MyLife (C.D. Cal. 2021)

- The DOJ, on behalf of the FTC, alleged that the company's cancellation mechanism violated ROSCA because it was not "simple." According to the court:
 - The Complaint alleged that MyLife made it difficult to cancel subscriptions by primarily offering one method of cancellation: telephone
 - When consumers sent an email request for cancellation to MyLife's member support address, they would often receive an automated response directing the consumer to contact Customer Care by phone
 - When customers did reach an agent on the phone, they were faced with a six-part retention sales script with the goal of convincing customers not to cancel
- The Complaint further alleged that MyLife instructed its call agents to inform customers seeking a refund that the subscriptions were nonrefundable under MyLife's terms and conditions
- The parties ultimately settled
 - MyLife agreed to pay \$16 million
 - MyLife's CEO was ordered to pay \$5 million
 - Both parties are permanently banned from offering any product with a negative option feature

Extending ROSCA to Protect Businesses

On July 29, the FTC announced a settlement with a payment processor and two of its sales agent affiliates.

- The action alleged hidden terms, “surprise” exit fees, and charges made to merchants without their consent
- Under the proposed stipulated order, the payment processor agreed to repay \$4.9 million in redress to merchants

In addition to claims for violations of Section 5 of the FTC Act for misrepresentations made to merchants, the action also included claims for violations of ROSCA.

- The ROSCA violations were based on the company’s alleged withdrawal of funds from the merchants’ accounts without their consent and the lack of a simple cancellation method, which made it difficult and costly to cancel the service
- Because ROSCA is a consumer protection statute, the FTC’s allegations of ROSCA violations in a case involving customers that are small businesses are noteworthy



The FTC Ramps Up Consumer Data and Privacy Protection

The FTC Files Suit as Part of Its Crackdown on Commercial Surveillance

FTC v. Kochava, Inc., Case No. 2:22-cv-377 (N.D. Idaho)

In August 2022, the FTC filed a lawsuit against data broker, Kochava Inc., for selling geolocation data from hundreds of millions of mobile devices that could be used to trace the movements of individuals to and from sensitive locations, such as reproductive health clinics, places of worship, homeless and domestic violence shelters, and addiction recovery facilities.

- Kochava was selling the data to assist companies in advertising and analyzing foot traffic at their stores and other locations
- Additionally, the FTC alleges that Kochava failed to adequately protect its data from public exposure because Kochava allowed anyone to obtain a large sample of sensitive data with little effort and use it without restriction

This suit is part of the FTC's larger campaign to crack down on harmful commercial surveillance practices that collect, analyze, and profit from information about people and prosecute the illegal use and sharing of highly sensitive consumer data, including sensitive health data.

FTC Enforcement Regarding Targeted Advertisements

US v. Twitter, Inc., 3:22-cv-3070 (N.D. Cal.)

In 2011, Twitter stipulated to an FTC administrative order imposing financial penalties if Twitter misrepresented users' security, privacy, and confidentiality.

- The administrative order stemmed from allegations that Twitter told users they could control who could see tweets and private messages when Twitter did not have safeguards to honor these representations

On May 25, 2022, Twitter and the Department of Justice, on behalf of the FTC, entered into a stipulated order for penalties for violating the 2011 order.

In obtaining the \$150 million in penalties, the DOJ alleged that Twitter collected users' personal information for security, such as multi-factor authentication or account auto-recovery.

- The DOJ alleged, instead, that Twitter used consumers' information to serve them with targeted advertisements.

The 2022 Order requires Twitter to implement further consumer protection provisions, including:

- Prohibiting the use of phone numbers and emails to serve targeted ads
- Requiring Twitter to notify users of improper use of phone numbers and email addresses and inform them how to turn off targeted ads
- Providing multi-factor authentication options that do not require a phone number
- Implementing an enhanced privacy and security program and reporting incidents to the FTC



Practical Impact on FTC Engagement (Open Discussion)



© 2022 Venable LLP.

This document is published by the law firm Venable LLP. It is not intended to provide legal advice or opinion. Such advice may only be given when related to specific fact situations that Venable has accepted an engagement as counsel to address.

VENABLE LLP



The Most Important Result of Your Marketing Efforts

The Purchase



Ellen T. Berge

Partner | +1 202.344.4704 | ETBerge@Venable.com

VENABLE LLP

What Consumers Want

Faster, More Convenient Transactions

- Fast, frictionless payments
- Convenience: subscriptions, auto-ship, auto-replenish
- Splitting card payments

Secure Transactions

- Minimize risk of losing sensitive information
- Reputation and trustworthiness
- Confidence in international transactions

Alternative Payment Options

- Deferred payments – credit cards, buy now pay later (BNPL)
- PayPal, Google Pay, Apple Pay, Amazon Pay
- Digital currencies

What Merchants Want

Checkout Optimization

- Reduced checkout friction (for example, “Buy” and “Buy Now” buttons)

Reduced Costs / Faster Payments

- Reduced transaction processing costs
- Reduced fraud liability
- Real-time payments

Repeat Customers

- Subscriptions
- Loyalty programs

Today's "Quick Hits"

1. Buy Now, Pay Later
2. Surcharges and Convenience Fees
3. Subscription Sales

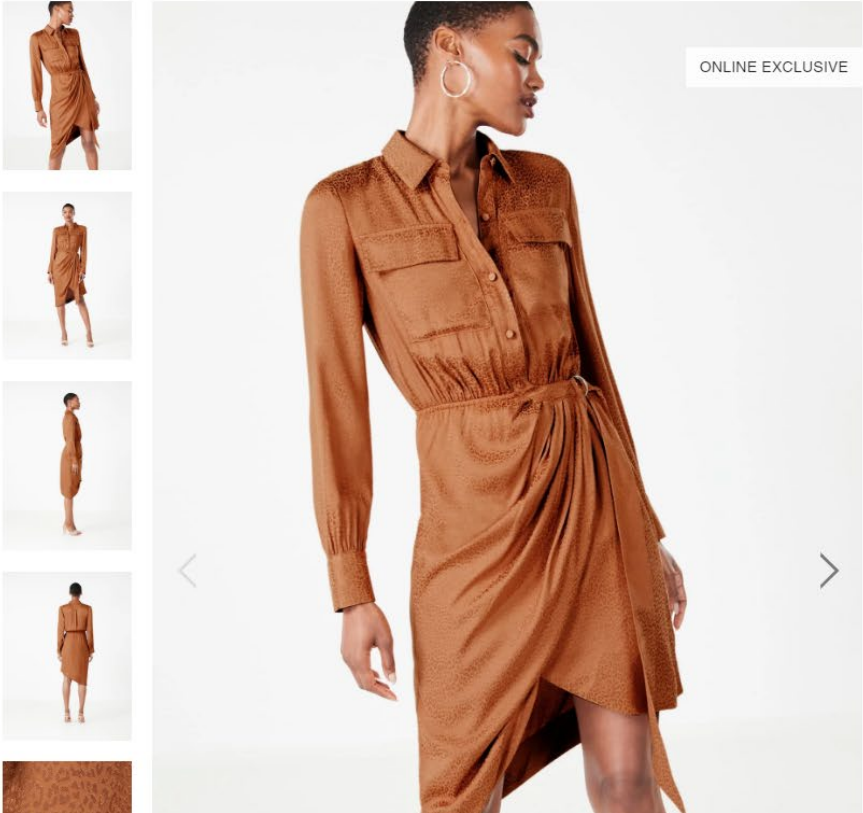
Deferred Payments

Buy Now, Pay Later (BNPL)

What Is BNPL?

BCBGMAXAZRIA

SIGNATURE COLLECTION NEW DRESSES CLOTHING SHOES & ACCESSORIES BCBGENERATION BCBG GIRLS THE BCBG EDIT SALE



FERNANDA BUTTON-FRONT DRESS

\$268.00

or 4 interest-free payments of \$67.00 with **afterpay** or **Klarna**

EXCLUSIVE TO BCBG.COM

Part of our premium Signature Collection, this chic button-down dress is a perfect transitional piece for fall and winter. Crafted with silky-smooth, non-stretch rayon for a luxe fit and feel and topped with a button placket and collar. Complete with two front pockets, button cuffs and a faux-wrap skirt that creates a beautiful tulip silhouette. Finished with an elastic waistband for comfortable wearability and a double-ring belt detail for adjusting the fit of the skirt.

COLOR



SIZE



[SIZE GUIDE](#)

ADD TO CART



What is BNPL?

- Definition: Any program that lets the consumer take possession of an item or receive a service without requiring that the consumer pay the full amount immediately
- Most BNPL programs: Four payments in six weeks (two-week intervals)
 - Payments often charged to credit card
- Advertising spin: No fees or interest, no credit checks
- 81.1% of credit card users reported satisfaction with using a BNPL product*
- Compared to users of traditional credit, debit, and P2P products, BNPL users are generally:*
 - Lower earning (less than \$75,000 annually)
 - Younger (41.6% under age 36)
 - Non-white (30% reporting non-white race/ethnicity)
 - More likely to be employed (70.6%, compared to less than 66% for other products)

*Source: Federal Reserve Bank of Philadelphia, *Buy Now, Pay Later: Survey Evidence of Consumer Adoption and Attitudes* (June 2022).

Comparing Payment Mechanisms

% Respondents Reporting Product Use Over the Previous 12 Months

Product	Overall Users	Heavy Users (11+ Times)
Credit Card	92.2%	77.1%
Debit Card/Cash	87.2%	64.3%
P2P Payment	84.7%	40.5%
BNPL	31.0%	5.2%

*Source: Federal Reserve Bank of Philadelphia, *Buy Now, Pay Later: Survey Evidence of Consumer Adoption and Attitudes* (June 2022).

Increased Growth, Increased Scrutiny

- Accumulating debt: Consumers have difficulties managing varying payment schedules with multiple BNPL loans across different sellers
- Missed payments result in late fees (e.g., \$7 or \$10 per missed payment)
- BNPL loans not reported to major credit reporting agencies
 - Individuals without credit or with poor credit able to obtain goods and services they might not be able to afford
 - Good repayment history is not reported, but missed payments are
 - Experian, Equifax, and TransUnion will include BNPL loans in credit report data; dependent on reporting in the first place
- “Regulatory Arbitrage”: BNPL companies not adequately evaluating what consumer protection laws apply to their products (e.g., disclosure requirements, dispute resolution)
- Data harvesting, behavioral targeting based on payment histories, shopping trends

Consumer Financial Protection Bureau Opens Inquiry into “Buy Now, Pay Later” Credit

Buy Now, Pay Later Expected to Set New Records for Lending this Holiday Season

DEC 16, 2021

SHARE & PRINT



WASHINGTON, D.C. – Today the Consumer Financial Protection Bureau (CFPB) issued a series of orders to five companies offering “buy now, pay later” (BNPL) credit. The orders to collect information on the risks and benefits of these fast-growing loans went to Affirm, Afterpay, Klarna, PayPal, and Zip. The CFPB is concerned about accumulating debt, regulatory arbitrage, and data harvesting in a consumer credit market already quickly changing with technology.

Key Questions for Sellers to Ask

- How does BNPL change your relationship with the customer?
 - New processes to handle customer service issues, refunds
 - Education on high-level benefits and risks of using BNPL products
 - Your customer becomes a customer of the BNPL provider
 - May offer other payment products (installment loans, etc.)
- What are your costs for offering BNPL payment options?
 - Merchants pay between 3% and 6% of purchase price to BNPL providers (similar to interchange fees in card transactions)
 - What happens if there is a return or refund? How do you support seamless customer service?

What's Next for BNPL?

- Continued growth of the BNPL market
 - Major BNPL firms have expanded offerings to include more traditional loan products (e.g., 3 - to 12-month installment loans)
 - Since January 2021, at least 67 transactions (M&A, corporate financing) involving BNPL services (including Afterpay's \$29 billion purchase by Block f/k/a Square and \$1.64 billion investment in Klarna) (Source: Nilson Report, April 2022)
 - June 2022 announcement of the "Apple Pay Later" service
- Continued regulatory scrutiny
 - Nov. 2021 House Financial Services Committee hearing: "Buy Now, Pay More Later?"
 - CFPB outstanding Dec. 2021 inquiry into BNPL credit
 - Proposed BNPL regulations in the UK (requiring lenders to ensure consumers can afford short-term loans)

Pay-to-Pay

Surcharges, Convenience Fees, Service Fees

Surcharges, Convenience Fees, Service Fees

- **Surcharge** – A fee added to a transaction for the acceptance of payment by credit **card (not allowed for debit card)**. A surcharge is generally defined to mean any increase in the price or cost of goods or services that is imposed on a customer paying by credit card, that is not imposed on a customer paying by cash, check, or other means.
- **Convenience Fee** – A fee added to a transaction that is charged for a bona fide convenience to the cardholder (**e.g., an alternative channel outside the merchant’s customary payment channel**) that is not charged solely for the acceptance of a credit card. State laws generally make no distinction between a surcharge and a convenience fee.
- **Service Fee** – A separate fee (i.e., not included in a single transaction) assessed to a cardholder who uses a credit card for transactions **in certain permitted merchant categories**.

Key Differences (Visa/Mastercard Rules)

Surcharge

- Prohibited in CT, ME, PR
- Requires notice to card brands (Visa/MC)
- Must include disclosures at point of sale
- Maximum surcharge: 4%
 - Note: New Colorado law (effective July 1, 2022) allows surcharges of either 2% of transaction value OR the actual amount the merchant pays to the payment processor for processing the transaction

Convenience Fee

- May be only added for card-not-present transaction (online, telephone, mail order)
- May not be charged by a merchant operating exclusively in a card-not-present environment
- Must be disclosed clearly
- Must be a flat or fixed amount, regardless of value of payment due (i.e., not a percentage)
- Must not be added in addition to any surcharge
- Must not be charged on a recurring or installment transaction

Service Fee

- Allowed only in permitted merchant categories: schools, universities, courts, and government agencies
- Must be clearly disclosed
- Must be reasonable reflection of costs associated with completing the transaction
- Must be processed as a separate transaction, if fee is assessed by a third party in a card-not-present environment

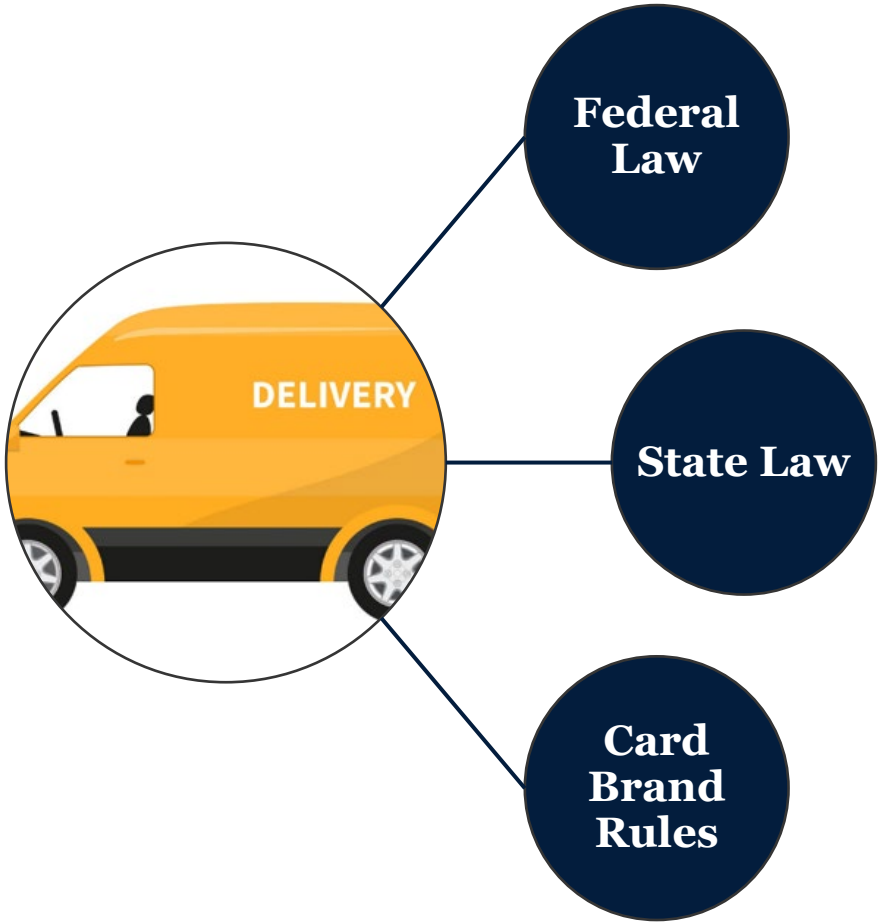
Legal Pitfalls in Convenience Fees

- Fair Debt Collection Practices Action (FDCPA): Prohibits “[t]he collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.” 15 U.S.C. § 1692(f)
- State law may invoke the FDCPA and create a private cause of action (class action)
 - See, e.g., Maryland Consumer Debt Collection Act
 - *Alexander v. Carrington Mortg. Servs., LLC*, 23 F.4th 370 (4th Cir. 2022): Maryland law does not permit the collection of convenience fees in connection with mortgage payments, because mortgage payments are payments toward a debt

Recurring Payments

Subscriptions, Auto-Replenish, Membership Clubs, and More

Regulatory Framework / Rules



- Restore Online Shoppers' Confidence Act (ROSCA) – Online transactions
- FTC Telemarketing Sales Rule – phone transactions
- Section 5 of the FTC Act (UDAP prohibitions)

- Significant laws in – California, New York, Virginia, Vermont, Colorado, Delaware, Illinois, District of Columbia, others
- New California amendments (effective July 1, 2022)

- Visa
- Mastercard

Summary of Requirements

- **Clear and Conspicuous Disclosures**
- **Affirmative Express, Informed Consent**
- **Order Confirmation**
- **Simple Cancellation Mechanism**
- **Renewal Reminders**
- **Material Changes to the Offer**

Noteworthy Outliers

- Disclosures must be “clear and conspicuous” (CA, CO, DE, DC, ND, NY, OR, TN, VA)
- For annual renewals, consumer must take affirmative action to opt into the automatic renewal as well as accept the contract (VT)
- Specific provisions for free or promotional trial offers (CA, DC, others)
- Cancellation:
 - If consumer enrolled online, must be able to cancel online (CA, NY, VA, others)
 - CA: Cancellation must take form of (a) a prominently located direct link or button within customer’s account or profile, or within device or user settings, **OR** (b) an immediately accessible termination email formatted and provided by the business that consumer can send without additional information
- Post-order “acknowledgment”: Must send order confirmation, including how to cancel and other disclosure info (CA, NY, others)
- Renewal reminders (CO, others)
 - States have different timing requirements

Current / Future Litigation Trends

- Deficient disclosures
- Non-compliance “order acknowledgments” (email confirmations)
- Non-compliant cancellation mechanisms / difficult cancellation
- Failure to provide required renewal reminders

Noom Class Action

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MOJO NICHOLS, SUSAN BREWSTER,
DUANE DEA, MARYANNE DERACLEO,
KAREN KELLY, REBECCA RICHARDS,
JENNIFER SELLERS, and STACY
SPENCER,

Individually and on Behalf of All Others
Similarly Situated,

Plaintiffs,

v.

NOOM, INC., ARTEM PETAKOV, and
JOHN DOES 1 TO 5,

Defendants.

No. 20 Civ. 3677 (LGS) (KHP)

THIRD AMENDED CLASS ACTION
COMPLAINT

JURY TRIAL DEMANDED

Allegations:

- Violations of CA, NY, other state laws
- Consumers tempted by “low cost” and “zero cost” trial
- Trial period “extraordinarily difficult to cancel”
- Cannot cancel via email, mail, phone, fax, or through website
- Exorbitant multi-month, nonrefundable subscription fees
- Attempted to artificially reduce high chargebacks by charging a small-dollar amount for previously “free” trial
 - (chargebacks: ratio of sales to returned transactions)

Complaint filed Jan. 21, 2021

Nationwide class

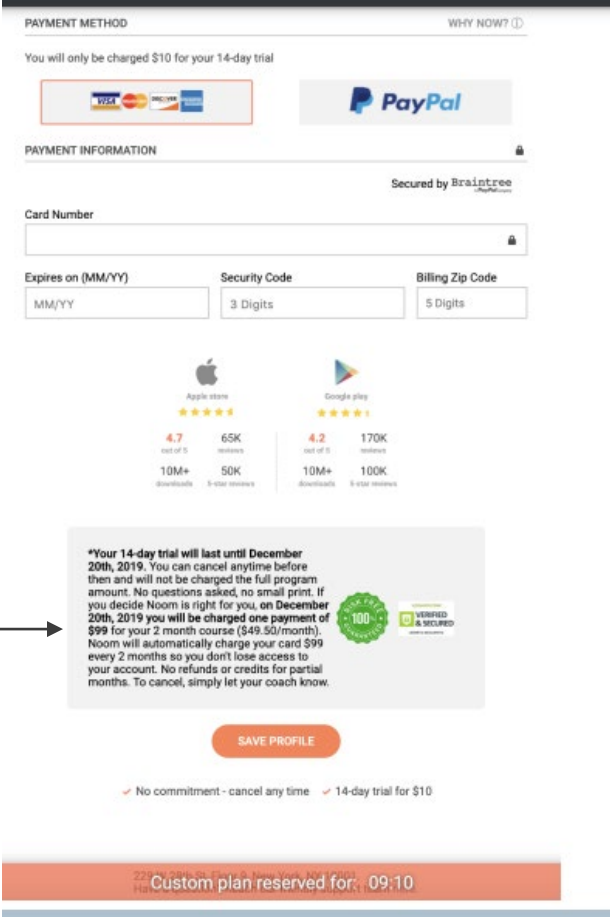
Noom – Dark Pattern Allegations?

long been on notice that Noom’s trial period cancellation process is both wildly inconsistent with consumer expectation and highly lucrative:

If you want to cancel, you don’t go to “Settings – My Account – Cancel Subscription.” You don’t get to give up that easy. In order to cancel the app, you need to contact your virtual trainer and tell them you’re a big pansy That’s a genius move that will only serve to increase customer retention¹⁹

Noom’s “genius move” also constitutes a calculated exploitation of the psychology of human decision-making that demonstrates how little Noom cares about the impact its conduct has on people.

According to plaintiffs, the payment page was the only place where any disclosures appeared, was visually confusing (colors and spacing), and designed for someone to overlook the fine print.



Noom Settlement

February 2022

- \$56 million cash settlement fund + \$6 million in subscription credits
- Agreed to business practice changes, effective for two years
 - Separate express consents to both the negative option terms and the entire transaction
 - Send a reminder notice prior to conversion from trial subscription to periodic auto-renewing subscription, with deadline to cancel, date of next charge, amount of next charge

Noom's New Checkout Page:

In order to use the Noom app you'll need an iPhone or Android smartphone

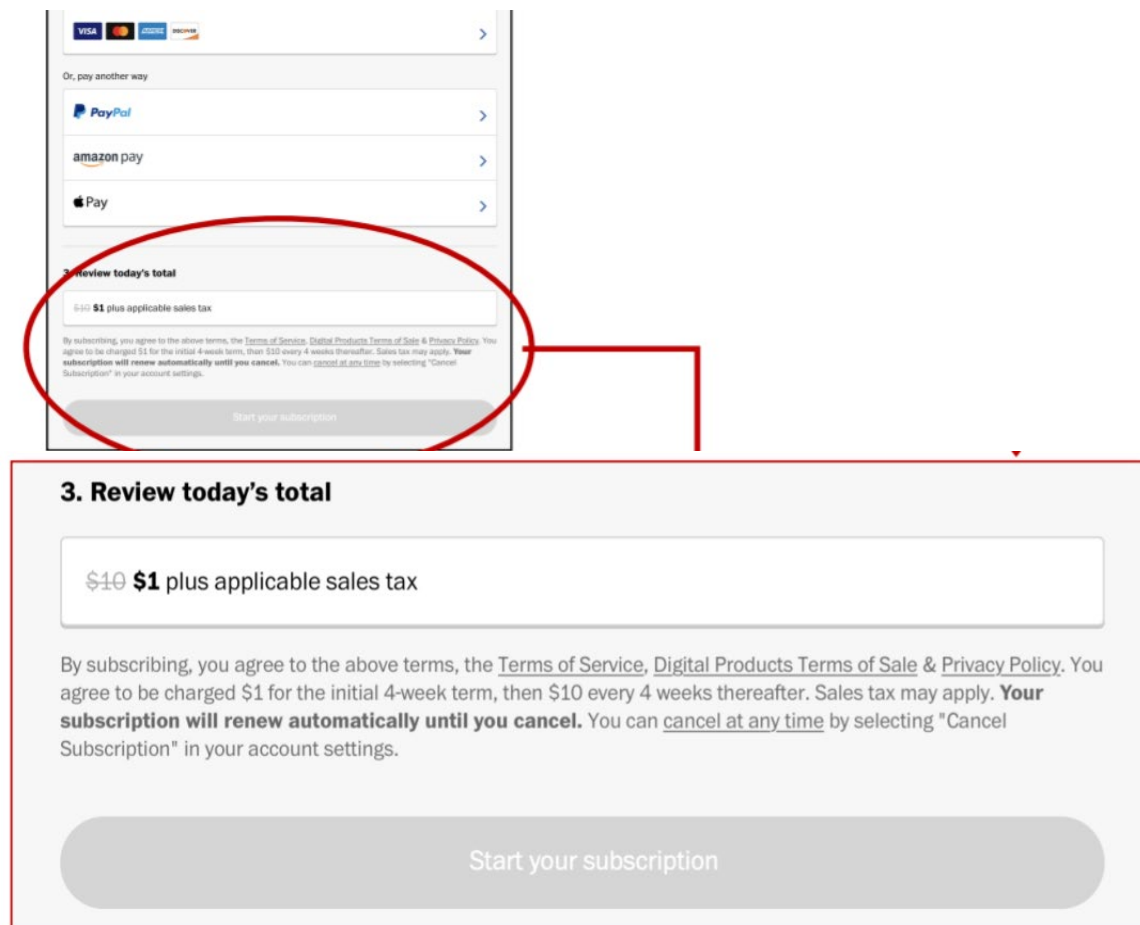
- This is an autorenewing subscription.
- If I don't cancel during my 7-day trial, Noom will charge me \$119 after the trial ends on August 23, 2022.
- Noom will charge my payment method on file \$119 automatically every 2 months thereafter until I cancel. Tax charged at renewal is subject to change based on applicable tax rates.
- I can cancel using the cancel button in my account page, accessible on Noom's website or through the settings section in the app.
- If I cancel before the end of a subscription period, I understand that Noom will not provide a partial refund.

I agree to the above terms of the 7-day trial and autorenewing subscription

Submit

By clicking "Submit" above, I have read, understood, and accepted Noom's [Terms and Conditions](#), [Privacy Policy](#), and [Research Policy](#).

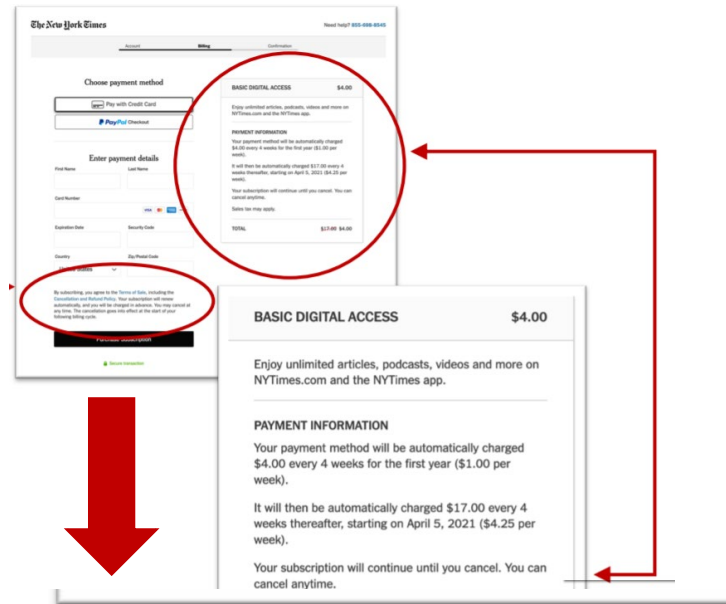
Jordan v. Washington Post. (N.D. Cal. 2020)



Plaintiff's Allegations:

- Checkout page fails to disclose that the method of cancellation available to a particular consumer varies, depending on the medium through which that consumer initially purchased and/or enrolled in her subscription
 - Does not disclose that those who purchased their digital-only subscriptions directly through the website "can go to [their] Account Profile to cancel"
- The checkout page does not state that the consumer "must cancel [her] subscription before it renews each Billing Period to avoid billing of the next Billing Period's subscription fees to [her] Payment Method," or that "when [the subscriber] cancel[s], [she] cancel[s] only future charges associated with [her] subscription, and [she] will not receive a refund for the current Billing Period"
- (Also alleged no affirmative consent)

Moses v. New York Times (S.D.N.Y. 2020)



By subscribing, you agree to the [Terms of Sale](#), including the [Cancellation and Refund Policy](#). Your subscription will renew automatically, and you will be charged in advance. You may cancel at any time. The cancellation goes into effect at the start of your following billing cycle.

Plaintiff's Allegations:

- Although the Checkout Page states that the customer's "subscription will continue until [the customer] cancel[s,]" it nevertheless fails to comply with the ARL because it is placed in the block of text positioned near the top right of the webpage, while the "Purchase Subscription" button appears toward the bottom left of the webpage
 - It is therefore not "in visual proximity to the request for consent" to the automatic renewal offer
 - Moreover, it is presented in the same size, color, and font as those of the surrounding block of text, and it is placed alongside other, unrelated disclosures without distinction from the surrounding text of the same size in any manner that calls attention to the language. In other words, the disclosure was presented in such a way that it could be, and was, easily overlooked, and is therefore not "clear and conspicuous"
- (Also alleged failure to obtain affirmative consent)

Morrell v. WW International, Inc. (S.D.N.Y. 2021)

Digital Buy 6, Get 9 Months

Plan and membership [Edit](#)
Digital; Buy 6, Get 9 Months

Price Breakdown

Standard 3 Months Fee	\$62.85
Starter Fee	\$20.00
Free 3 Months	-\$62.85
First 3 Months Total	\$0.00

Payment [Edit](#)
[REDACTED]

Billing address [Edit](#)
[REDACTED]

Required: By checking this box, you acknowledge that you have read and agree to be bound by the terms above, including the Membership Agreement.

PLEASE NOTE: Early termination fee will be applied in the event of cancellation prior to completion of full term.

Automatic Renewal and Cancellations: You agree that your membership automatically renews at the end of your initial payment plan and you will be charged at the standard monthly fee (currently \$20.95 plus tax where state and local sales tax apply) until you cancel. You can cancel at any time by visiting the [Cancellation Policy](#).

Terms and Conditions: You understand that your membership is governed by the [Membership Agreement](#). You acknowledge our [Privacy Policy](#) and [Notice of Privacy Practices](#).

Submit

Plaintiff's Allegations:

- Inadequate disclosure did not meet “clear and conspicuous” standard and was not in close proximity to request for consent
- Text smaller than text used to show transaction details
- Text in gray font color that is same size, color, and font as surrounding block of text; blends with the background
- Text is buried among three other disclosures

Court:

- Disclosures provided sufficient notice of automatic renewal, cancellation policy, and recurring charge amount
- Disclosure set out in its own paragraph with boldface text and hyperlinked text that sufficiently contrasted
- Requiring consumer to click a button to consent to terms and submit order was enough
- **BUT court held that confirmation email was insufficient:**
 - However, the defendant fails to provide any information about the cancellation policy in the acknowledgment email and merely states “instructions on how to cancel are located in the Help section of the [WW] site.”

FTC v. ABCMouse (September 2020)

- Alleged that customers thought they were signing up for a 12-month plan but were enrolled in a negative option plan
- Material terms of the offer were disclosed via a separate hyperlink
- FTC challenged representations about the ease of cancellation because the website did not disclose how people could cancel
- FTC alleged that the company made it difficult to cancel
 - Did not post a customer service telephone number or email address that customers could use to contact, long wait times, confusing online cancellations, did not honor cancellation requests

The image shows a screenshot of the ABCmouse website's enrollment process. On the left, there is a promotional banner for a "Special Offer" featuring a yellow ribbon and a green badge that says "38% OFF Annual Membership!". Below this, a price tag shows "\$59⁹⁵ for 12 Months" with a checkmark icon. A "Payment Option" section offers "4 equal monthly installments of \$19⁷⁵ (Save 17%)". A link "Click Here" is provided for more information. Below the banner is a testimonial box with a cartoon woman, stating that in a recent study, "5,000 parents who use ABCmouse.com with their children, over 85% reported a significant positive impact on their children's learning." At the bottom of the banner, it says "Award-Winning Curriculum!" with several award logos.

On the right, the "Easy Enrollment!" form is displayed. It is divided into three numbered steps:

- 1 Create Your Family Account**: Includes fields for Email, Confirm Email, Password, and Confirm Password.
- 2 Enter Your Payment Information**: Includes fields for Cardholder Name, Credit Card Number, Expiration Date (MM/YY), CVV, and Billing Zip/Postal Code. It also features logos for VISA, MasterCard, Discover, PayPal, and Amazon Pay.
- 3 I agree to the Terms & Conditions**: Includes a checkbox for agreement and a "Submit" button.

Below the payment information section, there is an "Easy Cancellation" notice: "If your family does not absolutely love ABCmouse, you can cancel at any time!" and a security icon with the text "Your information is safe and protected."

Settlement Amounts (Examples)

FTC

- ABC Mouse (2020): \$10 million
- AdoreMe (2017): \$1,378,654
- Urthbox (2019): \$100,000
- RevMountain (2018): \$92 million
- Triangle Media (2019): \$48.1 million
- MyLife (December 2021): \$21 million

Other settlements over \$20 million – \$120 million

California Attorney General

- j2 Global (2019): \$1.2 million (\$585,000 in restitution plus penalties)
- AdoreMe (2018): \$600,000 in civil penalties, a minimum of \$200,000 in restitution, \$250,000 in cy pres
- Guthy-Renker (2019): \$1.2 million in penalties and up to \$7.3 million in restitution
- Care.com (2020): \$1 million (\$700,000 in civil penalties and \$300,000 in restitution)
- DropBox (2018): \$1.7 million in civil penalties and \$500,000 in restitution
- Box.com (2020): \$274,000 in penalties, costs, and restitution
- Other cases involved penalties over \$1 million and over \$7 million in restitution

Class Actions

- Synapse: \$4.9 million
- New York Times: \$3.9 million in access codes and \$1.25 million in attorneys' fees
- Washington Post: \$6.8 million in cash and noncash benefits to class members

Other settlements over \$16 million – over \$22 million

Subscriptions: What's Ahead?

- Continuing law enforcement and class action complaints
- New litigation over failure to comply with renewal reminder notices
- More amendments to state laws?
- Greater scrutiny by state attorneys general
- Broad use of ROSCA by the FTC
 - Expansion to business-to-business dealings, including commercial transactions with automatic renewal clauses that are “signed” over the Internet



© 2022 Venable LLP.

This document is published by the law firm Venable LLP. It is not intended to provide legal advice or opinion. Such advice may only be given when related to specific fact situations that Venable has accepted an engagement as counsel to address.

VENABLE LLP



Legal Updates and New Requirements for FDA-Regulated Products

Todd A. Harrison

Partner and Co-Chair | +1 202.344.4724 | TAHarrison@Venable.com

Richard A. Starr

Associate | +1 202.344.4375 | RAStarr@Venable.com



VENABLE LLP

Agenda

- Proposed Dietary Supplement Registration Requirements
- Update on CBD
- FDA's Final NAC Guidance
- Other Updates



Proposed Changes to FDA Authority Over Dietary Supplements

FDA Safety and Landmark Advancements Act (FDASLA)

- U.S. Senate Health, Education, Labor, and Pensions (HELP) Committee sent to the full Senate for consideration
 - Mandatory Product Listing Proposal
 - Would require listing of all dietary supplement products and ingredients with FDA
 - Well-intentioned but with several unintended consequences
 - Proposed companion language: “[t]he introduction or delivery for introduction into interstate commerce of any product marketed as a dietary supplement that does not meet the definition of a dietary supplement under section 201(ff)” is a prohibited act.
 - Implications for NAC and CBD
 - Impact on good and bad actors
- FDA’s existing authority to take action

Update on CBD, Delta-8 THC, and Delta-9 THC

CBD and Food

- Currently, CBD (whether derived from marijuana or hemp) may **not** be sold as or in a food in interstate commerce
- In foods, CBD is not considered by FDA as an approved food additive or “generally recognized as safe” (GRAS)
 - FDA believes there is insufficient safety research to deem CBD GRAS



CBD and Dietary Supplements

Similarly, CBD (whether derived from marijuana or hemp) may **not** be sold as or in a dietary supplement in interstate commerce

Dietary supplements cannot contain approved drugs

- In 2018, FDA approved Epidiolex, a CBD-containing anti-seizure medication

Exception 1: Ingredients “marketed” as a food or a dietary supplement prior to inclusion in an approved drug

- FDA is not aware of any such marketing



CBD and Cosmetics

- Technically, CBD is allowed in cosmetics
- FDA generally requires that cosmetic ingredients are safe for uses indicated on a label
- However, FDA also classifies cosmetics based on product claims
- Even with safety substantiation, a CBD-containing cosmetic may not make drug, disease, or structure/function claims



CBD, Delta-9 THC, and Delta-8 THC

- Products containing delta-8 THC (a type of cannabinoid distinct from delta-9 THC and CBD) are recently becoming popular
- However, the regulatory status of delta-8 THC is even more unclear than the regulatory status of CBD and delta-9
- The 2018 Farm Bill only referred to the legal concentration of delta-9 THC
- It is possible that FDA will view delta-8 THC as a controlled substance, so selling products containing delta-8 currently poses a high enforcement risk



The Rise of Delta-9 THC From Hemp

- Is the hemp industry treading on thin ice?
- Are delta-9 gummies produced from purified hemp extracts of delta-9 lawful under the Farm Bill 2018 and FDCA?



States to Watch on CBD Regulation

- States with particularly detailed regulations governing CBD products:
 - New York
 - Texas
- States that are still not friendly to CBD products include:
 - Mississippi – The state has very specific THC content requirements, and hemp can be grown legally in the state only with a USDA license
 - Louisiana – Among other requirements, each separate CBD product must be registered with the state

Industry Takeaways

- The CBD industry is growing at a breakneck pace in the U.S., but poses many regulatory issues for stakeholders at the state and federal levels
- CBD products should not make unauthorized health claims
 - Claims purporting to treat or cure disease (including COVID-19) are especially risky, and are an enforcement priority for FDA
- Ingestible CBD products are still considered *per se* unlawful
- CBD research is being sought by FDA
 - The CBD industry should take an active role in helping FDA develop the best possible scientific bases for issuing new regulations

FDA Issues Final NAC Guidance

Background: N-Acetyl-L-Cysteine (NAC)

- NAC was approved as a new drug under section 505 of the FD&C Act on September 14, 1963 (see 28 FR 13509 (Dec. 13, 1963) (announcing the approval))
- NAC has been in use in dietary supplements for some time
- Action by private entities
 - Amazon
 - Citizen Petitions
- FDA Action

Final NAC Guidance

In August of this year, FDA issued its Final Guidance on Enforcement Discretion for Certain NAC Products.

The guidance recognizes that although the agency believes NAC is technically excluded from the definition of a dietary supplement, it is exercising enforcement discretion for dietary supplement products containing the substance.

Unless or until FDA uncovers safety concerns, FDA will continue this enforcement discretion until

1. the Agency completes notice-and-comment rulemaking to allow the use of NAC in or as a dietary supplement, or
2. FDA denies the NPA citizen petition's request for rulemaking

Personal Care Safety Act (Introduced Again)

- S. 2100 was introduced by Dianne Feinstein
- Would require registration of cosmetics manufacturers; disclose ingredient list for all cosmetic products in the registered facility
- FDA must annually conduct a safety review of at least five cosmetics ingredients or nonfunctional constituents and, if appropriate, issue a final finding on the safety of that ingredient or constituent. The FDA must also implement regulations for good cosmetics manufacturing practices



Continuing Litigation Targets

- Flavor and color claims
 - All-natural
 - “No artificial” colors, flavors, ingredients, etc.
 - Always keep in mind when characterizing flavor that FDA views all colors as artificial
- Per-serving/per-capsule challenges (such as vitamin C, for instance) regarding the potency of serving/capsule sizes



Questions?



Todd A. Harrison

Partner and Co-Chair

+1 202.344.4724

TAHarrison@Venable.com



Richard A. Starr

Associate

+1 202.344.4375

RAStarr@Venable.com



© 2022 Venable LLP.

This document is published by the law firm Venable LLP. It is not intended to provide legal advice or opinion. Such advice may only be given when related to specific fact situations that Venable has accepted an engagement as counsel to address.

VENABLE LLP



Where Does UX Optimization End and Use of Digital Dark Patterns Begin?



Alex Megaris

Partner | Venable LLP

Ari N. Rothman

Partner | Venable LLP

Luis Escobar

Senior Vice President, Director of Experience | 21GRAMS

VENABLE LLP



What Are Digital Dark Patterns?

Defining “Dark Patterns”

Subset of “deceptive marketing.”

The term “dark patterns” was first coined by Harry Brignull, a UX specialist, in 2010.

Also known as “deceptive design pattern”

- Harry Brignull: “a user interface carefully crafted to trick users into doing things they might not otherwise do, such as buying insurance with their purchase or signing up for recurring bills . . . [they] are not mistakes. They're carefully crafted with a solid understanding of human psychology, and they do not have the user’s interests in mind.”
- “deceptive system designs on websites and apps that prey on human cognitive processing frailties.”
Nichols v. Noom (S.D.N.Y. 2021)
- “Dark patterns are deceptive design choices that take advantage of behavioral tendencies to manipulate users to make choices for the designer's benefit and to the user's detriment. Examples of ‘dark patterns’ include complicated navigation menus, visual misdirection, confusing wording (such as double negatives), and repeated nudging.”

Trick Questions

A series of checkboxes is shown
The meaning of the checkboxes is alternated, so that ticking the first one means "opt out" and the second means "opt in."

Please enter your details to reserve your item(s)

Title :

First name * :

Last name * :

Email * :

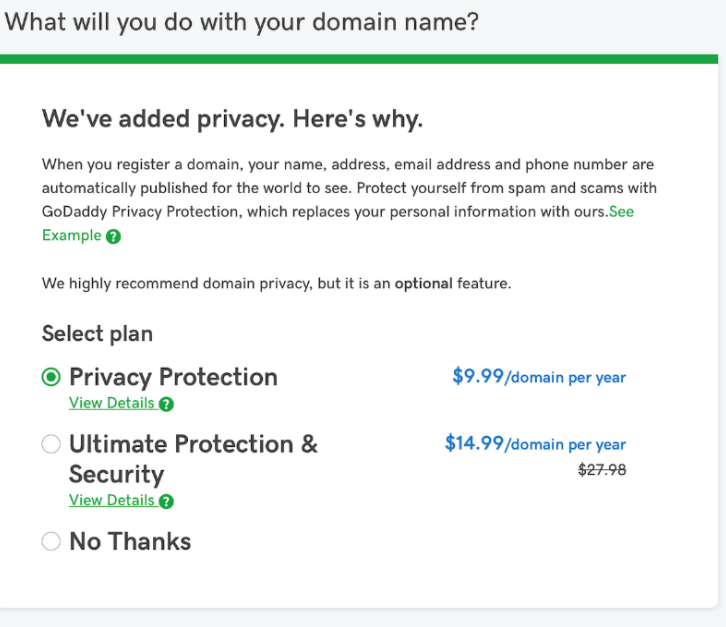
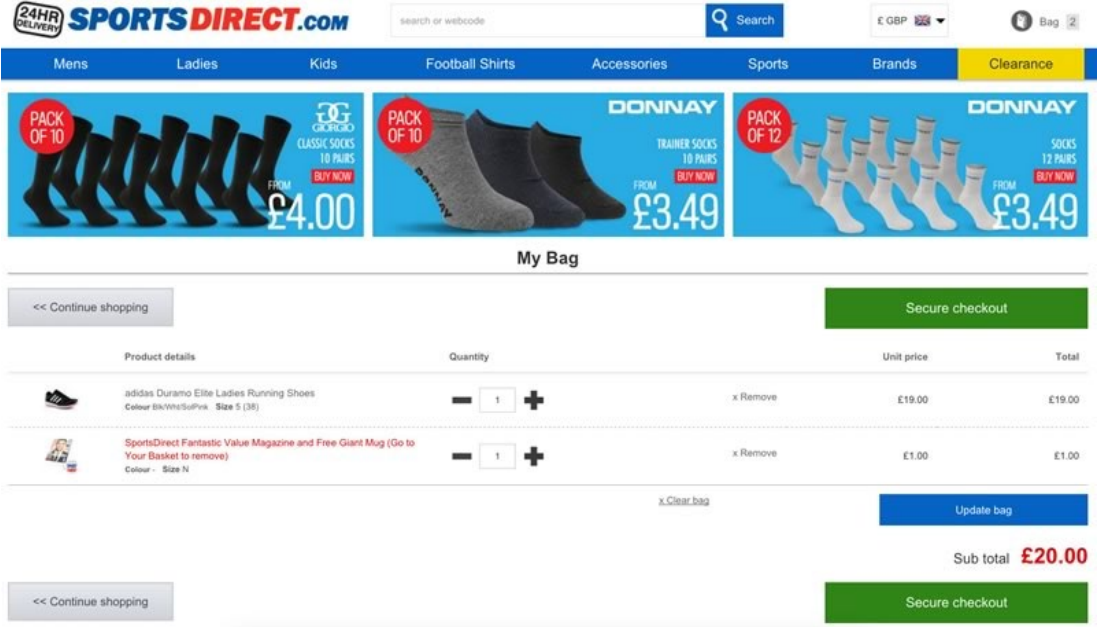
Phone number * :

Please do not send me details of products and offers from Currys.co.uk

Please send me details of products and offers from third party organisations recommended by Currys.co.uk

Sneak into Basket (aka “Inertia Selling” or Negative Option)

- An extra item is added to the cart automatically when online shopping.
- The site may “trick” users into adding an extra item themselves by defaulting a choice.



Price Comparison Prevention

- A website makes it challenging for users to compare the prices of items and determine what options are the most cost-effective

PRICE COMPARISON PREVENTION

 Granny Smith apples loose €2/kg Add to cart	 Jonagold apples (6 pack) €1,7/pack Add to cart	 Conference pears loose €2/kg Add to cart
--	---	---

The Ladders.

You're passionate about your career.
We're passionate about advancing it.

Focused on your goals
See only jobs, employers and recruiters that are right for you. Without clutter.

26,639 employers and recruiters
We'll show you the recruiters you *should* know and can connect to, confidentially.

Improve your resume
Work closely with in-house, certified experts who will help highlight your strengths.

Take the first step toward the right career move.

First Name
Last Name
Email
Create Password
Zip/Postal Code
 I do not live in the US or Canada
Current Total Compensation
Function

Select a Subscription Limited time promotion. Cancel at any time*

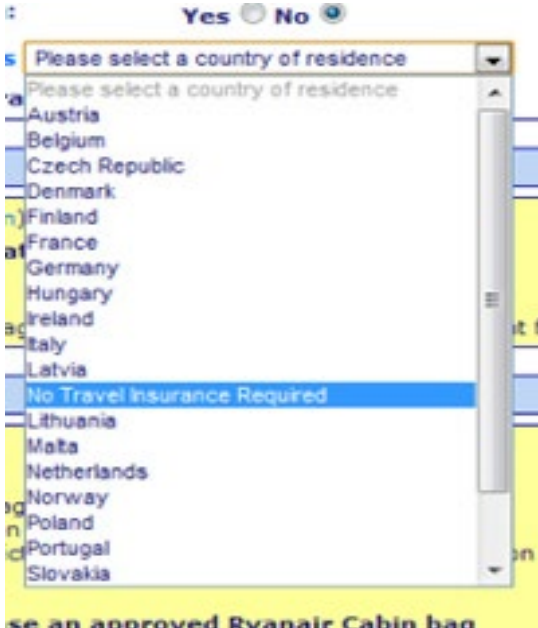
- Free Basic**
Preview job titles only
- \$25 Premium, (1 month)**
Access everything on our job search site for 1 month!
- \$49 Premium, Save 35% (3 months)**
Save \$26 when you choose 3 months of unlimited access!
- \$89 Premium, Save 41% (6 months)**
Save \$61 when you choose 6 months of unlimited access!
- \$149 Premium, Save 50% (12 months)**
Save \$151 when you choose 12 months of unlimited access!

JOIN NOW

*By joining TheLadders.com, you agree to TheLadders.com's Terms of Use and Privacy Policy. To ensure continuous service, your membership will be auto-renewed at the regular price in effect at the time you joined. You may cancel at any time - simply refer to our Cancellation / Refund Policy or call us directly at 866-937-1005.

Intentional Misdirection

- Designs focus consumers' attention on one thing to distract from something else.
- When purchasing a flight, users are asked to select their country of residence—a mandatory question. Most users select their country of residence. However, the question is actually related to buying travel insurance—in the list of countries shown here, “No travel insurance required” is an option listed between Latvia and Lithuania.



Hidden Costs

- Unexpected costs appear late in the check-out process.
- For example, additional costs are disclosed and added only after credit card details are filled out.

The screenshot shows a rental listing for an apartment in Quin 8, HCMC. The listing includes details like '2 guests - 1 bedroom - 1 bed - 1 bath' and 'Kitchen - Wifi - Air conditioning'. A red circle highlights the price '\$257 / month' with the label 'Displayed Price'. Below, a reservation summary shows a 'Total' of '\$290' with the label 'Actual Price'. A breakdown of costs is provided below the reservation summary.

Item	Amount
Accommodation	\$310
17% monthly price discount	-\$53
Cleaning fee	\$5
Service fee	\$28
Total	\$290

Order Subtotal	\$50.98
Standard Delivery	\$14.99
Care & Handling	\$2.99
Tax	\$4.56
Total	\$73.52
Savings Today ⓘ	\$9.00

Privacy

- The user is put in a position where they are tricked into publicly sharing more information than they otherwise intended.
- Many websites and mobile apps require consumers to share their personal information to use the websites and apps, and the data is subsequently shared or sold in a way the user did not intend or want.
- Websites, apps, and social media platforms that make it difficult for users to exercise choice over the collection, use, and sale of their data.
- Websites and mobile apps may access a user's contacts as a way to identify and contact those individuals.
- Using, sharing, or selling location data without a user's knowledge.

Roach Motel

- A website makes it hard to cancel recurring charges, delete an account, unsubscribe from a mailing list, or otherwise opt out of payments or communications.



How do I close my Stamps.com account?

We are sorry to hear that you want to discontinue your Stamps.com service. In order to *cancel*, please go to the Manage Account section or simply call us at our toll-free number 1-855-608-2677 Monday through Friday, 6 a.m. to 6 p.m. and Saturday, 6 a.m. to 3 p.m. Pacific Time. One of our Customer Care Representatives will be happy to assist you.

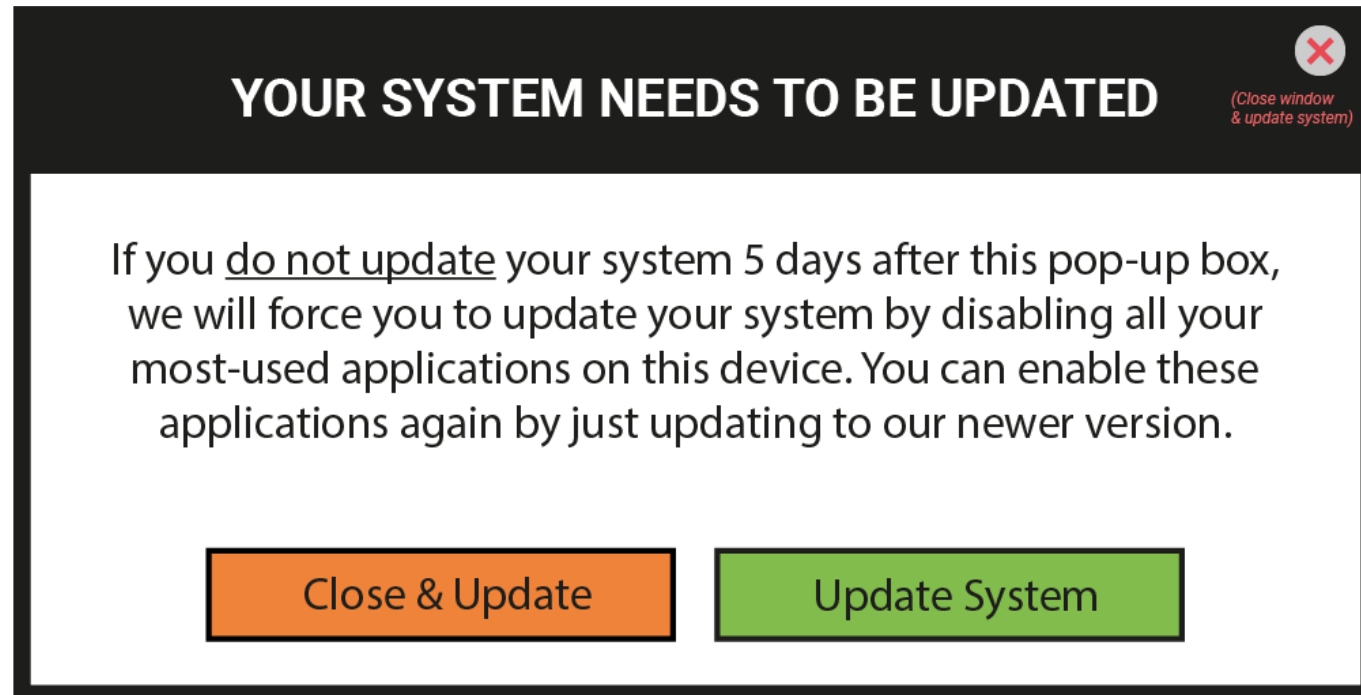
Was this answer helpful?

Answers others found helpful

- [How to Change Service Plans](#)
- [Managing Payment Methods](#)
- [How does my billing cycle work?](#)
- [Account Fee Payment history](#)
- [Stamps.com PC Postage Terms and Conditions](#)

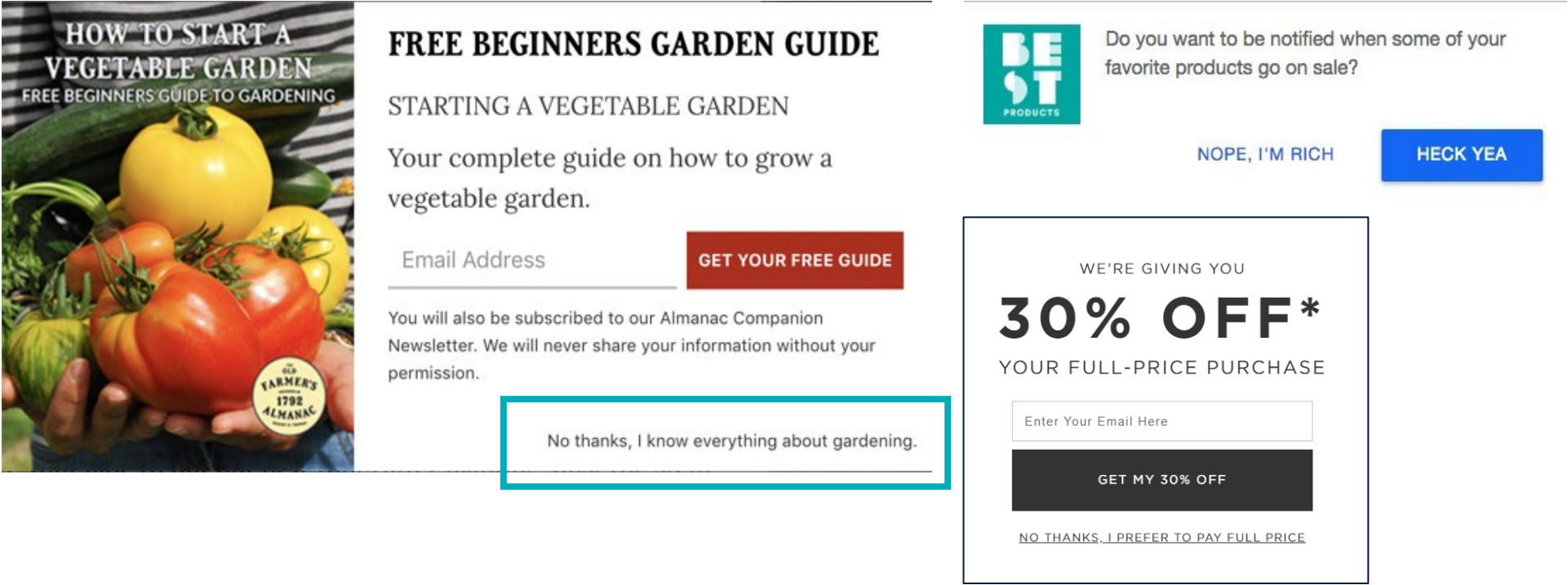
Bait and Switch

- The user thinks their action will have one outcome but instead a different, unwanted outcome occurs.
- Ex: In this update prompt, clicking on “X” resulted in the update occurring



Confirmshaming

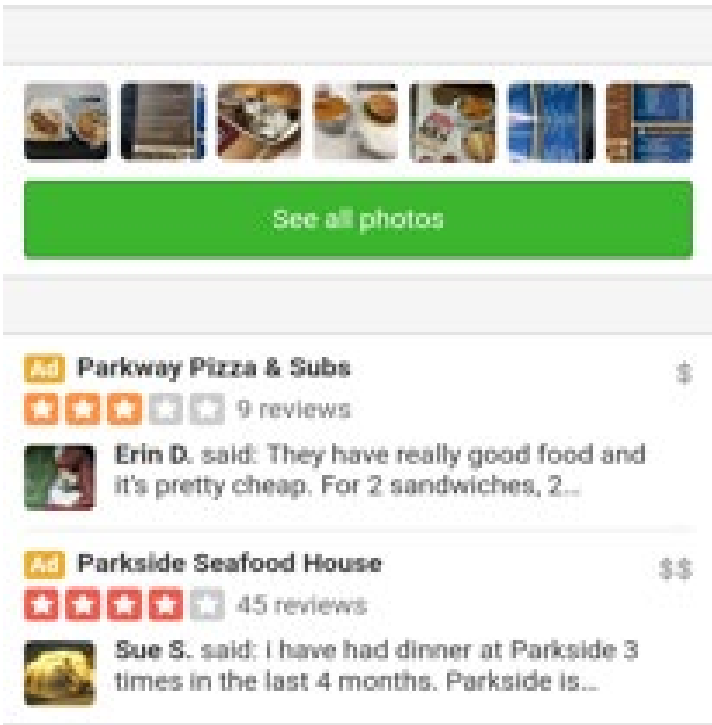
- The site tries to pressure individuals to sign up for something by guilt or shaming them.
- The declining option is phrased in a way that shames people into opting in.



The image shows two side-by-side screenshots of a website. The left screenshot is for a 'FREE BEGINNERS GARDEN GUIDE'. It features a photo of fresh vegetables and a sign that says 'HOW TO START A VEGETABLE GARDEN FREE BEGINNERS GUIDE TO GARDENING'. Below the photo is a form with an 'Email Address' field and a red 'GET YOUR FREE GUIDE' button. A teal box highlights the text 'No thanks, I know everything about gardening.' below the form. The right screenshot is for 'BEST PRODUCTS' and asks 'Do you want to be notified when some of your favorite products go on sale?'. It has two buttons: 'NOPE, I'M RICH' and 'HECK YEA'. Below this is a '30% OFF*' promotion with an email input field and a 'GET MY 30% OFF' button. A link at the bottom says 'NO THANKS, I PREFER TO PAY FULL PRICE'.

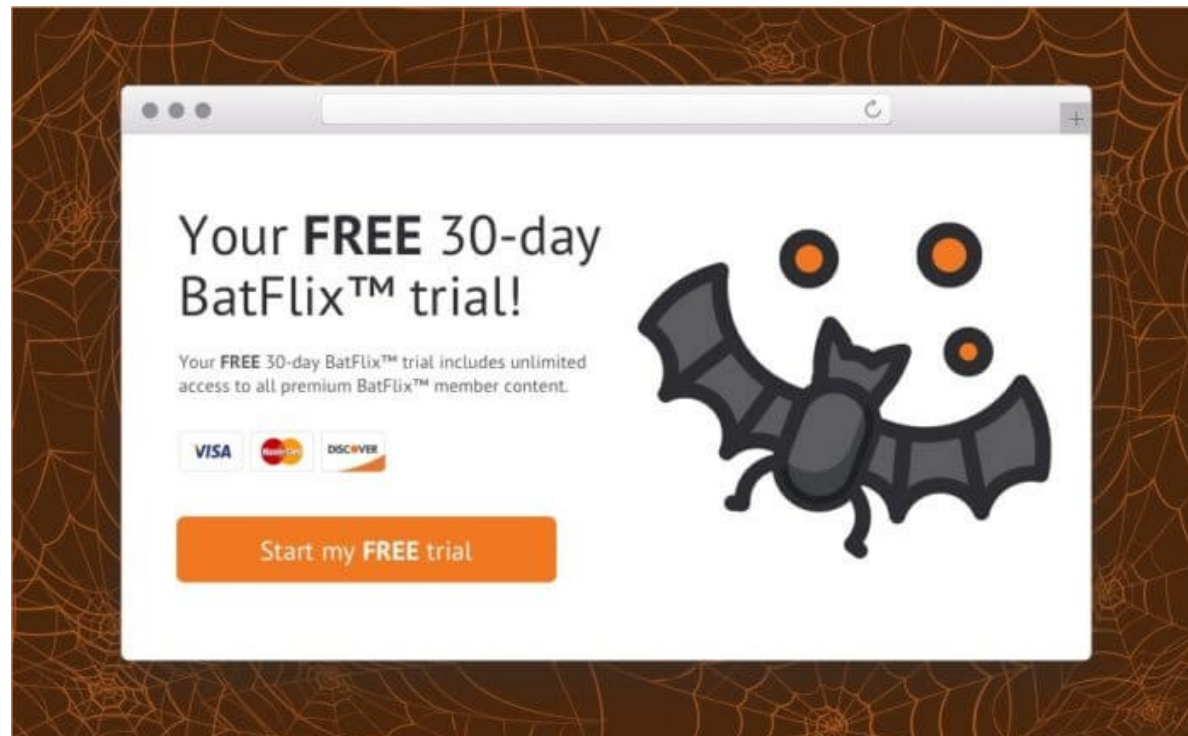
Disguised Ads

- Disguised ads look like they are relevant to the website where they are placed but instead cause a user to go to another location that is undesirable or unwanted.



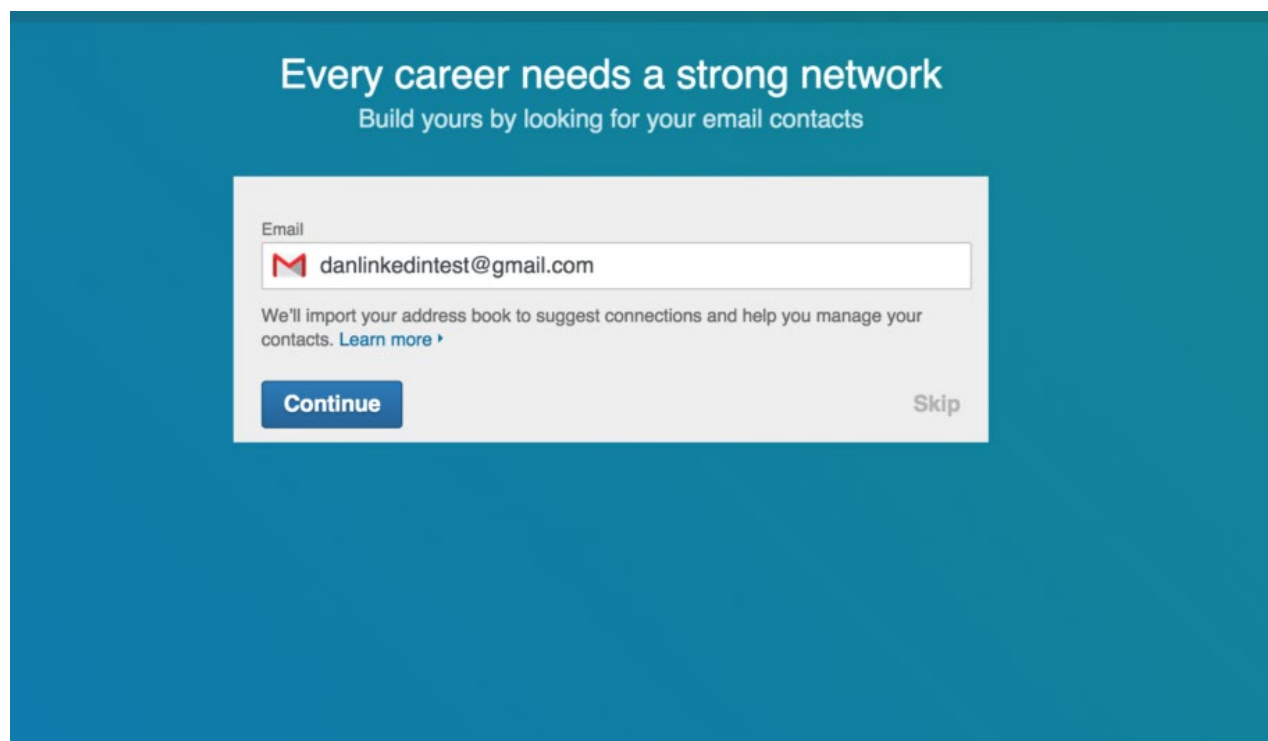
Forced Continuity

- A user is asked to enter their credit card or other financial information for a free trial, forgets to cancel, and continues to be charged.



Friend Spam

- A product asks for permission to access online accounts (like email or social media accounts), yet, instead of using the service for a desirable outcome (like finding contacts), the product spams your contacts.

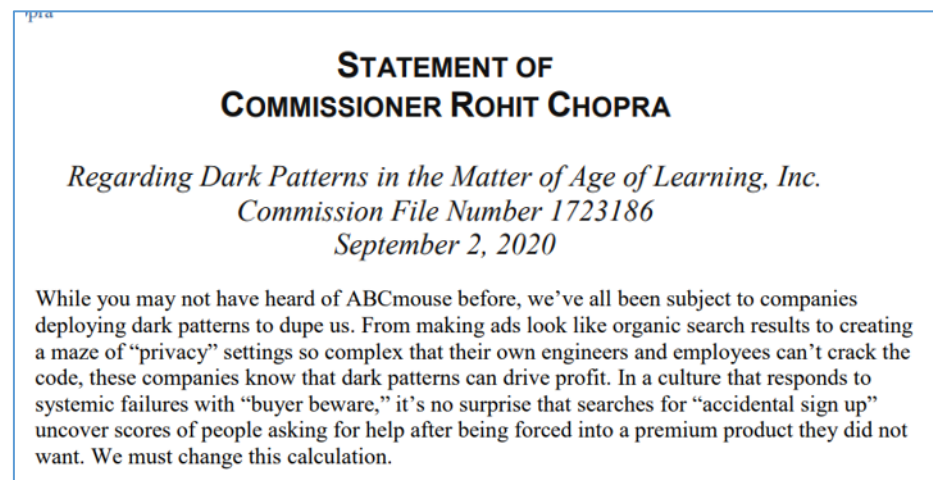
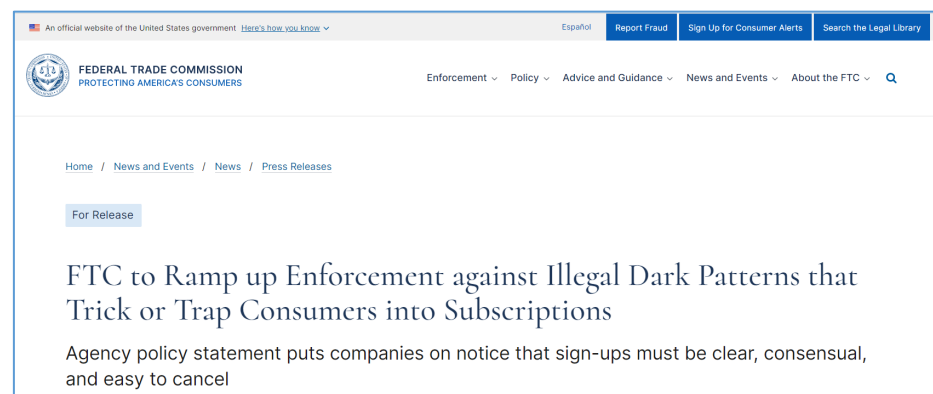




What Are the Legal Risks of Using These Design Features?

Heightened Regulatory Scrutiny

- “Bringing Dark Patterns to Light: An FTC Workshop”
 - The FTC hosted a virtual workshop on April 29, 2021, to examine digital “dark patterns.”
 - The workshop explored the ways in which user interfaces can have the effect, intentionally or unintentionally, of obscuring, subverting, or impairing consumer autonomy, decision-making, or choice. For example, some sites sneak extra items into a consumer’s online shopping cart, or require users to navigate a maze of screens and confusing questions to avoid being charged for unwanted products or services.
- FTC requested public input about potential updates to its “Dot.Com Disclosures” on many issues, including how to address the use of so-called dark patterns, which the FTC uses to describe manipulative user interface designs used on websites and mobile apps
- FTC, CFPB, and state AGs have brought several enforcement actions, including
 - *DC v. GrubHub* (D.C. 2022)
 - *New York v. FarePortal* (N.Y. 2022)
 - *CFPB v. TransUnion* (N.D. Illinois 2022)
 - *FTC v. Credit Karma*



Class Actions on the Rise – Exemplar Allegations

- *MacQuaid v. New York Times* (D. Oregon 2022): Putative class action challenging cancellation process for “automatic renewal” program for newspaper’s subscription plans. For instance, although one page of the NYT platform states that consumers can cancel their NYT subscription via chat, the chat feature was only available during certain hours and most of the time the feature was unavailable due to excessive chat from customers.
- *Oberstein v. Live Nation Ent., Inc.* (C.D. Cal. 2020): Putative class action challenging Ticketmaster for alleged anti-competitive practices and supracompetitive pricing for ticket prices.
- *Nichols v. Noon* (S.D.N.Y. 2021): Class action challenging the sign-up flow and cancellation processes and submitted an expert opinion supporting the allegations; plaintiffs alleged trick wording and visual interference were used, the countdown timer was deceptive, and canceling was hard.
- *Farmer v. Airbnb, Airbnb Payments* (N.D. Cal. 2020): Airbnb’s web interface *appeared* to offer two cancellation options: (1) the host’s cancellation policy (which in this case would provide the user with no refund) or (2) an option for a “travel credit” that must be used by the end of the next year. However, an option for a “full cash refund” appeared at the bottom of the web page, without its own radio button, and is accompanied by a warning that it will “require submitting official documentation.”



Ways to Mitigate Risk

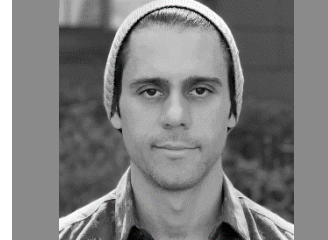
Questions?



Alex Megaris
Partner | Venable LLP
+1 212.370.6210
AMegaris@Venable.com



Ari. N. Rothman
Partner | Venable LLP
+1 310.229.9909
ANRothman@Venable.com



Luis Escobar
SVP, Director of Experience |
21GRAMS



© 2022 Venable LLP.

This document is published by the law firm Venable LLP. It is not intended to provide legal advice or opinion. Such advice may only be given when related to specific fact situations that Venable has accepted an engagement as counsel to address.

VENABLE LLP



The TCPA and FTSA, and the Four-letter Words That Describe Them



Dan Blynn

Partner | +1 202.344.4619 | DSBlynn@Venable.com

Steve Freeland

Partner | +1 202.344.4837 | SRFreeland@Venable.com

Liz Rinehart

Associate | +1 410.528.4646 | LCRinehart@Venable.com



VENABLE LLP

Agenda

Part I: The Telephone Consumer Protection Act

- Overview
- Compliance Requirements
- Litigation Trends

Part II: The Florida Telephone Solicitation Act

- Overview
- Compliance Requirements
- Litigation Trends

Part III: Other State Telemarketing Laws on the Horizon



Telephone Consumer Protection Act

Federal Law

Telephone Consumer Protection Act (TCPA) (47 U.S.C. § 227)

- Regulates and restricts **outbound** calls
- Do-Not-Call requirements
- Consent requirements for autodialed calls/texts to cell phones
- Consent requirements for prerecorded calls to landlines and cell phones
- Disclosure requirements
- Caller ID requirements
- Prohibits unsolicited fax ads

A text message is a “call” under the TCPA.

Telemarketing Sales Rule (TSR) (16 C.F.R. Part 310)

- Regulates telemarketing calls
 - Outbound and upsells on inbound
- Do-Not-Call requirements
- Disclosure requirements. Examples:
 - Free trials and negative options
 - Prize promotions
 - Debt relief services
- Consent requirements
- Consent and other requirements for prerecorded message calls (robocalls)
- Recordkeeping requirements
- Prohibits providing “substantial assistance” to aid TSR violations

Federal Law - Enforcement

Telephone Consumer Protection Act (TCPA) (47 U.S.C. § 227)

- FCC has implementing regulations
- FCC and private plaintiffs enforce
- FCC fines: up to about \$20,000 per call/text (TRACED Act, Dec. 2019)
- Private lawsuits: \$500 per call/text
 - Up to \$1500 per call/text for “willful or knowing” violations
 - No cap on damages
 - Top 10 TCPA class action settlements between about \$14 million and \$76 million

Telemarketing Sales Rule (TSR) (16 C.F.R. Part 310)

- Enforced by FTC (not private plaintiffs)
- Civil penalties: \$43,280 per call/text
- Recent Do-Not-Call settlements in the millions to hundreds of millions of dollars
- Active enforcement of disclosure requirement for free trial offers and negative option programs marketed by phone
- Active enforcement of “substantial assistance” doctrine
 - Payment processors, lead generators, telemarketing companies



TCPA Consent Requirements – Informational Calls

Informational/Non-Marketing Calls/Texts

- Cannot have any sales purpose whatsoever.
 - Examples: doctor’s appointment reminders, school closing notices, service appointment confirmations, and scheduling notices.

Prior Express Consent Required to Use an Autodialer

- Not specifically defined by law or regulation
- Can be verbal or written
- It is the company’s responsibility to prove consent

How Do You Get “Prior Express Consent”?

FCC Orders

- Merely providing a telephone number to the caller is “prior express consent” to receive non-telemarketing calls
 - Courts critical: implied vs. “express” consent
 - Petition challenging Orders pending before FCC since 2017
- The call must be *closely related to the purpose for which the original number was originally provided*
 - *Example:* Purchase tickets to an event and provide mobile number as part of check-out process; court might view scope of consent as limited to that particular event (*See Walintukan v. SBE Entertainment Grp., LLC, 2018 WL 2357763 (N.D. Cal. May 24, 2018)*)

Prior Express Consent is NOT capturing the number from other sources

- It is **not** capturing a phone number from caller ID
- It is **not** finding number in a phone book, on the Internet, or some other public source
- It is **not** obtained via skip tracing
- It is **definitely not** capturing a number from a Do Not Call request

TCPA Consent Requirements – Marketing Calls

Marketing Calls/Texts

- Anything intended to sell something, generate interest in a product, generate leads, offer coupons, etc.

Prior Express *Written* Consent Required to Use an Autodialer

- Must be evidenced by an agreement bearing the signature of the person called or texted (either a traditional “wet” signature or a digital/electronic one)
- The agreement must authorize the specific company or organization to deliver marketing messages
- The agreement must include the telephone number to which the signatory authorizes such marketing messages to be delivered
- The agreement must clearly and conspicuously disclose both that:
 - The call or text may be made using an autodialer
 - The person is not required to provide his or her consent as a condition of making a purchase

How Do You Get “Prior Express Written Consent”?

Specific wording is not required, but disclosures must be “clear and conspicuous”

- Legible, easily noticed, should not be buried with other disclosures or camouflaged, cannot require scrolling below a “submit” button to see
- Checkbox recommended, not required
- “Double-Opt In” method for consumer-initiated text
 - Example: “Reply Y to receive recurring mktg txts at this # via autodialer. Consent not required for purchase. Msg&DataRatesMayApply.”
- One-time, on-demand texts sent immediately in response to consumer requests for information do not require prior express written consent
 - “Text FREELAND to 56278 to receive a complimentary copy of Steve’s Big Book of Beards.”
- Additional info not required by law, but may be required by carriers or short code providers:
 - “Msg and data rates apply; receive up to [x] msg monthly Reply STOP to cancel, HELP for help.”

Keep records of
disclosure and
consent
Best practice:
Retain for 5 years

TCPA Consent Examples in the Marketplace

ENTER YOUR INFORMATION HERE

* Email Address:

* Confirm Email Address:

* Mobile Number:

Enter/Confirm your address
Used to determine your local Domino's store

* Street Address:

* City:

* State: * Zip Code:

SMS Terms & Conditions


By subscribing, you consent to receiving up to 6 SMS or MMS marketing messages per month from 366466. Message and data rates may apply. To opt out of Domino's text messaging program, send the word STOP to DOMINO (366466) at any time. You understand and agree that text messages sent to your mobile phone/device may be generated using automated technology. Your consent to receive text messages is not required to make a purchase.

For help or information on this program send HELP to 366466.

For additional assistance, contact 1-800-366-4667 or you may [click here](#) to send us an email.

Supported Carriers: AT&T, Verizon Wireless, Sprint, T-Mobile (T-Mobile is not liable for delayed or undelivered messages), Boost, Carolina West, Cellcom, Cricket, C-Spire, Google Voice, MetroPCS, nTelos, Rural Carrier Group, Tier 2/3 Carrier Group, U.S. Cellular, Virgin Mobile


To read our privacy policy, [click here](#).

I'm not a robot 

CANCEL SIGN ME UP

A text message will be sent to confirm your participation.

You must reply YES to confirm your subscription to complete the sign-up process.



SIGN UP FOR TEXT ALERTS

You'll get a special welcome offer and insider access, like event invites, news on exclusive product launches, and more.

ENTER YOUR PHONE NUMBER*

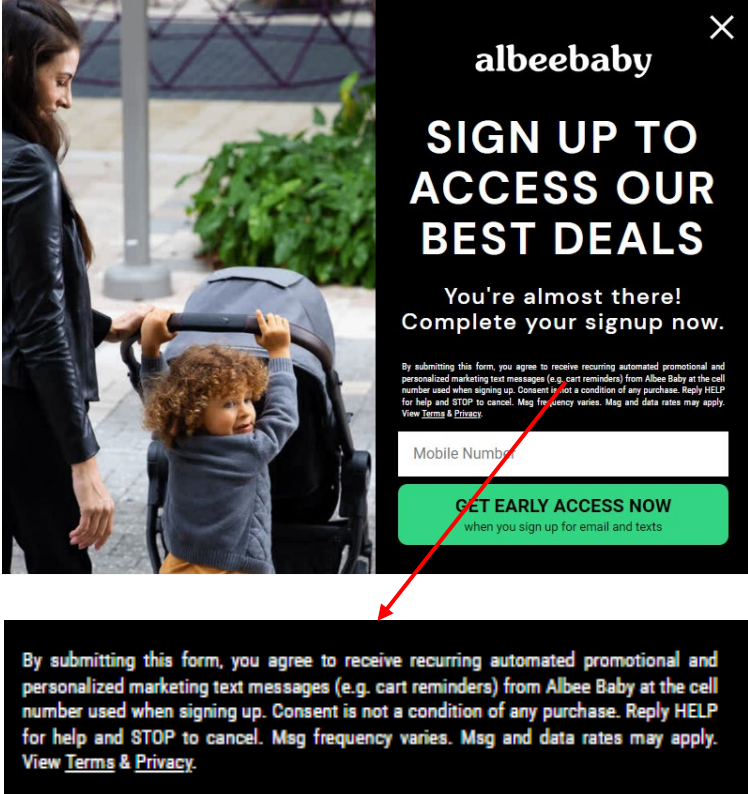
ZIP CODE

EMAIL

Providing your email address and zip code are optional, but will enable us to provide a more personalized experience. It will not enroll you in our email marketing program.

By providing your mobile phone number and submitting this form, you agree to receive recurring special offers and marketing text messages from the Ann Taylor Mobile Alerts program. Messages may be sent using an automatic telephone dialing system. Consent not required as a condition of purchase. Reply HELP to 85996 for help, STOP to 85996 to cancel. Message and data rates may apply. Text message terms and privacy policy available at [Terms & Conditions](#) and [Privacy Policy](#).

Sign Up



albeebaby

SIGN UP TO ACCESS OUR BEST DEALS

You're almost there!
Complete your signup now.

By submitting this form, you agree to receive recurring automated promotional and personalized marketing text messages (e.g. cart reminders) from Albee Baby at the cell number used when signing up. Consent is not a condition of any purchase. Reply HELP for help and STOP to cancel. Msg frequency varies. Msg and data rates may apply. [View Terms & Privacy](#).

Mobile Number:

GET EARLY ACCESS NOW
when you sign up for email and texts

By submitting this form, you agree to receive recurring automated promotional and personalized marketing text messages (e.g. cart reminders) from Albee Baby at the cell number used when signing up. Consent is not a condition of any purchase. Reply HELP for help and STOP to cancel. Msg frequency varies. Msg and data rates may apply. [View Terms & Privacy](#).

TCPA Consent Examples in the Marketplace

TOP CLASS ACTIONS
HELPING RIGHT CONSUMER WRONGS™

Settlements Open Lawsuits Legal News Featured ...

English >

GET HELP – IT'S FREE

Join a Free Florida Robocall Lawsuit Investigation

Fill out the form below if you are a Florida resident who received one or more calls that may have violated Florida telemarketing laws.

The law firm responsible for the content of this page is: Hiraldo Law, P.A.

First Name *

Last Name *

City *

State *

Choose a State

Phone *

Email *

Have you experienced an unsolicited text message or pre-recorded voice message?

Text Message

Pre-recorded message (or voice message)

Both

What is the name of the company that contacted you? *

What does the new Florida robocall law provide?

The Florida TCPA bill provides important updates to the Florida Do Not Call Act. Consumers can seek an injunction and recover at least \$500 in monetary damages per violation. The bill also authorizes a court to increase this award to \$1,500 in cases involving willful and knowing violations.

The new Florida robocall law will also require telemarketers who use an autodialer or recorded messages to first obtain prior express written consent from the consumer to be contacted. Florida telemarketing laws define autodialers as "an automated system for the selection or dialing of telephone numbers or the playing of a recorded message."

This definition is somewhat broader than the federal TCPA definition of autodialer, meaning some telemarketers whose dialing systems are compliant with the federal law may violate the new Florida robocall law.

In addition, the new robocall bill changes the Florida Telemarketing Act to reduce the hours during which telemarketers can call consumers from between 8 a.m. and 8 p.m. local time. The FTA previously allowed telemarketers to call until 9 p.m.

Telemarketers are also prohibited from calling a consumer more than three times within 24 hours about the same matter and cannot use spoofing technology to disguise their identity.

Does my number need to be listed on the Do Not Call Register Florida to qualify?

You do not need to have your number listed on Florida's Do Not Call registry in order to potentially qualify for compensation under the new telemarketing law. Telemarketers must abide by the stricter rules or risk paying \$500 per violation, or \$1,500 per willful violation of the law.

Get Our Newsletter

We tell you about cash you can claim every week! subscribe to our free newsletter today.

No

Yes, sign me up!

Any information you submit to Top Class Actions may be shared with Hiraldo Law, P.A. While your communications with a lawyer may be subject to the attorney-client privilege, communications through this website may not be. Please do not share any confidential or privileged information through this website. Top Class Actions or the attorneys with whom your information is shared may be ordered by a court of law to produce your information in certain legal situations. Also, you are not formally represented by a law firm unless and until a contract of representation is signed by you and the law firm. *

I understand and agree

Opt In to Receive Text Messages

Opt In to Receive Text Messages

By checking this box, I consent to receive marketing text messages from Top Class Actions sent by an automatic telephone dialing system. I consent to Top Class Actions providing my phone number to the lawyers or their agents sponsoring this investigation, and I consent to receive marketing calls and text messages from those lawyers or their agents. You may opt out at any time. You can review Top Class Actions' Terms and Conditions and Privacy Policy here.

CAPTCHA

I'm not a robot

SUBMIT

Missing the “consent not required” disclosure

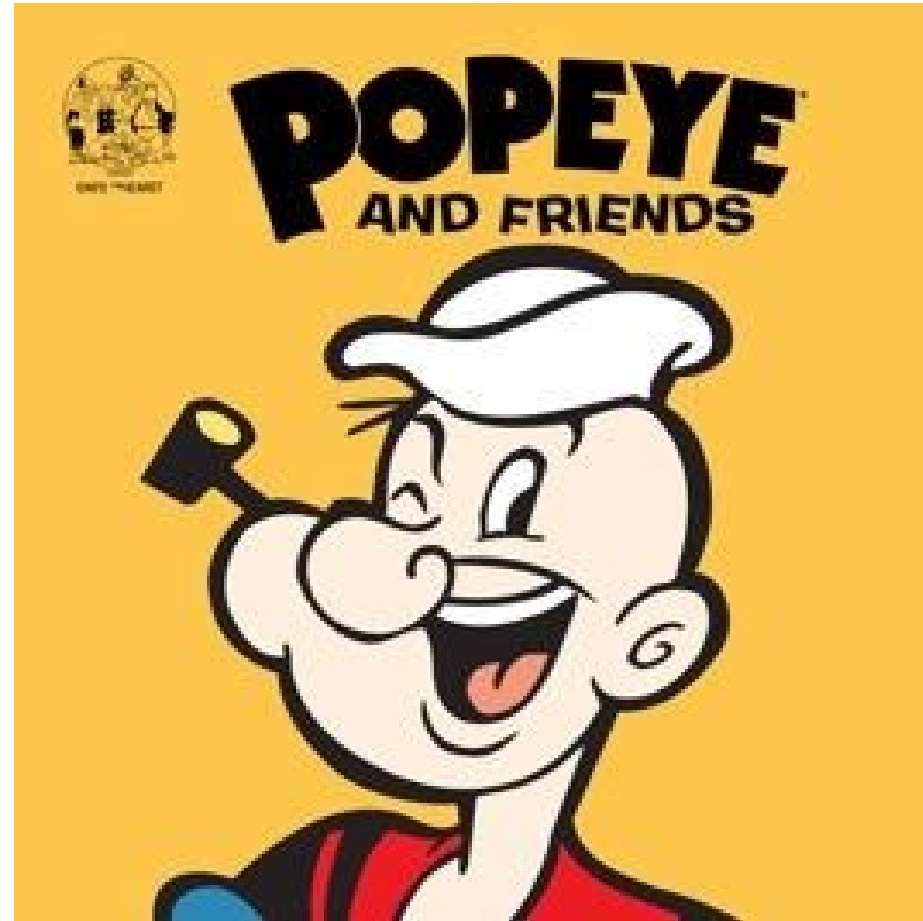
Current TCPA Consent and Calling Rules

	Cell Phone		Residential Landline	
	Telemarketing	Non-telemarketing	Telemarketing	Non-telemarketing
Autodialer (call)	Prior express <i>written</i> consent	Prior express consent	None	None
Autodialer (text message)	Prior express <i>written</i> consent	Prior express consent	N/A	N/A
Prerecorded message	Prior express <i>written</i> consent	Prior express consent	Prior express <i>written</i> consent	None
Live operator (no autodialer)	None	None	None	None



TCPA Current Issues and Trends

Autodialers *Used to Be* a Real Head-Scratcher...



What Is an Autodialer?

Autodialer (“automatic telephone dialing system”): Equipment that has the “capacity to store or produce telephone numbers to be called, using a random or sequential number generator and to dial such numbers.”

- Basically, a platform that has the “*capacity*” to dial thousands of numbers in a short period of time *without human involvement*



Differing Historical Court Views (Examples)

Not an Autodialer

- Dialing system is **not** an ATDS because it dialed from a set list and did not produce or store numbers using a random or sequential number generator, and call those numbers
- Human required to manually upload existing lists of phone numbers into database
- Human required to select which numbers would be texted from list
- Human required to draft the message content and select date and time for the send
- Human required to enter a “captcha” and then click “send” to transmit the message to the numbers selected
- Clicker agent launches calls, then transfers calls to a closing agent

Yes, an Autodialer

- Texting platform **could be** an ATDS because it stored telephone numbers and dialed them – i.e., texts sent based on a list of specific numbers
- Device that can store numbers in a list and then call them without a significant level of human involvement is an autodialer



But Then...

Facebook, Inc. v. Duguid, 141 S. Ct. 1163 (2021)

- Unanimous, 9-0 decision authored by Justice Sotomayor (who expressed concerns at oral argument that she might be using an ATDS whenever she made a call/sent a text from her cell phone).
- Adopted the narrow autodialer definition favored by the Third, Seventh, and Eleventh Circuits.
- Held:
 - “The question before the Court is whether that definition encompasses equipment that can ‘store’ and dial telephone numbers, even if the device does not ‘us[e] a random or sequential number generator.’ It does not. To qualify as an ‘automatic telephone dialing system,’ a device must have the capacity either to store a telephone number using a random or sequential generator or to produce a telephone number using a random or sequential number generator.”

But Then...

Facebook, Inc. v. Duguid, 141 S. Ct. 1163 (2021)

- Open issues:
 - Footnote 7: “. . . an autodialer might use a random number generator to determine the order in which to pick phone numbers from a preproduced list. It would then store those numbers to be dialed at a later time. See Brief for Professional Association for Customer Engagement et al. *as Amici Curiae* 19.”
 - *Bell v. Portfolio Recovery Assocs.*, 2021 WL 1435264, at *1 n.5 (W.D. Tex. Apr. 13, 2021) (“To be clear, the fact that the Court is permitting additional [limited] discovery regarding the capabilities of Avaya Proactive Contact Technology . . . should not be interpreted as a signal that the Court has adopted Plaintiff’s position regarding the proper interpretation of footnote 7 of the Facebook decision. **Indeed, it may be the case that Plaintiff has read too much into a single sentence in a footnote of opinion that seemingly adopted the narrower of two proposed interpretations regarding the definition of a restricted autodialer under the TCPA.**”) (emphasis added).
 - Human intervention still a relevant consideration (footnote 6)?
 - Is “capacity” to autodial still in play?
 - *McEwan v. NRA of Am.*, 2021 WL 1414273, at *7 (D. Me. Apr. 14, 2021) (“After the *Duguid* opinion, the ATDS portion of the claim requires an allegation that [defendant] **used** a random or sequential number generator to place calls to Plaintiff’s cellphone, **not merely a claim that its dialing system has that capability.**”) (emphasis added).
 - *Barry v. Ally Fin.*, 2021 U.S. Dist. LEXIS 129573 (E.D. Mich. July 13, 2021) (dismissal granted as to targeted collection calls; *Duguid* requires use of random or sequential number generator, not just capacity to use).
 - *Mina v. Red Robin*, 2022 WL 2105897 (D. Colo. June 10, 2022) (system not an ATDS unless it actually randomly generates telephone numbers).

May Consumers Revoke Consent?

Generally: Yes, a consumer may revoke consent at any time through any reasonable means, as long as revocation clearly expresses a desire not to receive further messages.

Case law principles:

- Consent does not expire on its own (*Dolemba v. Kelly Servs., Inc.*, 2017 WL 429572 (N.D. Ill. Jan. 31, 2017))
- Consumers cannot game the system (by using long, wordy responses to texts rather than a simple “STOP”) (*Viggiano v. Kohl’s Dep’t Stores, Inc.*, 2017 WL 5668000 (D.N.J. Nov. 27, 2017))

... But if consent was provided for by the consumer as bargained-for consideration supporting a contract, consent may not be revoked unilaterally by the consumer (*Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51 (2d Cir. 2017); *Medley v. Dish Network LLC*, 958 F. 3d 1063 (11th Cir. 2020))

- Not all courts agree at the district court level

What If You Call a Wrong Number?

Reassigned or wrong numbers – courts have construed them to be the same

“[M]illions of wireless numbers are reassigned each year”

2015 FCC Order—“called party” is the actual recipient of the call or text, rather than intended recipient

... But the standard for determining liability post *ACA Int’l v. FCC* is “reasonable reliance.”

- When the caller called or texted, was the caller’s reliance on the consent that it had reasonable?
- *See Sandoe v. Boston Scientific Corp.*, 2020 WL 94064 (D. Mass. 2020) and *Roark v. Credit One Bank, N.A.*, 2018 WL 5921652 (D. Minn. 2018) (both granting summary judgment to defendant and applying reasonable reliance standard).



FCC Reassigned Number Database

Unanimous Commission decision to adopt a single comprehensive database containing reassigned numbers for callers to query to avoid calling numbers that have been reassigned

- Landline, wireless, and VoIP numbers will be included in the database
- Callers who use the database will not be liable for calling a reassigned number if the database fails to report the number as reassigned
- Effective Nov. 1, 2021

Vicarious Liability

Can you be liable if you did not actually make the call/send the text?

FTC view: A company is on the hook for calls made by a third-party telemarketer simply by hiring the telemarketer.

FCC view: Non-callers may only be held vicariously liable under federal common law agency principles for a TCPA violation by a third-party telemarketer.

- FCC rejected FTC view

Very fact specific:

- “Agency means more than mere passive permission; it involves request, instruction, or command.” *Thomas v. Taco Bell Corp.*, 879 F. Supp. 2d 1079, 1084-85 (C.D. Cal. 2012) (granting summary judgment to defendant on vicarious liability TCPA claims), *aff’d*, 582 Fed. App’x 678 (9th Cir. 2014).
- Did you control, or have the right to control, the agent who made the call, especially the manner and means of the solicitation campaign that was conducted?
- Did you have actual knowledge the agent was violating the TCPA and did you ratify the agent’s conduct?

Individual Liability

- Individual liability is a real risk for TCPA suits.
 - “[A]n officer may be personally liable under the TCPA if he had direct, personal participation in or personally authorized the conduct found to have violated the statute, and was not merely tangentially involved.” *Texas v. Am. Blast Fax, Inc.*, 164 F. Supp. 2d 892, 898 (W.D. Tex. 2001).
 - *Montelongo v. My Fin. Sols. LLC*, 2020 WL 210814 (W.D. Tex. Jan. 14, 2020)
 - Individuals subject to liability were the employee responsible for TCPA compliance and a call center employee who allegedly made the call(s).



Ringless Voicemail

- Technology allows messages to be delivered directly to a consumer cell phone mailbox without ringing and without calls being carried over a wireless network
- Ringless voicemails are “calls” subject to the TCPA’s prohibitions/consent rules
 - *Picton v. Greenway Chrysler-Jeep-Dodge, Inc.*, 2019 WL 2567971 (M.D. Fla. June 21, 2019)
 - *Saunders v. Dyck O’Neal, Inc.*, 319 F. Supp. 3d 907 (W.D. Mich. 2018)
- Florida telemarketing statute expressly applies to ringless voicemail (Fla. Sta. § 501.059)



Other TCPA Issues and Trends

117TH CONGRESS
2D SESSION **H. R.** _____

To amend the Communications Act of 1934 to prohibit the use of automated telephone equipment to send unsolicited text messages, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

Mr. KRISHNAMOORTHY introduced the following bill, which was referred to the Committee on _____

A BILL

To amend the Communications Act of 1934 to prohibit the use of automated telephone equipment to send unsolicited text messages, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. RESTRICTIONS ON THE USE OF AUTOMATED**
4 **TELEPHONE EQUIPMENT.**

5 (a) IN GENERAL.—Section 227 of the Communica-
6 tions Act of 1934 (47 U.S.C. 227) is amended—

7 (1) in subsection (a)—

8 (A) in paragraph (1)—

1 (i) in subparagraph (A), by striking “,
2 using a random or sequential number gener-
3 ator” and inserting “or sent a text mes-
4 sage”; and

5 (ii) in subparagraph (B), by striking
6 “dial such numbers” and inserting “auto-
7 matically dial or send a text message to
8 such numbers”; and

- Autodialer complaints have decreased
- Focus now on do not call claims and prerecorded messages
- Novel theories, i.e., text messages can be “prerecorded messages”
 - But courts are rejecting these attempts
- **July 22 bill introduced in Congress to amend the TCPA and, in particular, the autodialer definition**



Florida Telephone Solicitation Act



State Law – Florida

Florida Telephone Solicitation Act (FTSA)

- Enacted in 1990, but no private cause of action
- Prohibits, among other things, telemarketing calls/texts that “involve[] an automated system for the **selection or dialing** of telephone numbers or the playing of a recorded message” without prior express written consent
 - Ringless voicemail also covered
 - Florida passed an autodialer-specific law in 1978, which became part of the FTSA in 1990
- Rebuttable presumption that calls/texts to Florida area codes are physically received in Florida
- Historically, only actions brought against in-state telemarketers
 - Makes sense given that the TCPA was enacted because of the “interstate loophole”—no ability to enforce state telemarketing laws against out-of-state callers
- July 2021 amendments allowed for a private cause of action □ hundreds of putative FTSA class actions filed since July 1, 2021
- No action taken by Florida legislature on early 2022 proposed amendments before session ended (“indefinitely postponed and withdrawn from consideration”)
 - Some of the amendments would have brought the FTSA more in line with the TCPA

State Law – Florida

FTSA

- July 2021 amendments allowed for a private cause of action
 - Hundreds of putative FTSA class actions filed since July 1, 2021
- No action taken by Florida legislature on early 2022 proposed amendments before session ended (“indefinitely postponed and withdrawn from consideration”)
 - Some of the amendments would have brought the FTSA more in line with the TCPA



State Law – Florida

Florida Telephone Solicitation Act (FTSA)

- Issues currently being litigated
 - Application to **inter**state telecommunications or only **intra**state ones?
 - Overly burdens commerce in violation of the Commerce/Dormant Commerce Clauses?
 - Violates the First Amendment?
 - Preemption by the TCPA?
 - Whether FTSA autodialer definition is coextensive with TCPA's ATDS definition?
 - Must a prior express written consent disclosure track the FTSA's definition verbatim, and specifically use the phrase "automated system for the selection or dialing of telephone numbers"?
 - Procedural issues (in Florida state court litigation): No action taken by Florida legislature on early 2022 proposed amendments before session ended ("indefinitely postponed and withdrawn from consideration")
 - Standing without a concrete injury-in-fact?
 - Class action plaintiff pick-off permitted (~ Rule 68 offer of judgment no longer permitted in federal court)?



State Law – Florida

- No summary judgment or class certification decisions yet
 - Several decisions on motions to dismiss:
 - *Alvarez v. Sunshine Life & Health Advisors LLC*, No. 2021 020996 CA 01 (Fla. 11th Cir. Ct. Mar. 10, 2022) (denying motion to dismiss and finding that Florida’s standing test was satisfied where plaintiff alleged a purely legal injury—the simple violation of the FTSA—without any attendant actual harms or damages)
 - *Turizo v. Subway Franchise Advertising Fund Trust Ltd.*, -- F. Supp. 3d --, 2022 WL 2919260 (S.D. Fla. May 18, 2022) (finding that the FTSA neither violates the First Amendment nor is void for vagueness, and the TCPA’s ATDS definition is not the same as what constitutes an autodialer under Florida law)
 - *Pariseau v. Built USA, LLC*, 2022 WL 3139243 (M.D. Fla. Aug. 5, 2022) (holding that the FTSA does not violate the First Amendment nor is void for vagueness)
 - *Calvin v. Humana, Inc.*, No. 9:22-cv-80804-WPD (S.D. Fla. Aug. 18, 2022) (holding that defendant’s dual-purpose text messages were “telephonic sales calls” under the FTSA)

State Law – Florida

- While a number of individual settlements and dismissals without prejudice, only one class settlement
 - *Alvarez v. Sunshine Life & Health Advisors LLC*, No. 2021 020996 CA 01 (Fla. 11th Cir. Ct. preliminary approval granted July 27, 2022)
 - Defendant making available \$2,556,000 as part of a common fund from which the following amounts will be paid:
 - Each settlement class member who submits a valid claim form will receive a check in the amount of \$300;
 - An incentive award to the plaintiff in the amount of \$5,000 for his service as the putative class representative;
 - Attorneys' fees and costs totaling 20% (or \$511,200) of the common fund; and
 - The costs of settlement notice and administration



State Law – Florida

TCPA/FTSA Consent Rules

	TCPA Cell Phones (Business and Residential)		TCPA Residential Landline		FTSA Cell Phones and Landlines
	Telemarketing	Non-telemarketing	Telemarketing	Non-telemarketing	Telemarketing (FTSA does not apply to non-telemarketing calls)
Autodialer (calls)	Prior express written consent	Prior express consent	No consent required	No consent required	Prior express written consent
Autodialer (text messages)	Prior express written consent	Prior express consent	No consent required	No consent required	Prior express written consent
Prerecorded messages (calls)	Prior express written consent	Prior express consent	Prior express written consent	No consent required	Prior express written consent
Live operator (no autodialer and no prerecorded messages)	No consent required (unless on a do not call list)	No consent required	No consent required (unless on a do not call list)	No consent required	No consent required
Number on the National Do Not Call Registry (calls and text messages)	Prior express written consent OR an established business relationship	No consent or an established business relationship required (do not call rules apply only to telemarketing calls/text messages)	Prior express written consent OR an established business relationship	No consent or an established business relationship required (do not call rules apply only to telemarketing calls/text messages)	NA
Number on the Internal Do Not Call List (calls and text messages)	Prior express written consent	No consent or an established business relationship required (do not call rules apply only to telemarketing calls/text messages)	Prior express written consent	No consent or an established business relationship required (do not call rules apply only to telemarketing calls/text messages)	No consent or established business relationship exceptions noted in the statute. NOTE: This restriction applies to consumer and business telephone numbers.
Number on the Florida Do Not Call List	NA	NA	NA	NA	Prior express written consent OR an established business relationship

Other State Telemarketing Laws



State Law – Oklahoma

- Oklahoma Telephone Solicitation Act (OTSA)
 - Patterned after the FTSA; adopts the FTSA’s autodialer and rebuttable presumption (area codes) provisions
 - Important difference between OTSA and FTSA:
 - OTSA specifically exempts, among others, “[a] person soliciting business from prospective consumers who have an existing business relationship [(“EBR”)] with or who have previously purchased from the business enterprise for which the solicitor is calling if the solicitor is operating under the same business enterprise”
 - In other words, if there is an EBR between the seller and consumer, telemarketing communications to that consumer are not subject to the OTSA or its general autodialer prohibition
 - Doesn’t seem to make sense, but that’s how the statute is drafted
- OTSA becomes effective on Nov. 1, 2022



State Law – Michigan

- **Proposed** Telephone Solicitation Act
 - Would ban the use of recorded calls to make telephone solicitations
 - “Telephone solicitations” is broadly defined to include calls for the purpose of encouraging the recipient to
 - Purchase, rent, receive, or invest in goods or services or make a charitable contribution
 - Provide personal information
 - Accept or participate in employment
 - Accept a prize promotion
 - “Express verifiable authorization” is a defense that includes prior written authorization, prior electronic authorization, prior oral authorization that is recorded, prior confirmation from an independent third party
- Also has DNC provisions
- Prohibits lead generation involving numbers on the DNC
- Requires disclosures by solicitor
- ADAD definition is similar to Florida’s, and means calls made using any device or system of devices that is used, whether alone or in conjunction with other equipment, for the purpose of automatically selecting or dialing telephone numbers
- Bans only the use of ADADs to make calls to numbers on the DNC list or to vulnerable numbers, such as hospitals, emergency lines, and those belonging to those 75 years or older
- Up to \$25,000 **per** violation by state AG
- Flat \$1,000 per violation plus fees for consumer suit

State Law – Washington

- Expands “telephone solicitation” to include telephone calls to a “person” rather than a “residential telephone customer”
- Still excludes calls where there is an established business relationship (inquiry- or transaction-based) between the seller and consumer
 - But the transaction-based EBR lasts for only 12 months from the date of last purchase
- Requires disclosures within 30 seconds
- End call within 10 seconds of request to end
- DNC requirements, including informing called party that their information will be removed from the seller’s list for at least one year
- 8 a.m. to 8 p.m., called party’s local time



State Law – New York

- Amended DNC law to require that telemarketers disclose **at the outset** of a telemarketing call the telemarketer's name and the identity of the company on whose behalf the call is being made (if other than the telemarketer itself) and that the recipient has the option to be added automatically to the seller's internal do not call list
 - These must be made before any other disclosures
- Must advise that the call is being recorded (if at all)
- Purpose of the call and the identity of the good or service for which a fee will be charged
- Record keeping requirements
- 8 a.m. to 9 p.m.



Questions?





© 2022 Venable LLP.

This document is published by the law firm Venable LLP. It is not intended to provide legal advice or opinion. Such advice may only be given when related to specific fact situations that Venable has accepted an engagement as counsel to address.

VENABLE LLP

General Counsel Fireside Chat

Alexandra Megaris

Partner | Venable LLP

April Lindauer

General Counsel | Carta

Tim Hirsch

General Counsel and Head of Corporate Development | Kinship

VENABLE LLP

Questions?



Alex Megaris
Partner | Venable LLP
+1 212.370.6210
AMegaris@Venable.com



April Lindauer
General Counsel | Carta



Tim Hirsch
General Counsel and Head of
Corporate Development | Kinship



© 2022 Venable LLP.

This document is published by the law firm Venable LLP. It is not intended to provide legal advice or opinion. Such advice may only be given when related to specific fact situations that Venable has accepted an engagement as counsel to address.

VENABLE LLP



Using the Self-Regulatory Process to Defend and Grow Your Brand

Claudia A. Lewis

Partner | +1 202.344.4359 | CALewis@Venable.com

Shahin O. Rothermel

Partner | +1 202.344.4550 | SORothermel@Venable.com

VENABLE LLP

Agenda

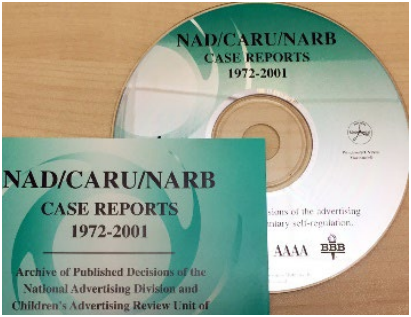
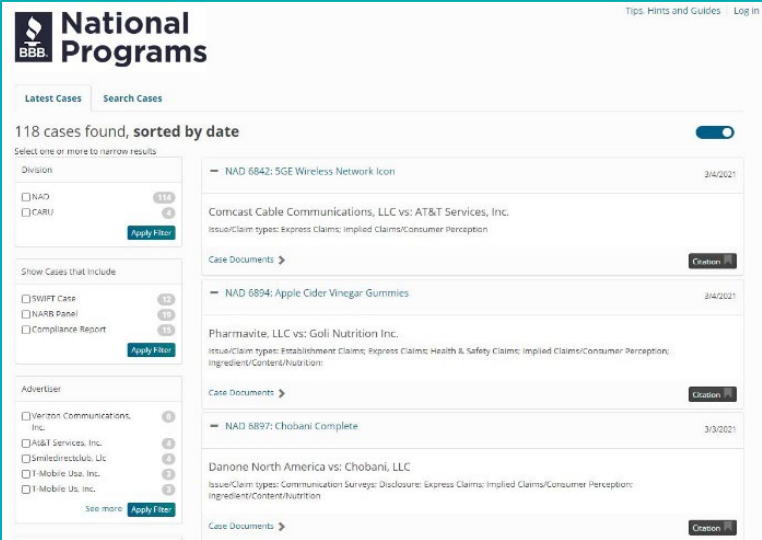
- Self-Regulation: Background
- Should You Engage in Self-Regulation?
- Recent Themes in Self-Regulation



Background

National Advertising Division: Background

- The National Advertising Division (NAD) monitors national advertising in all media, enforces high standards of truth and accuracy, and efficiently resolves disputes to build consumer trust and support fair competition.
- NAD reviews advertising based on challenges from businesses, or complaints from consumers, or on its own monitoring initiative, covering a wide variety of both industries and issues.
- NAD’s decisions represent the single largest body of advertising decisions in the United States. [BBB National Programs Online Archive](#)



National Advertising Division: Background

- The majority of NAD cases today result from competitor challenges.
- NAD pursues a monitoring program where it reviews advertising on its own initiative.
- Standard Track:
 - Challenge is submitted / case is opened.
 - NAD reviews written submissions and engages in meetings with the parties.
 - After reviewing the evidence, NAD issues a written report identifying the parties, the challenged claims, and NAD's decision.
 - Parties may appeal the decision to the National Advertising Review Board (NARB).
 - The case report is published.
- Compliance Proceedings: Challenge the advertiser's compliance with NAD's recommendations.
- Advertisers that refuse to participate in the NAD process, or who refuse to comply with NAD recommendations, are referred to the applicable government agency.

NAD | NARB Procedures

NAD Single Well-Defined Issue Fast Track (SWIFT)

- Developed to meet the need for quick resolution of truth and transparency issues that arise in advertising.
- The expedited process reviews advertising truth and transparency issues that **do not** require complex claim substantiation.
- Fast-Track SWIFT challenges are limited to **a single issue**.
- Submissions are made online, and only one substantive submission is permitted per party.
- The Fast-Track SWIFT process allows parties to receive a NAD decision within 20 business days from the opening of the case.

NAD Single Well-Defined Issue Fast Track (SWIFT)

- Currently, NAD accepts only three types of claims for Fast-Track SWIFT challenges:
 - The prominence or sufficiency of disclosures, including disclosure issues in influencer marketing, native advertising, and incentivized reviews
 - Misleading pricing and sales claims
 - Misleading express claims that do not require review of complex evidence or substantiation, such as clinical or technical testing or consumer perception evidence
- Claims that may be worded slightly differently but still convey the same message can be brought in a single challenge.

NAD Complex Track

- An enhanced process for resolving challenges that require review of complex claim substantiation.
- Designed to improve the user experience by providing more flexible scheduling and insights into NAD's perspective on the evidence.
- NAD Complex Track is designed for challenges that require complex claim substantiation, which may include:
 - Cases involving multiple expert reports explaining and/or rebutting the evidence submitted
 - Cases where the evidence will include consumer perception surveys or other studies or surveys that can require additional time to complete
 - Cases involving challenges to numerous claims made for a variety of products

Partnership with Facebook

- Partnership with Facebook to strengthen truth-in-advertising enforcement on the social network's U.S. platform.
- The partnership enables NAD to share case outcomes addressing Facebook advertising directly with Facebook, allowing Facebook enforcement teams to then act on those ads that violate their policies.



Should You Engage in Self-Regulation?

Advantages and Disadvantages of Self-Regulatory Process

- **Advantages:**

- Lower cost than litigation
- No discovery/one-way
- Confidential proceedings
- Levels the playing field

- **Benefits of NAD:**

- NAD has a published body of case precedent.
- NAD provides a process for appealing adverse decisions to the National Advertising Review Board.
- NAD is a mechanism for resolving disputes, no matter the size of the company and across industries.

Advantages and Disadvantages of Self-Regulatory Process

- **Disadvantages:**
 - Limited control over the proceedings:
 - Limited discovery
 - Confidential
 - Increases the focus on your own advertising.
 - Your competitor might have substantiation!
 - Recommendations are nonbinding.

Strategies and Considerations

- Do your homework:
 - Work with your marketing team to gather and analyze the data and determine whether the claim or practice is worth challenging.
 - Research the claim and legal precedent, and gather your own support and evidence.
- Make sure you are judicious in choosing the claims to challenge—an unfavorable decision can embolden competitors!
- Review your own advertising to avoid a counter-challenge.

Strategies and Considerations

- Determine whether to send a demand letter first.
 - Often, disputes can be resolved between businesses without involving the lawyers.
 - But tipping off your opponent can result in their filing first.
- Consider whether to notify the Federal Trade Commission, state attorney general, or the Better Business Bureau.
- *If you can't beat them, join them?*

Recent Themes in Self-Regulation

Influencer Marketing

- The Coldest Water, LLC (The Coldest Water Bottle), NAD Case Report 7023 (Oct, 2021)
 - NAD analyzed TikTok videos by influencers, featuring the Coldest Water bottle with the hashtag “#thecoldestwater” and tag @thecoldestwater, which did not include material connection disclosures with the company.
- NAD analyzed information provided about the advertiser’s influencer program:
 - The advertiser’s guidance issued to influencers, including contractual language about compliance with FTC guidance on influencer marketing, follow-up emails, and educational materials related to appropriate social media promotions.
 - The advertiser’s influencer program is “invite-only.”
 - The advertiser provided all influencers with specific social media guidelines. According to the guidelines, if the influencers promote the company in exchange for money or bottles, they are directed to disclose the relationship.
 - Compliance is monitored by a team of employees.
- NAD found that the advertiser made appropriate efforts to ensure that its influencers’ material connections were disclosed in TikTok videos for its Coldest Water bottle.



Influencer Marketing

- Goli Nutrition (Goli Ashwagandha Gummies), NAD Case Report 7059 (Apr. 2022)
 - According to the challenger, many of Goli’s partners did not disclose that they received compensation from Goli in exchange for their social media advertising, including when users purchase the product through the influencer’s discount code.
 - The advertiser provided NAD with educational material provided to its influencers and explained that it instructs its brand ambassadors to follow FTC guidance on endorsement and testimonial disclosure requirements, including explicit instructions to disclose “material connections” via required disclosure language, such as hashtags or otherwise specified language.
 - The advertiser monitors compliance by reviewing posts with relevant hashtags, including #golipartner, #goli, #goligummies, #golinutrition, as well as all posts where Goli is tagged.
 - If the advertiser’s compliance team identifies a non-compliant post, Goli contacts the brand ambassador and demands that they delete or revise the post to bring it into compliance. If the ambassador refuses to comply, Goli terminates his or her participation in its ambassador program.
- NAD was satisfied that the compliance program adequately addressed the concerns raised by the challenger.



Dietary Supplements and Health Claims

- Dakota Nutrition, Inc. (Elderberry Products), NAD Case Report 7067 (Jun. 2022)
 - NAD analyzed claims that dietary supplements contained the ingredient elderberry, including the product names Elderberry Capsules and Elderberry Gummies. NAD found that the names constitute an express claim that the products contain meaningful amounts of the named ingredient. NAD found the amounts of elderberry in these products was insufficient to support the claim.
- Innovix Pharma (OmegaVia Fish Oil and OmegaVia EPA 500), NAD Case Report 6974 (Apr. 2022)
 - NDA analyzed claims related to triglyceride and blood pressure management, such as “From triglyceride management to blood pressure, when it comes to heart health, Omega-3 supplements like these—when combined with a healthy diet and exercise—provide powerful support.”
 - NAD found qualified claims about EPA and DHA’s ability to support heart health in addition to a healthy diet and exercise were substantiated but recommended discontinuing the challenged performance claims and testimonials relating to mood health, heart health, and triglyceride management.
 - NAD noted that, in the absence of specific product performance testing, advertisers may make properly qualified claims based on ingredients in their dietary supplements, provided there are reliable ingredient studies assessing the ingredient in the same amount, formulation, and route of administration as the ingredient found in the product.



Ratings and Reviews

- PerSé Beauty Inc. (Prose Haircare Product Reviews), NAD Case Report 7054 (Mar. 2022)
 - NAD asserted that the advertiser published only select 5-star “Featured Reviews” on its website and claimed that it has “over 192,000 5-star product reviews!”
 - NAD recommended discontinuing the claim “over 192,000 5-star product reviews”:
 - NAD was not provided any evidence on how the reviews were collected and maintained, even though the advertiser represented that the “over 192,000 5-star product reviews” claim is based on a calculation of the number of 5-star reviews customers have awarded its product line
 - NAD concluded that it could not determine who collected the reviews, whether the feedback survey was a bona fide invitation for honest opinions, whether the survey questions had ever been changed (possibly rendering it unreasonable to aggregate the 5-star ratings obtained from different survey questions), or that the 192,000 5-star reviews were based only on a neutral “overall satisfaction” question as argued.



Native Advertising: Review Websites

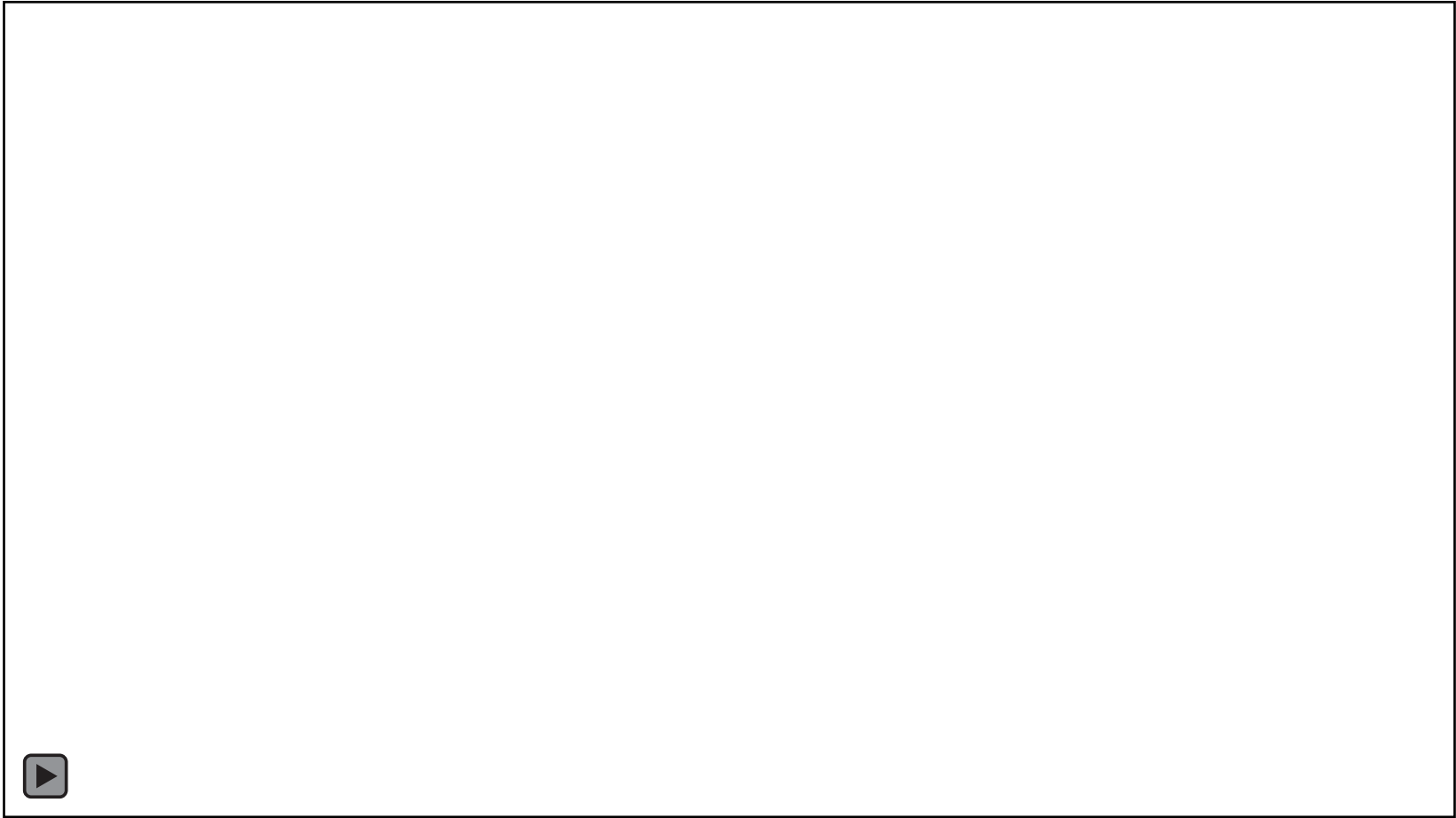
- BestCompany.com, LLC (BestCompany.com), NAD Case Report 6999 (Jan. 2022)
 - NAD analyzed claims for BestCompany.com, a review website, including claims that the site is an “honest and unbiased” website, a “Truly Independent and Impartial Review Site,” and implied claims that BestCompany.com is not “pay to play.”
 - NAD recommended discontinuing claims that (i) rankings on the BestCompany.com website “cannot be bought” or otherwise influenced to “unfairly favor one company over another, not based on merit”; (ii) Best Company does not have “any relationships with companies that guarantee their ranking or score and we never will”; (iii) “Best Company never has and never will take payment in exchange for an unmerited rank on BestCompany.com.”; and (iv) that Best Company’s rankings of various companies and their products on BestCompany.com are “honest and unbiased.”
 - Best Company’s ranking criteria result in a higher score for businesses that have a partnership with Best Company because:
 - A review generation campaign with Best Company will produce more verified reviews that hold more weight in the score allocated to the “Star Rating of Reviews.”
 - The score is impacted by the number of reviews, a number that will be much higher if a company engages Best Company for review generation.
 - The score takes into account “Responsiveness to Reviews” and “Verification of Data.” Companies that partner with Best Company are likely to both verify their data on Best Company and respond to reviews, resulting in a higher score.

Trusted Rankings

We rank companies based on a simple and transparent ranking algorithm that weighs customer reviews. Companies cannot buy their rank, period.

[Learn More](#)

Privacy



Privacy

- DuckDuckGo (Privacy Essentials), NAD Case Report 7022 (Jun. 2022)
 - NAD reviewed claims that the DuckDuckGo privacy browser, mobile app, and desktop extension is the “best, quickest and easiest step you can take for your privacy health,” when, in context, the claim refers to being the most comprehensive all-in-one, out-of-the-box solution; and the message that it does not share consumer personal data with third parties.
 - NAD concluded that DuckDuckGo provided a reasonable basis for claims related to its privacy browser mobile app and desktop extension, based on evidence of how DuckDuckGo operates differently from other search engines, excerpts from sworn testimony before the U.S. Senate Judiciary Committee Hearing “GDPR & CCPA: Opt-ins, Consumer Control, and the Impact on Competition and Innovation,” declarations from an expert in data privacy and security, and a declaration from Jon Callas, director of technology products at the Electronic Frontier Foundation.
 - NAD recommended that DuckDuckGo modify its advertising to make clear that this protection does not extend to the use of search engines and apps outside of the DuckDuckGo solution.

Direct Selling Self-Regulatory Council (DSSRC)

- Mary Kay, Inc. (Mar. 2022)
 - The DSSRC opened a compliance inquiry to review advertising from Mary Kay, Inc. that had been the subject of an inquiry from 2021.
 - DSSRC found new social media posts that referred to the significant income that can be earned from the Mary Kay business opportunity, including:
 - “I love that you can have freedom and flexibility – side gig or full-time business with Mary Kay.”
 - “With just \$30 you can earn 4-5 figure passive, residual income.”
 - “What would you do with extra income – big or small.”
 - “You can make residual or passive income.”
 - “If you are looking for an opportunity for a potential avenue of income, a change of career.... join the MARY KAY EXPANSION and earn BIG INCOME.”
- DSSRC recommended that these new earnings claims, made by Mary Kay salesforce members, be discontinued.

DSSRC

- DSSRC recommended that certain earnings claims disseminated by **My LaLa Leggings** salesforce members be discontinued, including:
 - *“My Lala Bosses has given hundreds of women of financial freedom from the comfort of their own home! Whether it be through online sales and referrals, or buying wholesale and selling retail, they truly offer a plan for everyone. Low start up costs, no monthly fees, no quota. No catch!”*
 - *“If the ‘Stimulus’ is giving you a little ‘extra’ cash OR you are looking to earn some passive income (or come) My Lala Leggings (not just leggings) is hosting FREE Affiliate sign ups till Jan. 8th. Sign up, start creating your own boutique, earn \$\$\$!”*

My Lala Leggings Fashions with Tiffany
January 8 · 🌐

Today is the last day to start a FREE clothing business with Lala Leggings.
Ready to earn extra income in 2021? Join my team today! Message me or comment below for more information.
#leggingsaddict #smallbusiness #free #joinmyteam

Dear Tiffany Sutton,
You got Paid!!! We would like to let you know that your commissions earned have been paid out now.
.:Payout preview.:
NO REFERRAL BONUSES ARE GRANTED ON FREE SIGNUPS

MY LALA Leggings
FREE WEBSITE 25% COMMISSIONS PAID WEEKLY
5% SUBAFFILIATE COMMISSIONS
25% AFFILIATE DISCOUNT WITH UP TO 40% LARGE PURCHASE DISCOUNTS
\$5 REFERRAL BONUS
CODE: 2021

Social Issues and Charitable Donations

- “NAD’s public interest mission to ensure consumers receive truthful advertising extends to companies’ representations committing to support social justice initiatives.”
- DoorDash, Inc. (Advertising by DoorDash), NAD Case Report 7036 (Feb. 2022)
 - NAD determined that DoorDash, Inc. was able to support its website claim: *“We are donating \$1 million, with \$500,000 going to Black Lives Matter and \$500,000 to create a fund to be directed by the Black@DoorDash ERG (Employee Resource Group) towards state and local organizations.”*
 - DoorDash provided documentation and invoices related to its donations to various organizations that support Black Lives Matter and related charities.
- Niantic Labs (Advertising for Niantic Labs), NAD Case Report 7037 (Feb. 2022)
 - NAD determined that Niantic, Inc. was able to support claims pledging charitable donations to “Black gaming” as well as social and racial justice organizations:
 - *“We’ll be donating Niantic proceeds from Pokémon GO Fest 2020 ticket sales, committing a minimum of \$5 million. Half of the proceeds donated will be used to fund new projects from Black gaming and AR creators that can live on the Niantic platform, with the ultimate goal of increasing content that represents a more diverse view on the world. The other half will go to US nonprofit organizations that are helping local communities rebuild.”*

NAD Single Well-Defined Issue Fast Track (SWIFT)

- DIRECTV challenged Charter Communications claims regarding the availability of sports channels and sports programming on DIRECTV’s streaming service (DIRECTV Stream). (NAD SWIFT #7093 (March 2022))
 - DIRECTV challenged claims made by Charter Communication (“Spectrum”) that consumers cannot watch the “biggest game of the year” on DIRECTV Stream; none of consumers’ “favorite sports channels” are available on DIRECTV Stream; and DIRECTV Stream has “no local sports channels.”
 - NAD recommended that Spectrum discontinue the challenged claims. However, NAD offered that an alternative to discontinuing the “no local sports channels” claim could be modified to inform consumers of the channels or networks that are not available as well as the specific package being compared.
- Dyson, Inc. challenged SharkNinja Operating LLC’s claim that the Shark HyperAIR hair dryer is the industry’s “first and only high velocity hair dryer and styling system.” (NAD SWIFT #7075 (Dec. 2021))
 - The advertiser voluntarily discontinued the claim.

Comparative and Superiority Claims

- SharkNinja (Vertex and Navigator Pet Pro Vacuums), NAD Case Report 7094 (Aug. 2022)
 - NAD recommended that SharkNinja modify or discontinue various claims made in a 30-minute infomercial comparing its Shark HyperAir hair dryer to the Dyson Supersonic and traditional hair dryers.
 - Recommended that Shark discontinue the claims “Shark PowerFins give you better hair pick up from the floor to the dust cup” and discontinue a Vertex/Dyson Ball Animal 2 product demonstration to avoid communicating the implied claim “Shark’s Vertex Vacuum will provide better hair pick up from the floor to the dust cup versus all competing vacuums.”
- WaterWipes (WaterWipes), NAD Case Report 7086 (Jul. 2022)
 - NAD determined that the advertiser’s study does not provide adequate substantiation for the broad superiority claims (“#1 wipe against the causes of diaper rash” and “#1 cleansing wipes helping against the causes of diaper rash”) or the establishment claim (“clinically proven as the #1 wipe against the causes of diaper rash”).
 - NAD noted that broad superiority claims such as a “#1” claim require strong support, while a “clinically proven” claim requires reliable and well-controlled clinical testing on the advertised product.



Comparative and Superiority Claims

- Twilio (Customer Data Platform), NAD Case Report 7089 (Jul. 2022)
 - Twilio Inc. provided a reasonable basis for claims that its customer data platform is the “#1 CDP,” provided it makes clear that the basis for such claim is 2020 market share, as measured by the International Data Corporation (IDC).
- Sanofi Consumer Healthcare (Zantac 360), NAD Case Report 7088 (Jun. 2022)
 - NAD analyzed “#1 doctor recommended” claims for its Zantac 360 heartburn medicine (“#1 doctor recommended medicine approved to both prevent and relieve heartburn” and “with the #1 doctor recommended heartburn medicine”).
 - The advertiser argued that doctor survey data for the generic group (necessarily based on the listed active ingredient) showed that in the relevant category, recommendations for famotidine-based store/generic brands far exceeded the recommendations for products with other active ingredients.
 - NAD disagreed and concluded that a doctor’s recommendation for a product was not the same as a recommendation for the active ingredient.



Contact Us



Claudia A. Lewis
Partner
+1 202.344.4359
CALewis@Venable.com



Shahin O. Rothermel
Partner
+1 202.344.4550
SORothermel@Venable.com



© 2022 Venable LLP.

This document is published by the law firm Venable LLP. It is not intended to provide legal advice or opinion. Such advice may only be given when related to specific fact situations that Venable has accepted an engagement as counsel to address.

VENABLE LLP



The Most Interesting...Campaign in the World

What's New and Hot in Advertising and Promotions



Melissa Landau Steinman

Partner | +1 202.344.4972 | MLSteinman@Venable.com

VENABLE LLP

Wedding-Themed Campaigns Trending

“Hard Dew I Dew”



Image source: <https://adage.com/article/marketing-news-strategy/hard-mtn-dew-seeks-fan-marry-can-hard-seltzer-las-vegas/2427551>

Be an “Officiant of High Life”



Image source: <https://www.foodandwine.com/news/miller-high-life-ordained-ministers-universal-life-church>

Frank's RedHot eNFT Campaign

- Frank's RedHot promotion where consumers could enter for a chance to win an NFT (shown) along with an “edible NFT” – an edible replica of the NFT featuring Frank's RedHot and chicken wings



Non-Fungible Tokens (NFTs) and Cryptocurrency

Increasing use of NFTs and cryptocurrency as prizes in sweepstakes (NFTs = non-fungible tokens). These may trigger additional issues—starting with the need for clear definition of terms—as well as:

Consideration: Requirement to purchase an NFT or cryptocurrency may be consideration and may trigger lottery laws.

- May be additional hidden fees (e.g., in opening wallet) as well
- May provide free AMOE, but must clearly and conspicuously disclose it. *See Suski v. Coinbase Global, Inc.*

Intellectual property: NFTs are unique, one-of-a-kind digital files, which may trigger IP considerations regarding copyright and reproduction rights.

Prize value: Cryptocurrency may rise and fall in value over the course of a sweepstakes, and NFTs may have no value at all, except as determined by the secondary market—how does one state “ARV” as required under state law?

Chance: Is there inherent randomness in numbering of NFTs? What about exchanges where certain NFTs are signed or have specified characteristics—is there chance there?

Skins Betting, Loot Boxes, and NFTs

- In gaming, players often gather “skins” (virtual tokens such as weapons or tools) during game play; some games include ability to purchase “loot boxes” with one or more unidentified items in them
 - Does this add “chance” to what would otherwise be a game of skill?
 - Are the loot boxes, skins, or other items a “prize” or a “thing of value”?
 - If there is no clear real-world value, or value is speculative, some courts have refused to find gambling violations
 - BUT if players are able to purchase skins, in-game or on secondary market, may trigger issues
 - 2020 FTC Workshop examined loot boxes and focused on issues such as importance of clear disclosures of odds/costs, children’s use
 - Crucial issues in several cases on appeal in Ninth Circuit now—*Taylor v. Apple*, *Coffee v. Google*, and *G.G. v. Valve*—where defendants defeated various claims in lower courts that loot boxes constitute illegal gambling

Gaming, Gambling and NFTs

- Analysis re: Skins and loot boxes easily translate to the world of NFTs and the metaverse (e.g., Roblox, Axie Infinity)
- There are several exchanges where consumers can purchase NFTs of their favorite sports personalities and/or other sports-related “utility NFTs” with different functions attached (e.g., NBA Topshots)
 - Similar to dynamic with trading cards, which was addressed in a series of class actions around the country (2005-2012)
- Example: Fortnite and NBA project that featured competition where 15,000 players per team were able sign up for NBA teams and participate in a series of challenges that were fed into a leaderboard to choose winner(s)
- NFTs are also often being sold or given away in packs or with utilities, where the purchaser may not know what exactly they will get
 - May be similar to loot box mechanism in video games, which has drawn scrutiny from regulators and created class action risk
 - Importance of disclosures



Metaverse Campaigns and Promotional Virtual Environments

Platform examples—Roblox, Decentraland, Fortnite, or independent/proprietary

Roblox Gucci Experience—virtual products:

- Explore with an avatar
- Acquire digital versions of real-world goods
- Example: Buy the digital version of a real-world Gucci bag for 350,000 Robux crypto (~U.S.\$4,100)
- Other new ventures:
 - iHeartland just announced activation on Fortnite (mostly in State Farm Park for now)
 - Bulgari opening proprietary world
 - Patron pop-up



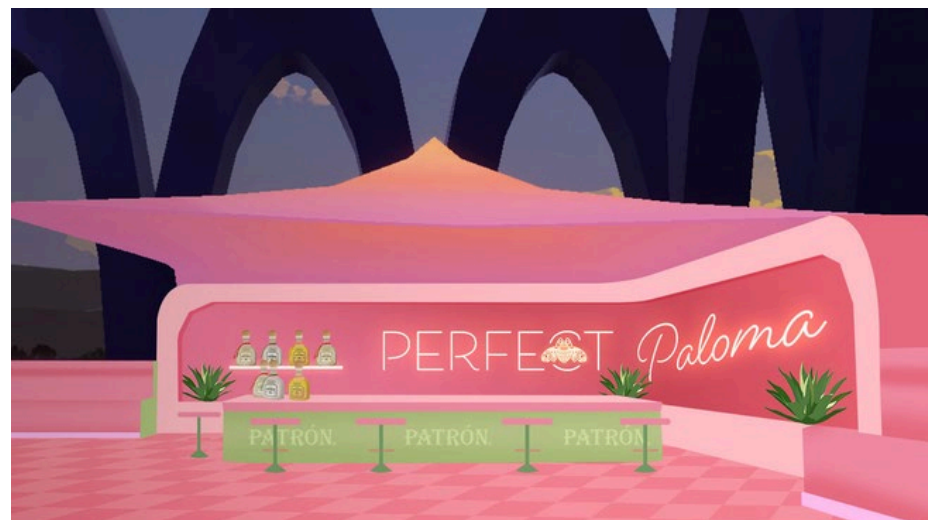
The Roblox experience (bottom) mimics the physical exhibition (top). In Roblox, visitors can purchase digital clothing that is available only for limited periods each day, creating a sense of exclusivity and encouraging visitors to return. Roblox.

Image and caption source: <https://www.voguebusiness.com/technology/inside-gucci-and-robloxs-new-virtual-world>

Patron Pop-Up

Advantages of metaverse implementations:

- Monetization: revenue / increased earnings
- Customer intelligence
 - Gauge appeal of a product look or design
 - Track customer participation/collect data
 - Challenges can be similar to Internet/social, e.g., age screening
 - Plus new/unknown
 - Note alcohol-specific challenges; laws that are not tailored



TINA.org vs. Roblox

Complaint Filed with FTC



April 19, 2022

VIA EMAIL

Samuel A.A. Levine, Director, Bureau of Consumer Protection
Serena Viswanathan, Associate Director, Division of Advertising Practices
Federal Trade Commission
600 Pennsylvania Ave. N.W.
Washington, D.C. 20580
slevine1@ftc.gov
sviswanathan@ftc.gov

Re: Deceptive Marketing on Roblox

Dear Mr. Levine and Ms. Viswanathan:

We write to the Federal Trade Commission concerning Roblox Corporation, a multibillion-dollar public company that operates a closed platform metaverse, where advertising is surreptitiously pushed in front of millions of consumers, including more than 25 million children and adolescents, by a multitude of companies and their avatar influencers. Such digital deception is possible because Roblox has failed to establish any meaningful guardrails to ensure compliance with truth in advertising laws, effectively

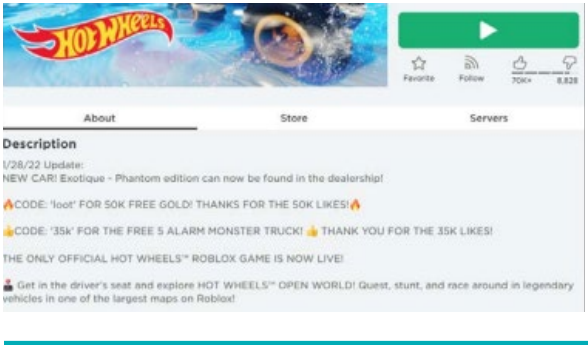
Allegations made by TINA.org:

- Consumers (including children) “lured to Roblox platform with unsubstantiated and atypical earnings representations that claim users can be financially successful game developers.”
- Robux (Roblox currency) used to buy avatar accessories, clothing, special abilities within games, premium subscriptions. Says TINA.org:
 - Not created or secured using blockchain technology
 - Not NFTs
 - Not a cryptocurrency
 - Therefore: lost account = lost assets

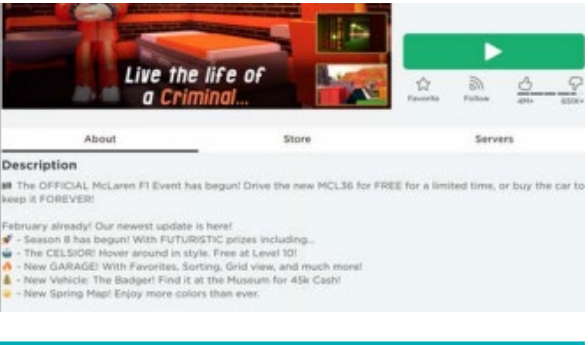
TINA.org v. Roblox

Allegations (Continued)

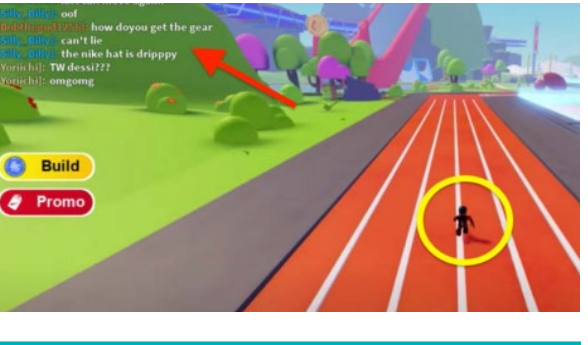
Advergames with deceptively branded worlds



Undisclosed sponsored content within organic worlds



Undisclosed avatar influencers within the Roblox metaverse



What Is Deceptive or Misleading in the Metaverse?

Lessons from Web 2.0

Case 1:22-cv-20925-XXXX Document 1 Entered on FLSD Docket 03/28/2022 Page 1 of 26

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

Walter Coleman, Marco DiLeonardo, Matthew Fox, and Madelyn Salzman on behalf of themselves and all others similarly situated, Plaintiffs, vs. Burger King Corporation, Defendant.	Case No.: JURY TRIAL DEMANDED
--	---

CLASS ACTION COMPLAINT

4. For example, Burger King currently represents that Burger King's Whopper looks as follows on its website and store menu ordering boards:



See https://www.bk.com/menu/picker-picker_5520.

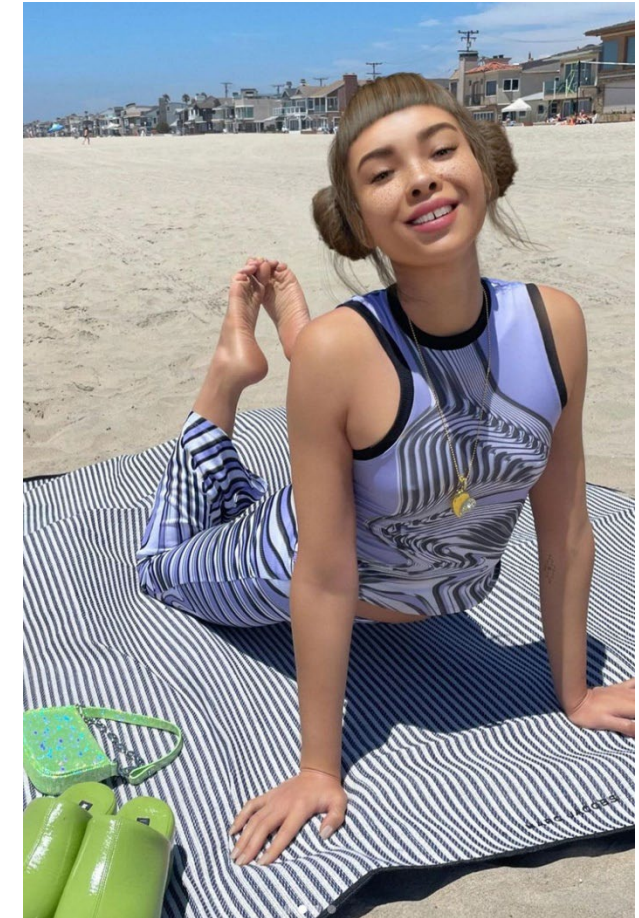
5. However, Burger King's Whopper burger actually looks as follows:



See <https://www.insider.com/best-and-worst-burgers-at-burger-king-ranked#double-cheeseburger-199-4>.

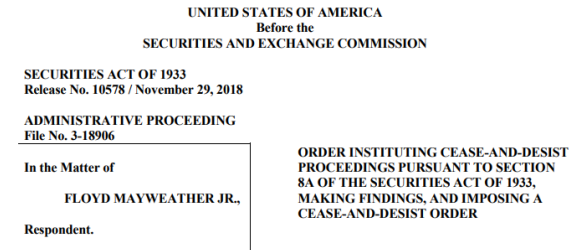
Next Wave—CGI Influencers in the Metaverse

- CGI influencers and avatars such as Lil Miquela (now just Miquela) have been in use since approximately 2018
- Miquela just announced partnership with PacSun, which has previously dropped NFTs and activated on Roblox
- Newer avatars like Prada's Candy and Yoox's Daisy are being introduced to promote the brands on multiple platforms, including in the metaverse—predicted \$1.5bn this year
- Virtual avatars cost less than regular influencers, are 100 percent controllable, can appear in many places at once, and are often—but not always— ideal spokespeople
- FTC updates to the Endorsements Guides proposed to expand definition of influencers to specifically include virtual influencers—but what do disclosures look like?



General Pitfalls for Influencers/Endorsers and Sponsors

- Influencers must always disclose payments/gifts under FTC Endorsements Rule—often not disinterested or impartial due to financial ties or close personal relationship
 - May otherwise be online backlash due to undisclosed conflicts of interest
 - Or legal
- Securities regulation: Must publicly disclose payments for securities promotions



I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), against Floyd Mayweather Jr. ("Mayweather" or "Respondent").

II.



Image source: <https://cryptocurrencynews.com/daily-news/why-is-kim-kardashian-pumping-ethereum-max/>

Diversity and Gender Issues



Update to Guidelines from Children’s Advertising Review Unit (CARU)

Update to Children’s Advertising Review Unit Guidelines for Advertising (eff. 1/1/2022) added important new guidelines:

- “Advertising should be respectful of human dignity and diversity. Advertising should not portray or encourage negative social stereotyping, prejudice, or discrimination”
- In first case to enforce, *CARU v. Primark U.S. Corp.*, No. 6441 (June 2022), Primark sold t-shirts and other merchandise with slogans where advertisements of the shirts geared toward girls including messaging such as “Be Kind, Be Happy,” “Kindness always wins,” and “Always Perfect,” while advertisements of the shirts geared toward boys had slogans like “Change the game,” “Born to win,” and “Awesome Adventures”
- According to CARU, the separate slogans sent distinct messages about what is appropriate for different genders and thus perpetuated sexist stereotypes
- In the words of CARU, “the clothing designed for and advertised to girls encourages girls to be perfect, good, kind, happy, optimistic, humble, and grateful. In contrast, the clothing advertised to boys contains slogans inspiring boys to be ambitious, active, adventurous, and to win”

Sexism and Stereotyping in Advertising in Other Countries

For adults, other countries are far ahead of the U.S.—

- UK, France, and Mexico prohibit sexism in advertising; UK goes so far as to prohibit fat-shaming
 - UK’s Advertising Standards Authority banned gender stereotypes advertising in 2018 and [said](#) in a statement that it would also ban ads that connect physical features with success in the romantic or social spheres; assign stereotypical personality traits to boys and girls, such as bravery for boys and tenderness for girls; suggest that new mothers should prioritize their looks or home cleanliness over their emotional health; and mock men for being bad at stereotypically “feminine” tasks, such as vacuuming, washing clothes, or parenting
 - France also banned retouching photos
 - Belgium, France, Finland, Greece, Norway, South Africa, and India have laws or codes of varying degrees and age that prevent gender discrimination in ads
 - Norway, for example, has had a [law prohibiting sexism in ads](#) since 1978
 - A [2004 Spanish law against gender violence](#) prohibits ads from showing degrading images of a woman’s body
 - [Austrian codes](#) consider depictions that reduce a person to their sexuality discriminatory

“Green” Campaigns

- It is more important than ever to the consumer to understand how the product they are buying affects the environment
- Be careful to understand the limits of what you can say
- FTC is pursuing updates to its “[Green Guides](#),” which provide guidance on claims such as “sustainable,” “recyclable,” etc.
- California and likely other states are moving to ban “forever chemicals” such as PFAs
- Class action lawsuits brought regarding claims like “nontoxic” with regard to cleaning substances, etc.
- For example, a grocery retailer was sued for touting its commitment to “sustainability” and “environmental stewardship”
- Burt’s Bees Cosmetics was sued for advertising that its ingredients “come from nature” and are obtained using “responsible sourcing methods”
- KLM was attacked for its “Be a hero, fly CO2 zero” tag line

Dwyer v. Allbirds class action

- *Dwyer v. Allbirds* class action: Allbirds faced a class action in which plaintiffs attacked allegedly false statements regarding the environmental impact of its wool shoes as described using a life-cycle assessment tool to estimate carbon footprint and a sustainability index
 - Plaintiffs argued that the methodologies Allbirds used were too narrowly focused on the impact of the shoes, did not account for the environmental impact of wool production overall
 - Ultimately, the case settled after a [decision](#) that Allbirds won on motion to dismiss
 - Allbirds was able to defend against the plaintiff's deceptive marketing claims because it had the calculations and data to back up its claims, and it provided the analysis and calculations on its website for consumers to review and evaluate. Both the Green Guides and the court's decision in *Allbirds* provide marketers with good guideposts on the type of data and information that companies should compile and provide to consumers to avoid potentially brand-damaging, greenwashing claims
 - Allbirds relied on the Higg Material Sustainability Index (MSI), a standard developed by the Sustainable Apparel Coalition to measure the environmental impact of apparel items. Allbirds also used a life-cycle assessment (LCA) to estimate its products' carbon footprint. The calculation specified that "Allbirds transportation emissions are calculated separately and our entire footprint is offset to zero"
 - The court found against plaintiff and determined that merely criticizing this methodology was not enough to state a claim. Importantly, the court noted that Allbirds' advertising made it clear what was included in its carbon footprint calculation. Although plaintiff believed Allbirds should have used a different method to measure its carbon footprint—one that includes the entire life cycle of wool production—the court found they did not plausibly allege that Allbirds' environmental impact claims were materially misleading

Charitable Promotions

- In celebration of its new label design, Campbell's dropped a limited-edition collection of 100 NFTs in collaboration with street-style artist Sophia Chang
 - All proceeds went to benefit Feeding America
 - Additionally, Campbell's worked with Aerial to offset the carbon footprint of NST as part of its commitment to sustainability
- *See also Red Wing Shoes "anti-Labor Day Sale,"* where it gave 100% of the profits from its sales to various organizations benefiting groups such as veterans and underrepresented groups in construction
 - Key thing is to (a) be clear about what is meant by "profits," disclose any minimum or cap; and (b) identify which organizations

AmeriCANA: Campbell's x Sophia Chang - Limited Editions

73 owners | 100 total | 84 favorites

Sale ends March 7, 2022 at 5:03pm EST

Current price
0.99 (\$2,662.88)

Buy now | Make offer

Description

Buyer acknowledges and agrees that Campbell Soup Company ("sponsor") owns all legal right, title and interest in and to any art, design, drawings and/or other content included in and/or associated with the Artwork including without limitation the limited-edition work of Campbell's Soup Inspired Artwork contained in the NFT (collectively, "content"), including, without limitation, all copyrights and other intellectual property rights therein.

Each Buyer's right to use the Content is limited to the ability

About AmeriCANA: Campbell's x Sophia Chang

Details

Contract Address	0x495f...7b5e
Token ID	1132728320299479...
Token Standard	ERC-1155
Blockchain	Ethereum
Metadata	Frozen

Price History

All Time Avg. Price: 0.1011

Listings

Unit Price	USD Unit Price	Quantity	Expiration	From	Buy
0.99 ETH	\$2,662.88	1	3 days	JPEGHODL	Buy
4.2069 ETH	\$11,315.64	1	5 months	KingKitega	Buy

Charitable Promotions

Charitable Promotion or Commercial Co-Venture (CCV) –

Arrangement between a charity and a business in which the business advertises in a sales or marketing campaign that the purchase or use of its goods or services will benefit a charity or charitable purpose.

1. Not a charitable solicitation (or raffle)
2. Tied to purchase of goods/services (e.g., MA)
3. Benefit charity or charitable purpose

About 40 states have laws that regulate CCVs

Issues/regulatory requirements:

- Registration/bonding (4 states)
- Written contract
- Advertising disclosures, e.g., amount/minimum donation, dates, fundraising registration number
- Accounting and recordkeeping



Mindy Kaling with Mastercard.
Paid Partnership · 🌐

Listen up America! 10/10 is THE date to dine out and pay with your Mastercard to support cancer research. Mastercard will donate \$1 at a time, up to \$4 MM, to Stand Up To Cancer. Invite your friends too! Make it a date to #StartSomethingPriceless. #Sponsored

TERMS : [Mastercard.com/priceless](https://www.mastercard.com/priceless)

👍👎👉👈 958

74 Comments 220 Shares 245K Views

Charitable Sweepstakes and Auctions

Increasing popularity of sweepstakes run by nonprofits, or commercial entities working with nonprofits.

- What laws apply?
 - Fla. Rev. Stat. Sec. 849.0935—provides explicit exception to lottery laws for nonprofit sweepstakes
 - Professional fundraiser laws?
 - California attorney general settlements/cease and desist letters with charitable sweepstakes websites (e.g., Prizeo)
- Distinct from a commercial co-venture campaign, which involves a purchase and donation and may trigger registration, bonding, contract, and accounting requirements
- Also different from raffles, which are restricted to nonprofits and subject to specific statutory requirements., including registration, residency, prize limits

Auctions, which are also distinct, may be subject to state auctioneer laws

But . . . Evolving Rules for Online Giving Platforms

- Charitable solicitation laws were developed prior to the internet, and even with the Charleston Principles, online fundraising efforts have not always had a clear path to compliance (e.g., web-based round-up programs, charitable sweepstakes, choose-a-charity campaigns, etc.)
- California enacted AB 488 last fall, regulating **charitable fundraising platforms, platform charities, and beneficiary charitable organizations**
- A charitable fundraising platform is, generally, any entity that *uses the internet* to provide a website, service, or other platform to persons in this state, and performs, permits, or otherwise enables acts of solicitation to occur
- Will require registration and reporting; specific disclosures; and administrative obligations (like transferring funds “promptly,” verifying the “good standing” of beneficiary organizations, etc.)



Wrap-Up/Questions





© 2022 Venable LLP.

This document is published by the law firm Venable LLP. It is not intended to provide legal advice or opinion. Such advice may only be given when related to specific fact situations that Venable has accepted an engagement as counsel to address.

VENABLE LLP



Can NFTs Promote Your Brand?

Protecting Your Brand While Exploring Advertising, Promotions, and Consumer Protection Issues Related to NFTs



Jim E. Nelson

Partner | +1 415.653.3730 | JNelson@Venable.com

Christopher L. Boone

Associate | +1 202.344.4248 | CLBoone@Venable.com

VENABLE LLP

Agenda

Part I: NFT Basics and Use Cases

Part II: Intellectual Property and Contracting

Part III: Regulatory Compliance and Consumer Protection

What Are NFTs?

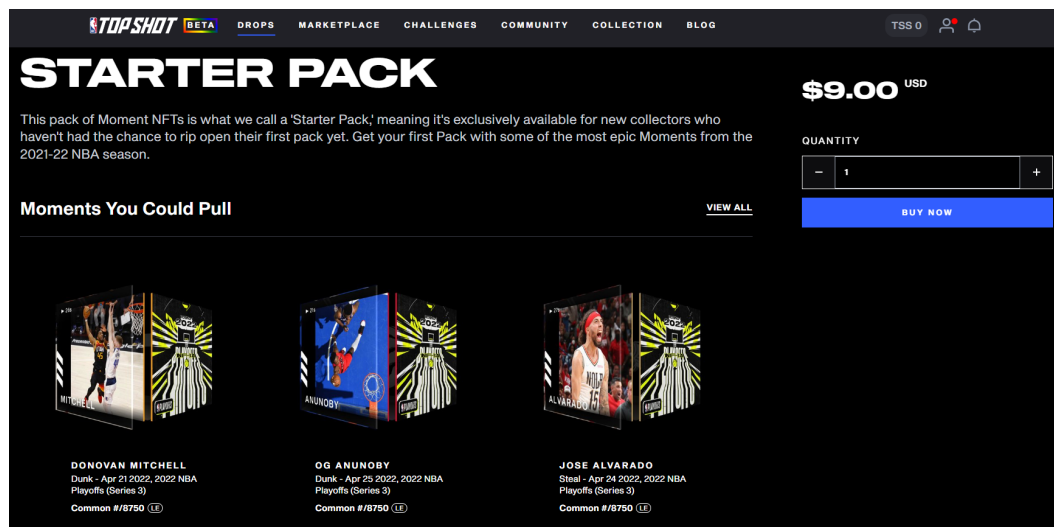
- An NFT, or “**N**on-**F**ungible **T**oken,” is simply a blockchain-based token, like a cryptocurrency, with additional information, such as a digital image (or a link to it).
 - Proof of ownership is achieved through a blockchain, allowing the purchase and sale of unique digital assets.
 - The movement of NFTs can be tracked from one blockchain address to another, which makes it possible to use NFTs to track ownership or licensed rights over assets.
- NFTs can be traded or purchased through native blockchain applications or purchased through traditional payment channels.
 - The holder of the NFT is its indisputable owner, but rarely does this include underlying transfer of IP rights (i.e., you own the NFT, not the art).

Use Cases

How Brands Create Value with NFTs

Digital Products / NFTs

NBA Top Shot: NFT Collectible “Trading Cards”

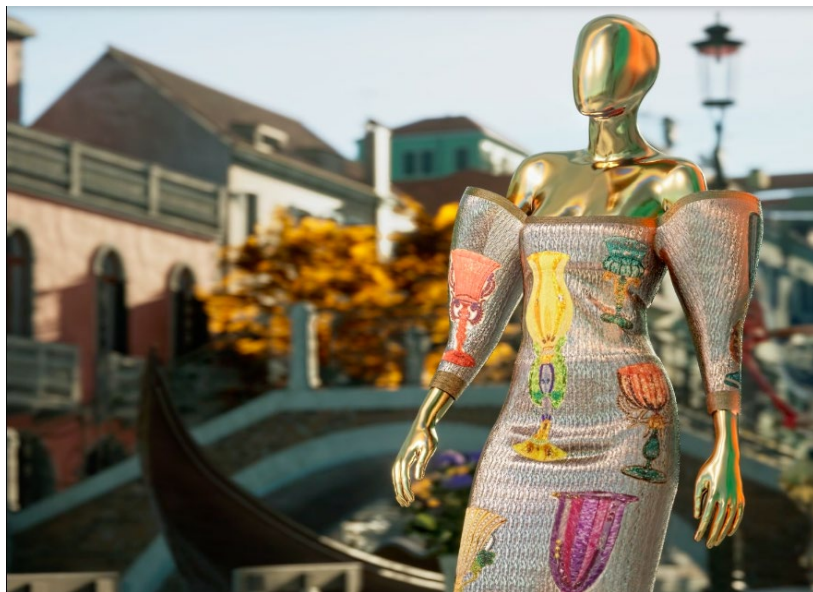


www.nbatopshot.com

- Record product information on the blockchain
 - Verifiable product origin information
 - Supply/production
 - Design: game and player stats, action description
- Results in a unique collectible/
Prevents counterfeit
- Secondary sales

Digital Apparel and Fashion / NFTS

- Major fashion brands are beginning to participate in completely virtual fashion shows
 - Dolce & Gabbana, Tommy Hilfiger, etc.



Gold Glass Dress NFT designed by Dolce & Gabbana



Dolce & Gabbana NFT Showcase at Metaverse Virtual Fashion Week hosted by Decentraland

Engagement Marketing

Coachella Music Festival and the NFT Blooming Flower

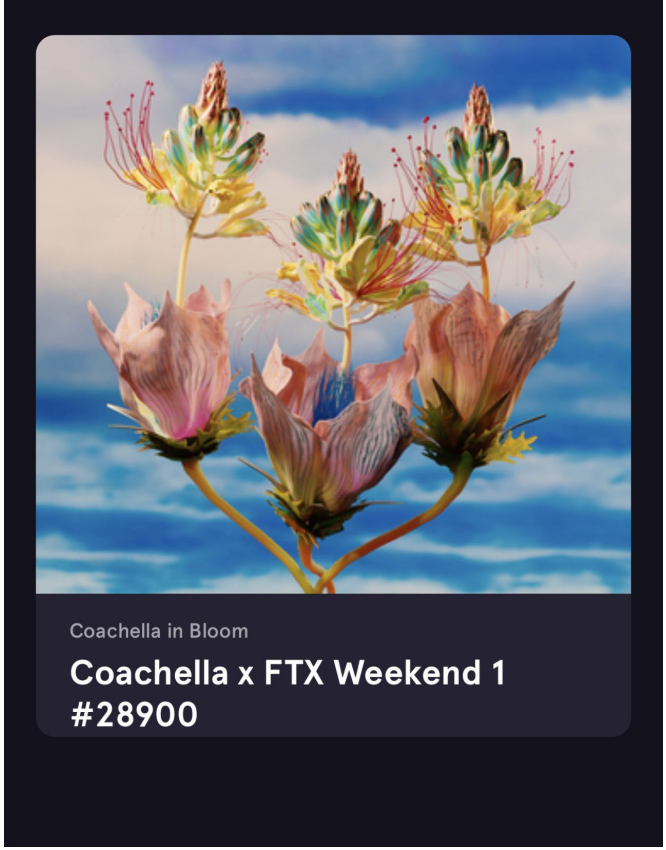
- All attendees received an NFT with an image of a flower that bloomed on the two Fridays of the festival.

Paramount and Avatar Legends

- Paramount Networks launched an NFT collection in conjunction with its animated series Avatar Legends.



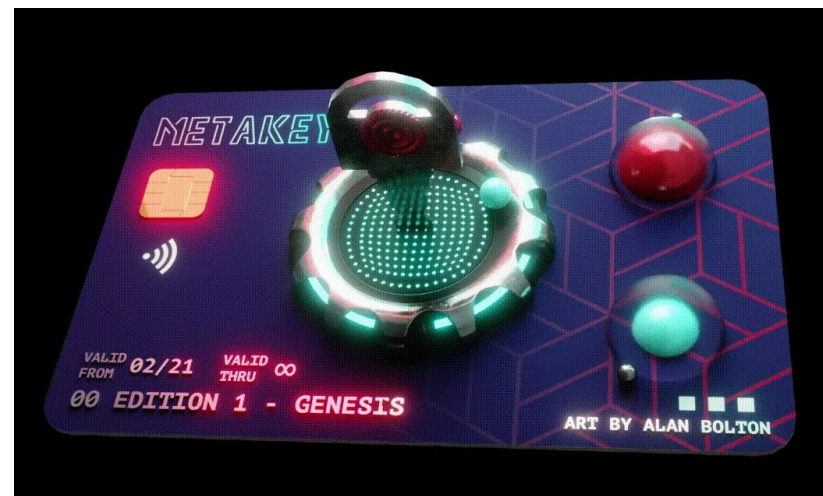
Paramount, Avatar Legends



Coachella in Bloom NFT

Event Tickets and Online Access / NFTs

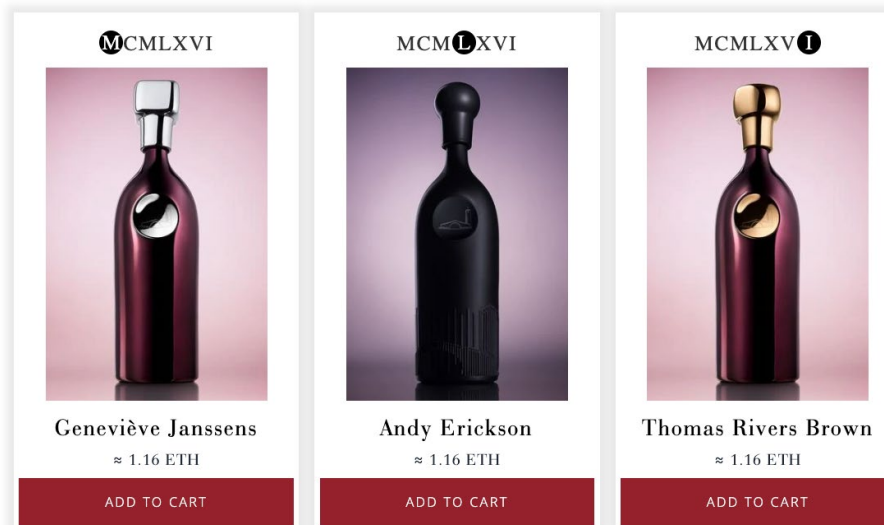
- Artists, entertainment venues, and sports vendors can issue event tickets as NFTs, bypassing major ticket platforms.
 - Can restrict or allow resale, set price ceilings, and more with smart contracts.
 - Can bake in royalties and transfer fees
 - Can track each ticket from start to finish
- Online Access NFTs grant holder access to gated communities or experiences in digital world.
 - Often used by influencers to give fans access to private discord channels hosted by the influencer.



MetaKey

Physical Products and Exclusivity / NFTs

- Californian winery, Robert Mondavi, launches the first wine label sold by NFT
 - Only 1996 bottles available
 - Retails for \$3,5000
 - Each NFT has a key to unlock a bottle redemption.



Robert Mondavi Winery

Fractional Ownership/Investment

Otis has been acquired by stock and crypto investing platform Public.com. [More on Otis Magazine ->](#)

Otis How It Works Assets List Magazine Cultured

★ Highest "Average 2021 ROI"
Among competitive fractional investing platforms
-Altan Insights

Invest in Culture

Buy and sell shares of collectibles, NFTs, and art.

Text Me The App

Download on the App Store GET IT ON Google Play

Start Investing

Example: Otis Collection LLC

- Sells SEC-registered fractional shares of “cultural assets” via Reg A+ offerings.

Frequently Asked Questions

Our team is here to help. Read FAQs or contact us directly.

View Full FAQ >

How Does An Otis Investment Work?

Investors select an Otis asset and acquire fractional interests that represents an indirect ownership interest in that asset.

How does Trading work?

Trading on Otis is similar to the stock market, where anyone can buy and sell shares of cultural assets.

Can I See The Assets In Person?

Otis will host pop-ups and events where you can come to view your assets at our dedicated gallery space at 47 East 3rd Street, New York, NY.

Start Investing

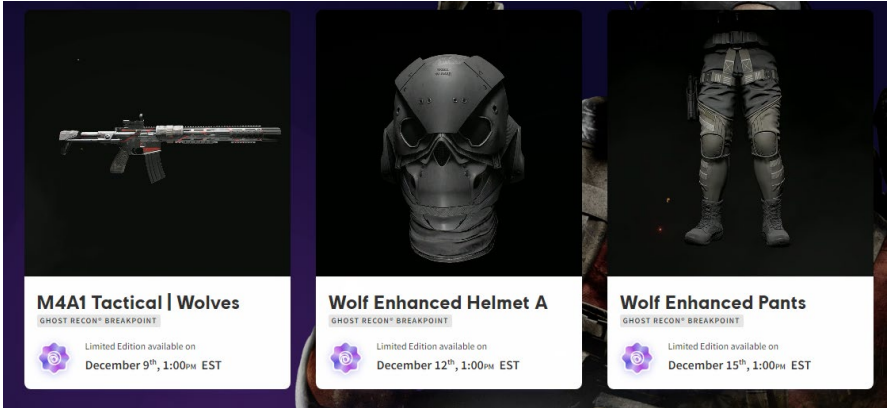
NFTs in Video Games



Sky Mavis, Axie Infinity



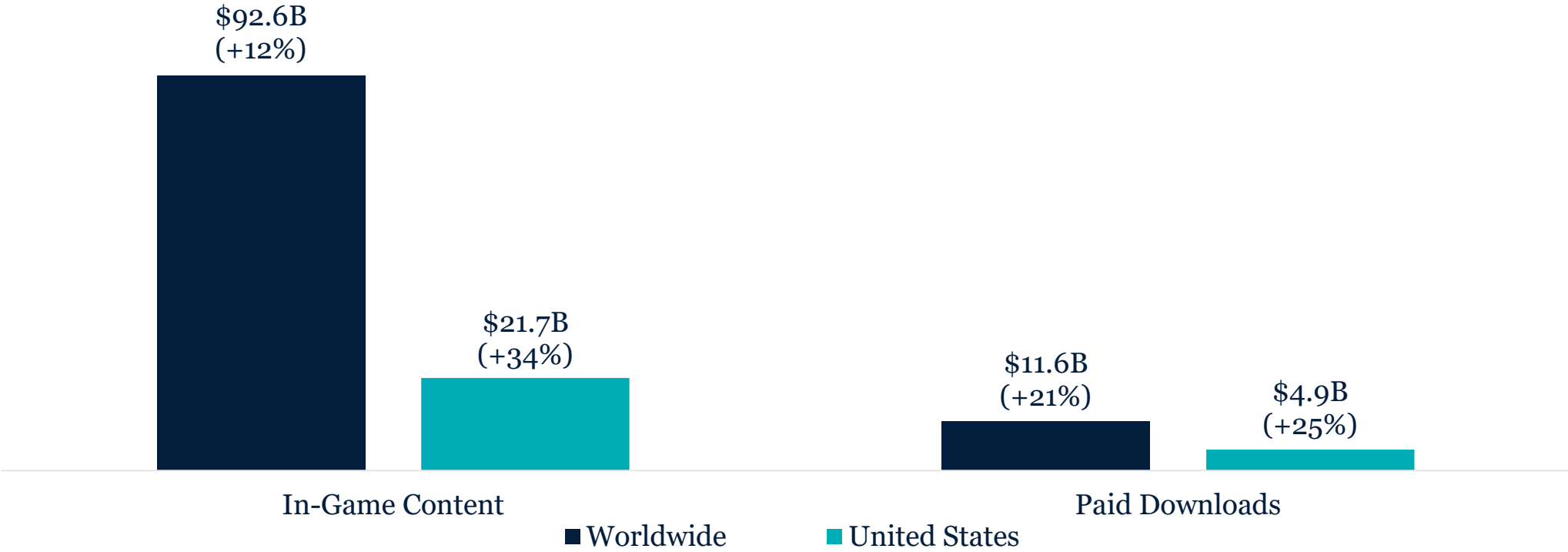
Roblox Studio



Ubisoft, Ghost Recon Breakpoint

Gamers Have Been Purchasing Digital Assets for Years

Digital Revenue, Jan. to Oct. 2020 (and Year-Over-Year Changes)



Source: SuperData Arcade.
© 2020 SuperData, a Nielsen company. All rights reserved.



NFTs in Games

- NFTs in games often take the form of trading cards, avatars, or other collectibles
 - An NFT can represent a pet that players can breed, battle, and trade
 - NFT “deeds” for land ownership in the virtual world
- NFT games may allow players to “earn money”
 - Token distribution rights
 - Sell/trade NFTs to other players
- NFT platforms may allow items to cross over between games
 - An NFT sword purchased in one game can be used in another, cross-compatible game
- **NFT “play to earn” models may raise securities issues**



Image credit – Pet Pals



Legal Issues

Intellectual Property and Contracting

Regulatory Compliance and Consumer Protection

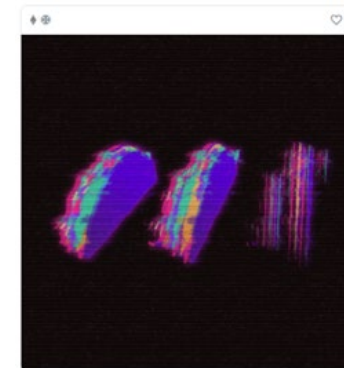
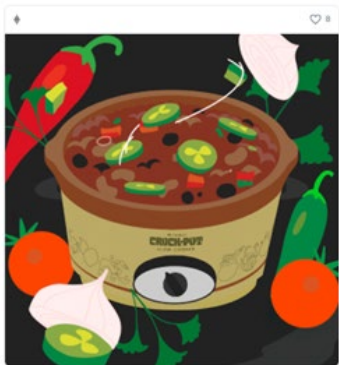
Securities Issues

Intellectual Property and Contracting

Protecting Your Brand's IP

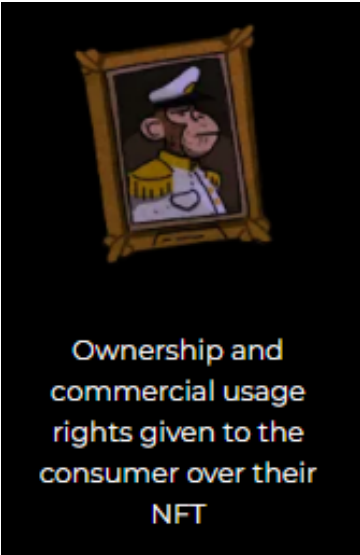
IP Clearance and Protection

- Rights and Clearance
 - Trademark, Copyright, Right of Publicity
- Confirm/Expand Existing Rights to Enable Enforcement Actions, if Required
 - Copyrights, Trademarks
 - Trademarks – Consider New Registrations, New Classes
- Consider Plan to Enforce IP Rights



Transfer of IP Rights

- Scope of IP rights transferred in an NFT is none or limited
 - Think of it as a painting
 - Exceptions include *Bored Ape Yacht Club*, granting a commercial license to use the artwork in the NFT



#3945
Owned by dssvault 54 favorites
Sale ends March 8, 2022 at 10:11pm EST
Current price: **83.69** (\$223,268.18)
Buy now Make offer

Price History
All Time All Time Avg. Price: **233.975**

Description
Created by BoredApeYachtClub

Properties

About Bored Ape Yacht Club

Details

Contract Address	0xbc4c7f3d
Token ID	3945
Token Standard	ERC-721
Blockchain	Ethereum
Metadata	Frozen

Offers

Price	USD Price	Floor Difference	Expiration	From
75.01 WETH	\$200,181.68	10% below	about 1 hour	KJ_13
88.6258 WETH	\$183,079.91	17% below	about 1 hour	685D27
6.64 WETH	\$17,714.19	92% below	6 months	EDE96D

✔ **Contract Source Code Verified** (Exact Match)

Contract Name: **BoredApeYachtClub**

Compiler Version: **v0.7.0+commit.9e61f92b**

Optimization Enabled: **No with 200 runs**

Other Settings: **default evmVersion, MIT license**

Contracting Structure

- Select Your Deal Partners Wisely
- Typical NFT Contracts:
 - Contract with the Seller/Licensor
 - Contract with the Platform, If More than a Marketplace
 - Contract with the Buyer/Licensee
- What's the Remedy?
 - What do the terms say?
 - Where to enforce?
 - International considerations
- A word on smart contracts . . .

Contracting Considerations

- Key NFT Contracting Terms:
 - Who is the contracting party? Where located?
 - Clear licensing terms
 - Which party is minting the NFT/getting NFT content and NFT ready for offering?
 - Which party is liable for third-party IP claims?
- Warranties and Indemnities
- Royalties and Payments on Primary and Secondary Sales? Cash or Crypto?
- Any related Marketing Efforts
- Do Seller/Licensor terms match up with Buyer/Licensee terms?
 - Which party has duty and expense of enforcement?
 - How would enforcement occur?

Compliance Risks

New Technology / Same Laws

Money Transmission and Securities Risks

- Are NFTs subject to money transmission regulation?
 - Generally, NFTs are **not** considered a “substitute for monetary value,” and therefore are not subject to money transmission regulation.
 - Typical or classic NFTs are more like collectibles or works of art
- Are NFTs securities?
 - An NFT in its “classic” form is probably **not** a security. The purchaser acquires a finished work, of intrinsic value.
 - BUT more esoteric NFTs (e.g., fractionalized ownership, distribution rights, play-to-earn gaming models) could implicate securities laws.



Consumer Protection Risks – NFTs

- Unfair and Deceptive Acts and Practices (UDAP)
 - Deceptive earnings claims
- NFT Packs – lotteries and gambling risks
- NFT Contests/Sweepstakes/Rewards



BBC.com



Pitfalls for Influencers/Endorsers and Sponsors

- Typically, not disinterested or impartial
 - Failing to mention financial ties (receipt of a large allocation of monetary consideration, coin, tokens, etc.)
 - Failing to mention a close personal relationship
- Online backlash: Undisclosed conflicts of interest
- Securities regulation: Must publicly disclose payments for securities promotions

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 10578 / November 29, 2018

ADMINISTRATIVE PROCEEDING
File No. 3-18906

In the Matter of
FLOYD MAYWEATHER JR.,
Respondent.

ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 (“Securities Act”), against Floyd Mayweather Jr. (“Mayweather” or “Respondent”).

II.



Image source: <https://cryptocurrencynews.com/daily-news/why-is-kim-kardashian-pumping-ethereum-max/>

Concluding Thoughts

- NFTs appear to be a “killer app” of blockchain technology, increasingly used by brands in novel and creative ways to engage with consumers, drive revenue, and gain valuable market research data.
- NFTs, the Metaverse and Web3 provide an entirely new format for applying existing legal frameworks, built largely upon consumer protection principles and intellectual property. We are excited to assist clients as they build and inhabit this next digital frontier.

About Us



Jim Nelson (San Francisco)

Partner

+1 415.653.3730

JNelson@Venable.com

Jim Nelson is a co-chair of the Technology, Media, and Commercial Group and the partner-in-charge of Venable's San Francisco office. Jim focuses on intellectual property-centered businesses that emphasize the development, production, and commercialization of IP assets. He manages a range of commercial contract and outsourcing engagements, in addition to his general corporate work forming and financing companies and supporting them in mergers, sales, acquisitions, and joint ventures. His clients range from startups to emerging growth and Fortune 50 companies.



Christopher Boone

Associate

+1 202.344.4248

CLBoone@Venable.com

Chris Boone focuses his practice on regulatory issues related to payment processing, blockchain, advertising and marketing, transportation, and telecommunications. Chris's blockchain practice focuses on regulatory compliance issues related to cryptocurrencies, token platforms, and NFTs. These representations include regulatory compliance counseling, state and federal money transmission guidance, advertising review, government affairs, and state and federal licensing.



© 2022 Venable LLP.

This document is published by the law firm Venable LLP. It is not intended to provide legal advice or opinion. Such advice may only be given when related to specific fact situations that Venable has accepted an engagement as counsel to address.

VENABLE LLP



The Absolute Best Panel on Puffery in the World; No Joke, for Real...It's the Best!!!



Roger A. Colaizzi

Partner | +1 202.344.8051 | RAColaizzi@Venable.com

William C. Lawrence

Associate | +1 202.344.4300 | WCLawrence@Venable.com



VENABLE LLP



The Best Definition of Puffery

- Statements in advertising that do not convey facts or measurable claims, but mere opinion
- Why puff?
 - Gain attention for brand
 - Use humor/provide entertainment value for consumers
 - Say something positive about your product/service, without making a claim of literal truth
- If statement is puffery:
 - Not actionable in a false advertising lawsuit
 - Does not require substantiation (e.g., NAD challenge)

Less Best Definitions

- Third Circuit
 - Marketing “that is not deceptive, for no one would rely on its exaggerated claims.”
- Fifth Circuit
 - “[A] general claim of superiority over comparable products that is so vague that it can be understood as nothing more than a mere expression of opinion.”
- Ninth Circuit
 - “[E]xaggerated advertising, blustering and boasting upon which no reasonable buyer would rely.”
- FTC
 - Marketing claims “that ordinary consumers do not take seriously.”

The Best Brief History of Puffery

- 1893 English Court of Appeal case involving a manufacturer’s promise to compensate customers with £100 (in that era, a considerable sum) if they were to contract the flu after properly using the Carbolic Smoke Ball—a rubber ball with a tube that allowed users to inhale carbolic acid vapors, purportedly to prevent disease.
- Customer sued after (surprisingly?) still getting the flu.
- Defendant argued that statements were “mere puff” and not to be considered literally.
- The Defendant failed, but the legal defense of puffery was born!
- The puffery defense became more prevalent in the early 1900s, when U.S. courts commonly applied a caveat emptor approach to commercial transactions.
 - For example, the Second Circuit, in *Vulcan Metals Co. v. Simmons Manufacturing Co.*, allowed a company to use a puffing defense, noting that consumers already naturally distrust marketing slogans and finding that customers have equal means of knowing or inspecting a product before purchasing it.

Puffing Back in the Day....

CARBOLIC SMOKE BALL
The Approved Cure for **HAY FEVER AND INFLUENZA.**

5/6
POST FREE.

Also

COUGHS
COLDS
CATARRH
ASTHMA
BRONCHITIS
HOARSENESS

FREE TRIALS AT OUR CONSULTING ROOMS



FOR INHALATION ONLY

5/6
POST FREE.

SORE THROAT
LARYNGITIS
CROUP
WHOOPIING
COUGH
NEURALGIA
HEADACHE

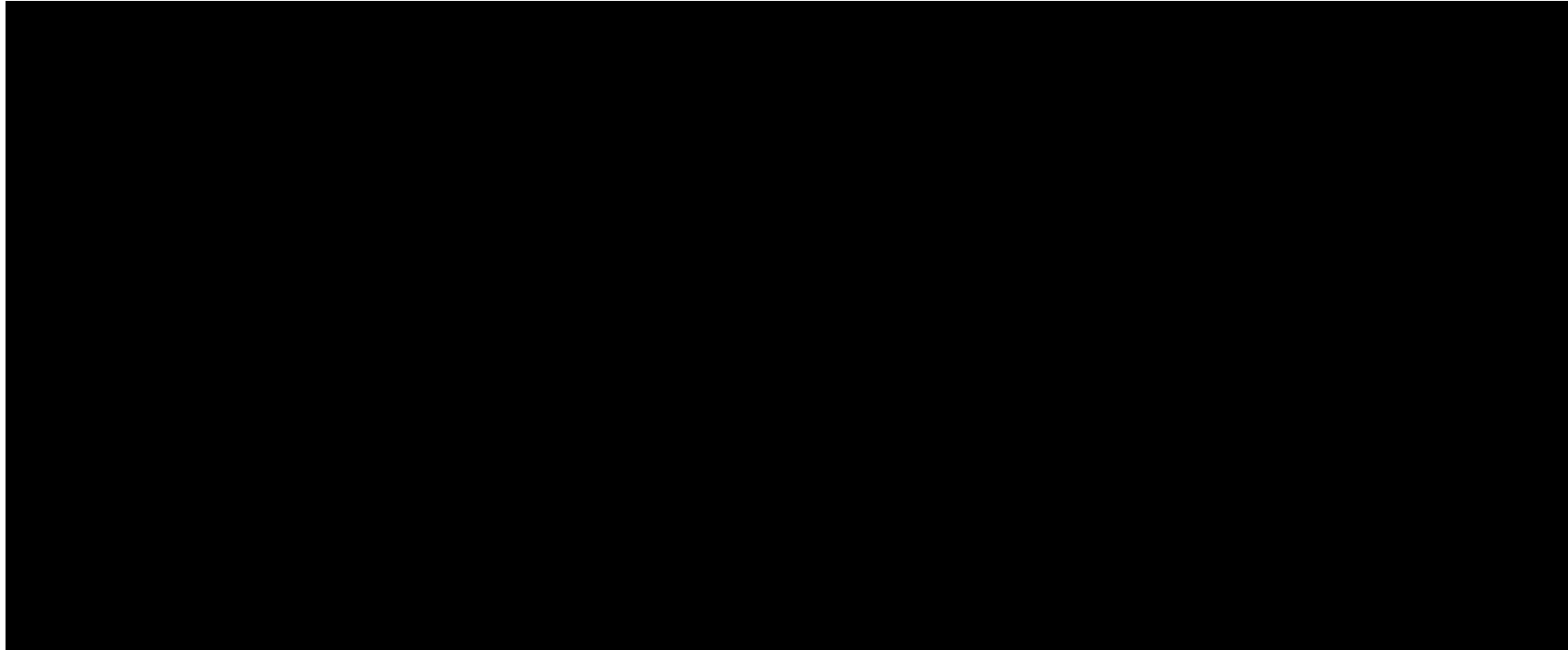
All the ailments mentioned above arise from **ONE CAUSE**, and they can, therefore, be cured by **ONE REMEDY,**

The Best Explanation of What Constitutes Puffery

- Is your advertisement a claim or puffery?
 - Would a reasonable buyer be justified in relying on the claim?
 - Can the challenged statement be proved true or false?
 - Are there other objective statements in the context of the commercial that would lend objectivity to the challenged statement?
- Is your answer yes to any of these questions? If so, the statement is likely a claim and you should modify it.
- Is your answer no to all of these questions? If so, it's likely a puff.

Exaggerated Claims as Puffery

- Walking the line between humorous exaggeration and bold claims



Smile but Don't Laugh ...

- “Humor and hyperbole do not relieve an advertiser of its obligation to support messages that their advertisements might reasonably convey—especially when the advertising disparages a competitor's product.”

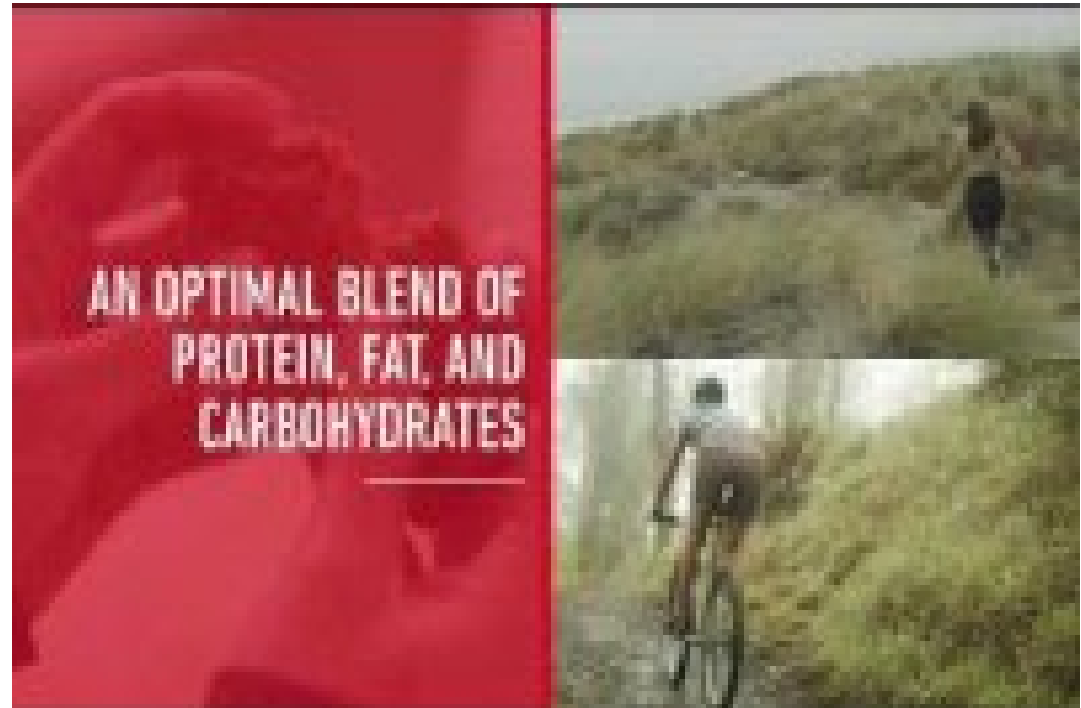


Is a Picture Worth a Thousand Words?

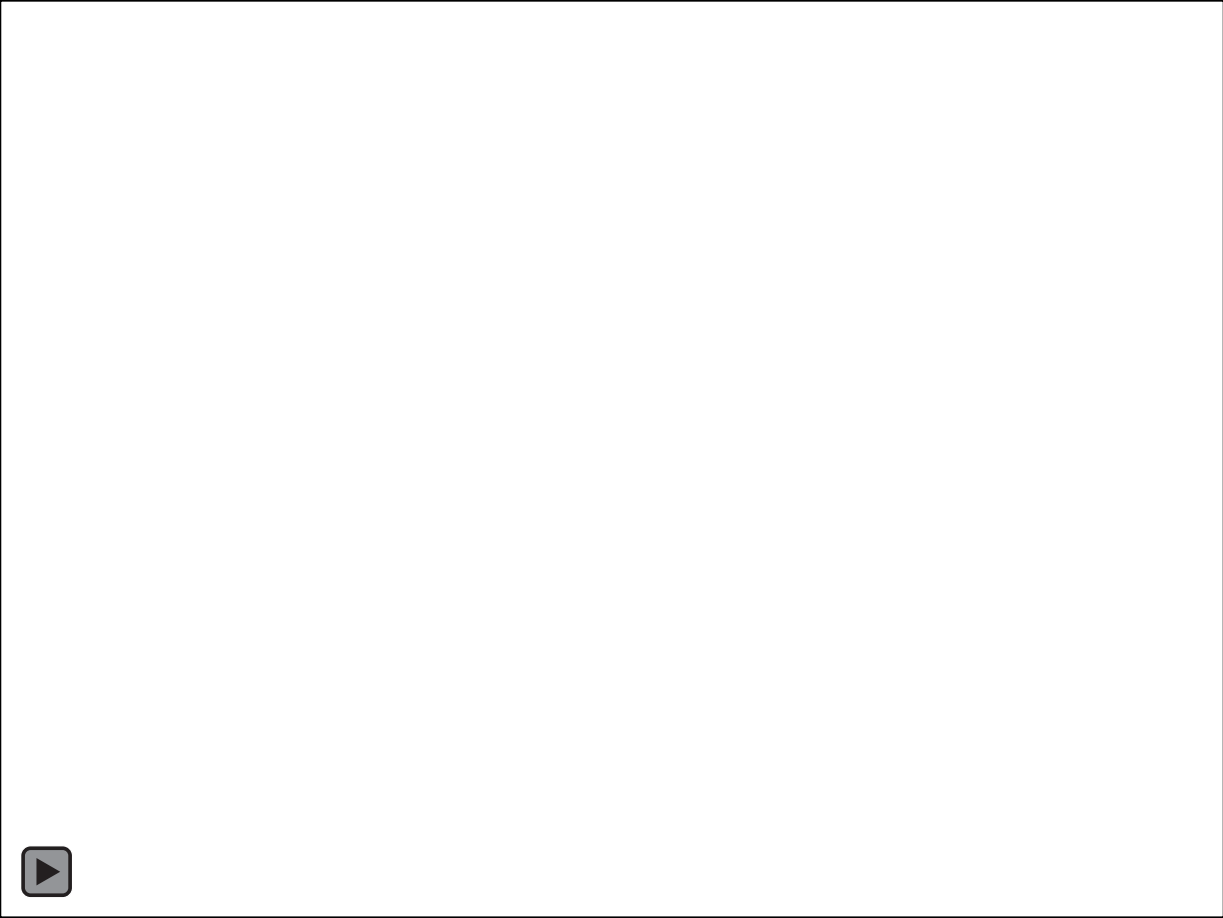


Vague or Subjective Claims as Puffery

- Must not be capable of proof
 - (i.e., substantiation) or disproof
 - Bald assertions of superiority only!!!



“World’s Best...”



The Battle of the “Best” Claims

“Best TV Ever”



LG OLED TV_{4K}
BEST. TV. EVER.

“Best Warranty”



Using Subjective Puffery? Context Matters

- Is the claim expressly comparative?
 - Is the product featured alongside competing products?
- Does the ad discuss specific product attributes?
 - Are they measurable?
- Are statements very general and/or couched in opinion?



But That Is Not All, Papa!!



vs.



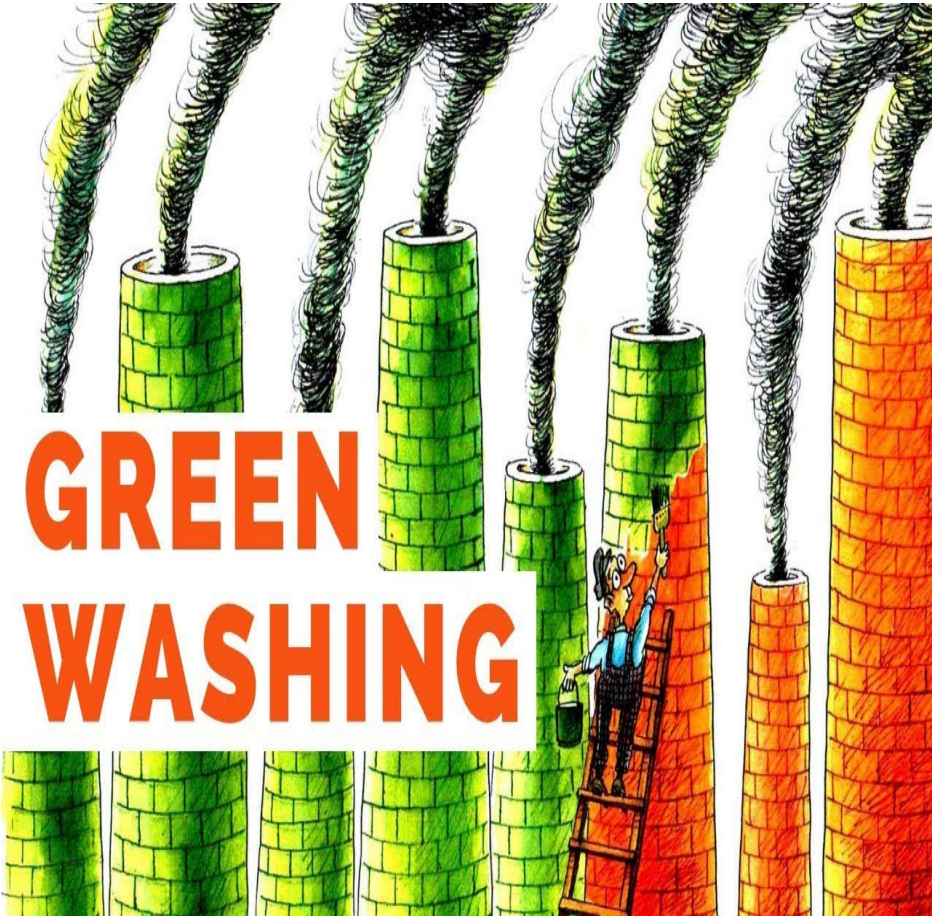
The Best Comparisons Cause the Most Risk



YZ Two Way Radio Service, Inc. vs. Uber Technologies, Inc

- Two vehicle-for-hire companies that provided black-car services sued Uber for allegedly false statements touting the “safety” of Uber’s services.
- “Uber is committed to connecting you to the safest ride on the road. This means setting the strictest safety standards possible, then working hard to improve them every day.”
- The court found that Uber’s safety-related statements fell into the “boastful and self-congratulatory” definition of puffery because many of the statements were couched in terms such as “committed to,” “aim to,” or “we believe deeply.”

Being the “Best” for the Environment



“OUR SHEEP LIVE THE GOOD LIFE”



Duck, Duck ...



Pop Quiz!



Pop Quiz!



A Final Word From Your Advertising Lawyers

- We hope that you have enjoyed The Absolute Best Panel on Puffery in the World and all other presentations by Venable attorneys, the world's best advertising lawyers

Also note ...

- Puffery may be a defense for law firm advertising
 - See *Conrad v. Russell*, 2011 WL 3877000 (W.D. Wis. 2011)



© 2022 Venable LLP.

This document is published by the law firm Venable LLP. It is not intended to provide legal advice or opinion. Such advice may only be given when related to specific fact situations that Venable has accepted an engagement as counsel to address.

VENABLE LLP



Privacy State Law Updates

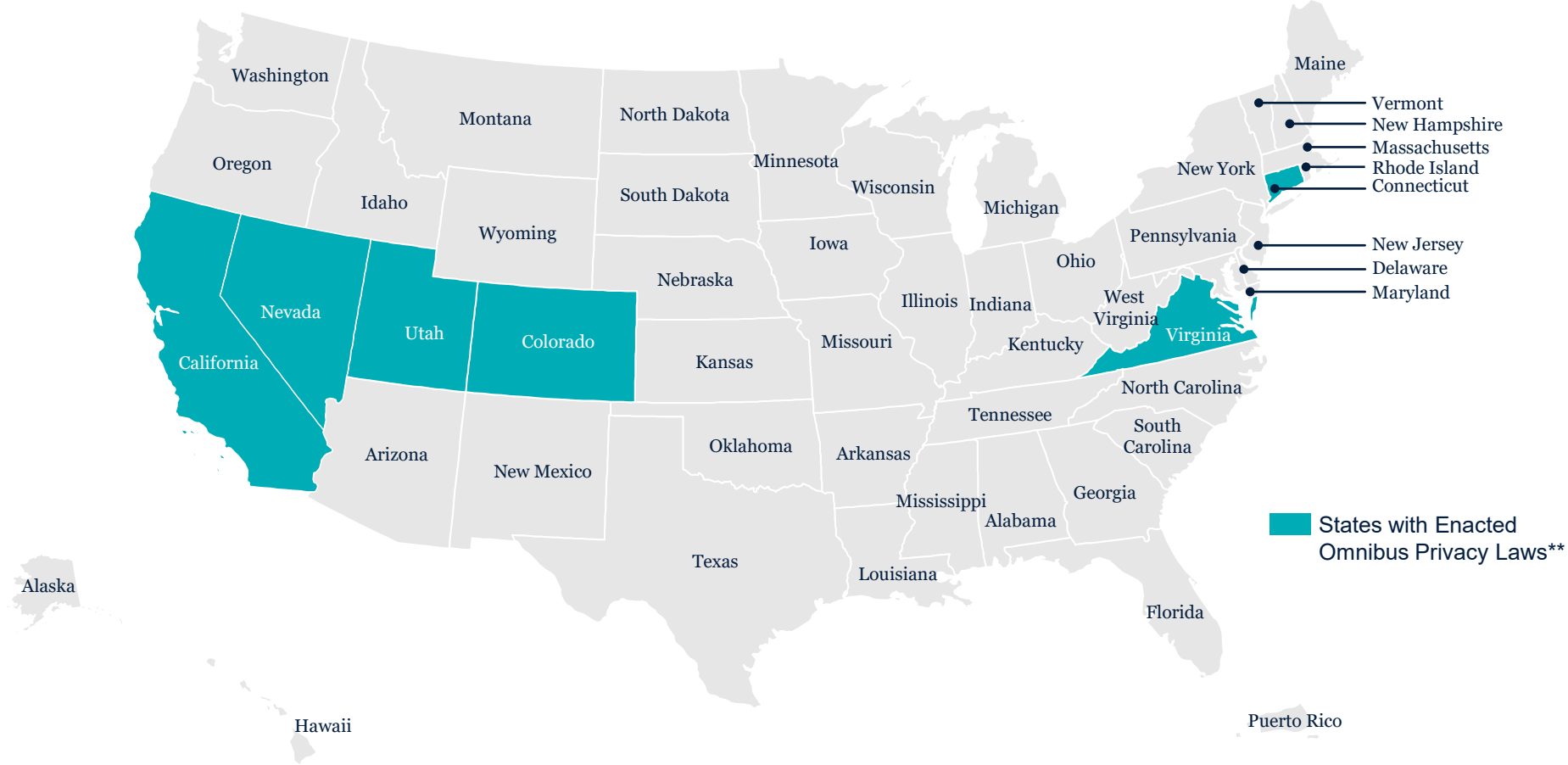
Rob Hartwell

Counsel | +1 202.344.4663 | RLHartwell@Venable.com



VENABLE LLP

State Privacy Laws



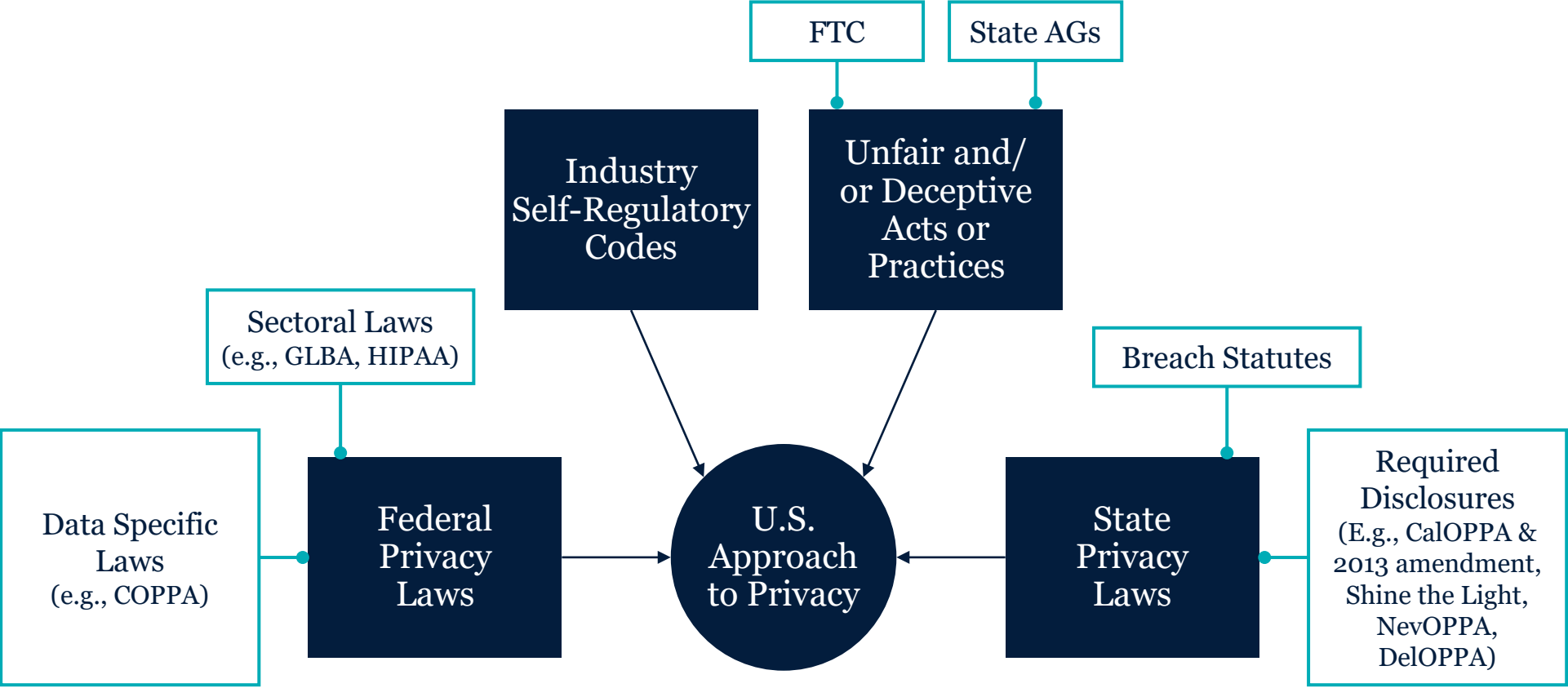
**Maine also passed a privacy law that is applicable to broadband Internet service providers.



Historical Perspective on Privacy Laws and Legislation

U.S. Approach to Privacy

Fair Information Practice Principles



Incidents and Foreign Laws

Cambridge Analytica

- Increased Congressional interest and scrutiny over the data practices of Facebook and other tech companies
- Increased pressure from consumer advocates to pass sweeping privacy legislation

Frequent Data Breaches

- Increased consumer perception that companies are not doing enough to protect the security of consumer data
- Increased congressional interest in passing a federal data security bill

Foreign Laws

- Increased criticism over the United States' sectoral approach to privacy
- GDPR becomes law in May 2018
- Increased pressure from consumers to pass similar sweeping privacy legislation

Enter the CCPA

October 2017 –
Ballot initiative
submitted by
consumer
advocates to the
California Attorney
General’s Office.



June 21, 2018 –
CCPA introduced to
replace the ballot
initiative.



**September 23,
2018** – Governor
Brown signs bill
making limited
amendments to
CCPA.



May 3, 2018 –
Announced the
initiative had
obtained enough
signatures to go
to voters.



June 28, 2018 –
Governor Brown
signs the CCPA
into law.



Enter the CPRA

September 2019 – CCPA amendments, making mostly technical changes.



November 2020 – CPRA placed on ballot and passes.



2022 – CPPA meetings; stakeholder sessions; *draft rule*.



2019-2020 – attorney general CCPA rulemaking activities (informal forums; notice and comment).



2021 – CPPA Board is chosen and begins holding meetings; informal comment period.





Other States Follow Suit

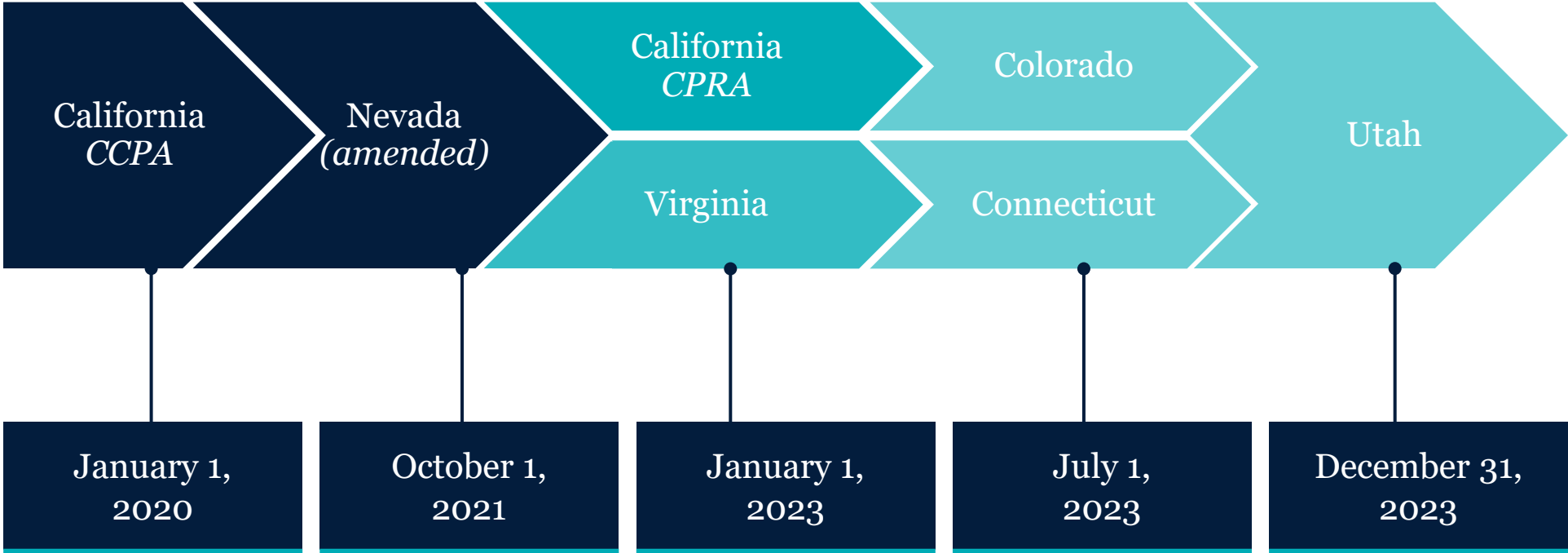
State Privacy Legislation Approaches

Hawaii	Arizona	New York	ULC (Nebraska & DC)	Rights Based
Constitutional amendment	Opt-in consent required for personal data collection	Fiduciary duties and opt in consent requirement for use and transfer of personal data	“Compatibility” test	California, Virginia, Colorado, Connecticut, Nevada, Utah

Potential to add to growing patchwork of state regulations

Timeline

Laws Effective



State Privacy Laws: Broad Similarities

- **Consumer Rights.** All omnibus state privacy laws provide consumers with certain rights, which may include rights to access, delete, correct, and opt out of certain activities or transfers of personal information or personal data
- **Privacy Policy Requirements.** All omnibus state privacy laws include notice requirements, which may include requirements to disclose the categories of personal information or personal data collected or processed, the purposes for collecting or processing such information, and how consumers may exercise their rights, in addition to other information

State Privacy Law Differences: Consumer Rights

	CPRA	VA	CO	CT	UT	NV
Access	✓	✓	✓	✓	✓	
Deletion	✓	✓	✓	✓	✓	
Correction	✓	✓	✓	✓		
Opt Out of Sales	✓	✓	✓	✓	✓	✓
Opt Out of Sharing	✓					
Opt Out of Targeted Advertising		✓	✓	✓	✓	
Opt Out of Profiling		✓	✓	✓		
Appeals Process Explicitly Required		✓	✓	✓		
“Targeted Advertising” Expressly Includes “Inferred” Data			✓	✓		
Consumer Rights Apply to Pseudonymous Data	✓	Only rights to opt out	Only rights to opt out	Only rights to opt out	Only rights to opt out	No explicit statement
Explicit Global Privacy Control Requirement	TBD		✓	✓		

State Privacy Law Differences: Global Privacy Controls

Virginia and Utah

- No explicit requirement to recognize universal opt-out signals

California

- The CCPA Regulations state that if “a business collects personal information from consumers online, the business **shall treat user-enabled global privacy controls**, such as a browser plug-in or privacy setting, device setting, or other mechanism, that communicate or signal the consumer’s choice to opt out of the sale of their personal information **as a valid request** submitted pursuant to Civil Code section 1798.120 for that browser or device, or, if known, for the consumer”

In contrast, the CPRA gives businesses the choice to respect global privacy control signals set by browsers or to offer the following:

- (I) A combined opt out from the sale and sharing of personal information and a direction to limit the use of sensitive personal information; or
- (II) Two separate opt-out links — one to “Limit the Use of My Sensitive Personal Information” and another titled, “Do Not Sell or Share My Personal Information”

The California Privacy Protection Agency’s proposed regulations potentially contradict this statutory requirement

State Privacy Law Differences: Global Privacy Controls

Colorado

- From July 1, 2023 until July 1, 2024, controllers that process personal data for targeted advertising or sales may allow consumers to opt out of such processing through a user-selected, universal opt-out mechanism. Effective July 1, 2024, controllers are required to honor browser/device signals
- Similar to California, the CPA charges the Colorado AG with issuing technical specifications governing the opt-out mechanism. The attorney general is required to issue the regulations by July 1, 2023

Connecticut

- Beginning January 1, 2025, controllers that process personal data for targeted advertising or sales must allow consumers to opt out of such processing through an opt-out preference signal sent, with such consumer's consent, by a platform, technology, or mechanism indicating the consumer's intent to opt out

State Privacy Law Differences: Global Privacy Controls

Technical Specification Requirements/“Safeguards” (CA, CO, and CT)

- Should not permit the manufacturer of a platform or browser or device that sends the opt-out preference signal **to unfairly disadvantage another business**
- Should **clearly represent a consumer’s intent** and be **free of defaults** constraining or presupposing such intent

Additional Technical Specification Requirements/“Safeguards” (CO and CT)

- Must **permit the controller to accurately authenticate the consumer as a state resident** and determine the mechanism represents a legitimate request to opt out
- Must adopt a mechanism that is **as consistent as possible** with any other similar mechanism required by law or regulation in the United States

State Privacy Law Differences: Verification/Authentication

- **CPRA.** Regulations may define required verification/authentication procedures. For delivery of sensitive personal information, the regulations may require a higher standard of authentication. Businesses are not required to comply with access, deletion, or correction requests if they are unable to authenticate them using commercially reasonable efforts. CCPA requires different “degrees” of verification based on the consumer request, **excluding** the right to opt out
- **Virginia.** Controllers must comply with “authenticated” consumer requests to exercise rights, **including** the right to opt out. Controllers must verify through reasonable means that the consumer who is entitled to exercise the rights is the same consumer exercising such rights. Controllers are not required to comply with requests if they are unable to authenticate them using commercially reasonable efforts; controllers may request additional information reasonably necessary to authenticate the request
- **Colorado.** Controllers must comply with “authenticated” consumer requests to exercise rights, **including** the right to opt out. Controllers must use reasonable means to determine that a request to exercise a right is being made by or on behalf of the consumer who is entitled to exercise the rights. Controllers are not required to comply with requests if they are unable to authenticate them using commercially reasonable efforts; controllers may request additional information reasonably necessary to authenticate the request

State Privacy Law Differences: Verification/Authentication

- **Connecticut.** Controllers must comply with “authenticated” consumer requests to exercise rights, **excluding** the right to opt out. However, a controller shall not be required to authenticate an opt-out request, but a controller may deny an opt-out request if the controller has a good faith, reasonable, and documented belief that such request is fraudulent. Controllers are not required to comply with requests if they are unable to authenticate them using commercially reasonable efforts; controllers may request additional information reasonably necessary to authenticate the request
- **Utah.** Controllers must comply with “authenticated” consumer requests to exercise rights, **excluding** the right to opt out. Controllers must use reasonable means to determine that a request to exercise a right is being made by or on behalf of the consumer who is entitled to exercise the rights. Controllers are not required to comply with requests if they are unable to authenticate them using commercially reasonable efforts; controllers may request additional information reasonably necessary to authenticate the request
- **Nevada.** Requires operators and data brokers to comply with “verified requests” (i.e., requests for which they can reasonably authenticate the identity of the consumer by using commercially reasonable means)

State Privacy Law Differences: Sensitive Data

- **CPRA.** Includes a right to opt out of use and disclosure of “sensitive personal information”
 - “Sensitive personal information” includes personal information that **reveals** a consumer’s social security, driver’s license, state identification card, or passport number; **specific geolocation information**; and a consumer’s account log-in, financial account, debit card, or credit card number in combination with any code allowing access to an account, **among other information**
- **Virginia.** Includes a right to opt in to “sensitive data” processing
 - “Sensitive data” includes personal data **revealing** racial or ethnic origin, religious beliefs, mental or physical health diagnosis, sexual orientation, citizenship or immigration status; processing genetic or biometric data for the purpose of uniquely identifying a natural person; personal data collected from a known child; **or precise geolocation data**
- **Colorado.** Includes a right to opt in to “sensitive data” processing
 - “Sensitive data” includes personal data **revealing** racial or ethnic origin, religious beliefs, mental or physical health condition or diagnosis, sex life or sexual orientation, citizenship or immigration status; genetic or biometric data that may be processed for the purpose of uniquely identifying a natural person; or personal data collected from a known child

State Privacy Law Differences: Sensitive Data

- **Connecticut.** Includes a right to opt in to “sensitive data” processing
 - “Sensitive data” includes personal data revealing racial or ethnic origin, religious beliefs, mental or physical health condition or diagnosis, sex life or sexual orientation, citizenship or immigration status; genetic or biometric data that may be processed for the purpose of uniquely identifying a natural person; personal data collected from a known child; or **precise geolocation data**
- **Utah.** A controller may not process sensitive data **collected from a consumer** without presenting the consumer with notice and an opportunity to opt out, or for personal data concerning a known child, processing data in accordance with COPPA
 - “Sensitive data” is defined **similarly to Virginia’s definition**, with an added category of information regarding an individual’s medical history, mental or physical health condition, or medical treatment or diagnosis by a health-care professional. “Sensitive data” also includes certain carve-outs that are not available in Virginia
- **Nevada.** Silent on sensitive data treatment

State Privacy Law Differences: Assessments

- **Utah and Nevada.** No specific reference to assessments
- **CPRA.** The CPPA is directed to **issue regulations** requiring businesses whose processing of personal information presents a significant risk to consumers' privacy or security to (A) perform an **annual cybersecurity audit**; and (B) **submit to the CPPA on a regular basis a risk assessment** with respect to personal information processing, including whether the processing involves sensitive personal information
- **Virginia.** Requires controllers to conduct and document data protection assessments for the following processing activities: processing personal data for purposes of **targeted advertising**; the **sale** of personal data; processing personal data for purposes of **profiling** where such profiling presents a reasonably foreseeable risk of certain impacts, injuries, or harms; processing **sensitive data**; and any processing activities involving personal data that present a **heightened risk of harm**
 - The Virginia attorney general may request, pursuant to a CID, that a controller disclose any such assessment that is relevant to an investigation conducted by the attorney general. Such disclosure does not constitute a waiver of attorney-client privilege or work product protection

State Privacy Law Differences: Assessments

- **Colorado.** A controller shall not conduct processing that presents a heightened risk of harm to a consumer without conducting and documenting a data protection assessment of each of its processing activities, including processing personal data for purposes of **targeted advertising**; the **sale** of personal data; **profiling**, if it presents a reasonably foreseeable risk of certain impacts, injuries, or harms; or processing **sensitive data**
 - A controller shall make the assessment available to the Colorado attorney general upon request. Such disclosure does not constitute a waiver of attorney-client privilege or work product protection
- **Connecticut.** Requires controllers to conduct data protection assessment for processing activities that present a heightened risk of harm to a consumer, including processing personal data for purposes of **targeted advertising**; the **sale** of personal data; **profiling**, if it presents a reasonably foreseeable risk of certain impacts, injuries, or harms; or processing **sensitive data**
 - The Connecticut attorney general may require a controller to disclose any such assessment that is relevant to an investigation conducted by the attorney general. Such disclosure does not constitute a waiver of attorney-client privilege or work product protection

State Privacy Law Differences: Enforcement and Regulation

- **CPRA.** The law stands up to the California Privacy Protection Agency (CPPA) to enforce its terms and issue implementing regulations, which is subject to a discretionary 30-day cure period. The CPRA also provides a limited private right of action related to certain data breaches, which is subject to a 30-day cure period
- **Virginia.** The law is enforceable by the Virginia attorney general, and a 30-day cure period is available to controllers. The law does not provide for a private right of action, nor does it explicitly delegate regulatory authority to any state agency
- **Colorado.** The law is enforceable by the Colorado attorney general and district attorneys. If a cure is “deemed possible,” a 60-day cure period is available to controllers until January 1, 2025. The law does not provide for a private right of action. The law explicitly delegates authority to the Colorado attorney general to issue regulations as necessary to further the purposes of the title. The law identifies “universal opt-out mechanisms” as a topic for implementing regulations

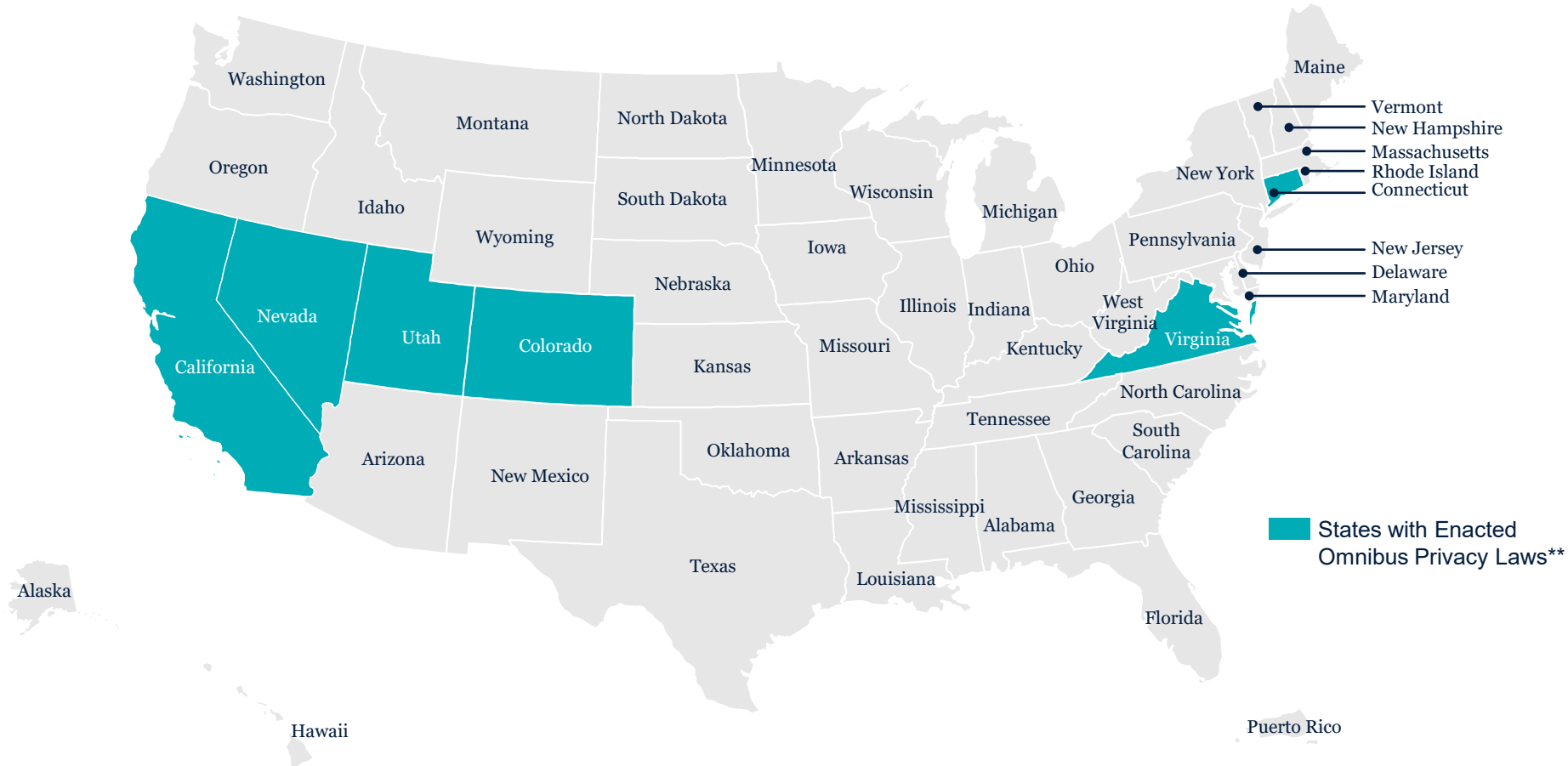
State Privacy Law Differences: Enforcement and Regulation

- **Connecticut.** The law is enforceable solely by the Connecticut attorney general, and violations will constitute an unfair trade practice for purposes of Connecticut’s UDAP statute. A 60-day cure period is available to controllers until December 31, 2024 if a cure is “deemed possible.” Beginning on January 1, 2025, the Connecticut attorney general has discretion to provide a cure period. The law does not provide for a private right of action, nor does it explicitly delegate regulatory authority to any state agency
- **Utah.** The law tasks the Utah Division of Consumer Protection with investigating violations and referring them to the Utah attorney general for enforcement, and a 30-day cure period is available. The law does not provide for a private right of action, nor does it explicitly delegate regulatory authority to any state agency
- **Nevada.** The law is enforceable by the Nevada attorney general. A one-time 30-day cure period is available for certain violations. The law does not provide for a private right of action, nor does it explicitly delegate regulatory authority to any state agency

State Privacy Laws: Regulatory Processes

- **California.** The California Privacy Protection Agency is tasked with issuing CPRA implementing regulations
 - **Rulemaking Comment Period:** Initial comment period ended August 22, 2022
 - **Statutory Deadline for Final Rules:** July 1, 2022
- **Colorado.** The Colorado attorney general is tasked with issuing CPA implementing regulations
 - **Pre-Rulemaking Comment Period (Informal Input).** Concluded August 2022
 - **Pre-Rulemaking Considerations Document**
 - *Guiding Principles:* Promote consumer rights; clarify ambiguities; facilitate efficient and expeditious compliance; harmonize; allow for innovation
 - *Targeted Topics for Informal Input:* Universal Opt-Out; Consent; Dark Patterns; Data Protection Assessments; Profiling and “Legal or Similarly Significant Effects;” Opinion Letters and Interpretive Guidance; Offline and Off-Web Collection of Data; Protecting Coloradans in a National and Global Economy

State Privacy Laws



**Maine also passed a privacy law that is applicable to broadband Internet service providers.

State Privacy Law Links

- **California Consumer Privacy Act of 2018 ([here](#))**
- **California Consumer Privacy Act of 2018 regulations ([here](#))**
- **California Privacy Rights Act of 2020 ([here](#))**
- **California Privacy Protection Agency ([here](#))**
- **California Proposed Regulations 2022 ([here](#))**
- **Colorado Privacy Act ([here](#))**
- **Colorado Privacy Act Attorney General webpage ([here](#))**
- **Connecticut Act Concerning Personal Data Privacy and Online Monitoring ([here](#))**
- **Virginia Consumer Data Protection Act ([here](#))**
- **Utah Consumer Privacy Act ([here](#))**
- **Nevada (2021 amendment) ([here](#))**



What's Next?



© 2022 Venable LLP.

This document is published by the law firm Venable LLP. It is not intended to provide legal advice or opinion. Such advice may only be given when related to specific fact situations that Venable has accepted an engagement as counsel to address.

VENABLE LLP