

What Every Brand Needs to Know When Facing the FTC

Speakers

Moderator: Amy R. Mudge, Partner, Venable LLP

Mary K. Engle, Associate Director for Advertising Practices, Bureau of Consumer Protection, FTC

Thomas A. Cohn, Deputy General Counsel, Regulatory, NBTV, Inc.

Big Questions



Questions?

Amy R. Mudge
amy_r.mudge@venable.com
Phone: 202.344.3700

Mary K. Engle
mary_k.engle@ftc.gov
Phone: 202.326.1500

Thomas A. Cohn
thomas_a.cohn@nbtv.com
Phone: 301.507.1700

Recent FTC Action and Major Brands



Big Questions



Closing or Warning Letters



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amy_r_mudge@venable.com
Phone: 202.344.3700

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mary_k_engle@ftc.gov
Phone: 202.344.3100

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thomas_a_cohn@nbtv.com
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Recent FTC Action and Major Brands

2007/2008



2010



2012



2005/2006



2009



2011



2013



2005/2006



2007/2008



**BEAR
STEARNS**



2009

CVS
pharmacy

K
kmart

RITE
AID

comcast

dish
NETWORK

Kellogg's

QVC QUALITY.
VALUE.
CONVENIENCE.


DIRECTV

2010

Kellogg's

ticketmaster



Countrywide[®]
HOME LOANS



2011



2012



2013



Neiman Marcus



Closing or Warning Letters



2009/2010 Letters



*Saks
Fifth
Avenue*

Neiman Marcus

2011/2012 Letters

The logo for Lucky Brand, featuring the words "Lucky Brand" in a stylized, cursive script. A small star is positioned above the letter 'y' in "Lucky". The logo is set against a light yellow, circular glow.The logo for Walgreens, consisting of the word "Walgreens" written in a red, cursive script.The logo for Pepsico, featuring a small globe icon to the left of the word "PEPSICO" in a bold, blue, sans-serif font.The logo for IKEA, consisting of the word "IKEA" in a bold, blue, sans-serif font, centered within a yellow oval, which is itself set within a blue rectangular border. A registered trademark symbol (®) is located to the right of the oval.

2013 Closing Letters

PETSMART

TOY Q QUEST[®]

munchkin[®]
It's the little things.[™]

Riddell[®]

Warning Letters



Big Questions

#1
How does a company get under the FTC's radar screen?



#2
How do investigators identify leads?



#3
What is the best way to negotiate the scope of information request?



#4
What is the best (or worst) way to engage with the Staff during discovery?



#5
What are tips for timing and content of write-ups?



"Drop the 'vulnerable' 'friendly' factor." (Sander) - If addressing to the regulator and usually communicating the weakness of the response & justify, that is, 'intended-to strength'."

"In a civil deposition case, do you really need to be the source of information? I mean that, not just the answer. You could get a written one. (Kramer) She would require the company. I will have the one, but you will not get the source for that."

#8
How does the Staff get "constant authority" and what is involved in trying to negotiate a retaliation?



"I have fought a judge. So he will cover's job is a strategic forward answer. I mean he can't stop the work. That gets attention to be a high priority. I mean that is what makes it. But this is a common one. As well as strength of that person's role in the fact. Although having a strong line. Usually to a lawyer than contacting a party."

#7
What are best practices for meeting with the Division or Regional Director to try to have the investigation closed?



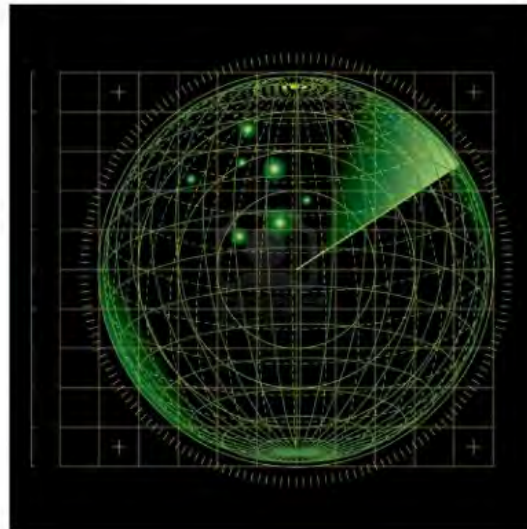
#6
What if the Company Oppes the Claims for the conduct at issue during the investigation?



"Do not make too much of the investigation. That may indicate of action will take. Com's relation. The firm will look at that."

#1

**How does a company get on the FTC's
radar screen?**



#2

How do investigations formally begin?



#3

What is the best way to negotiate the scope of information request?



#4

What is the best (or worst) way to engage with the Staff during discovery ?



#5

What are tips for timing and content of white papers?

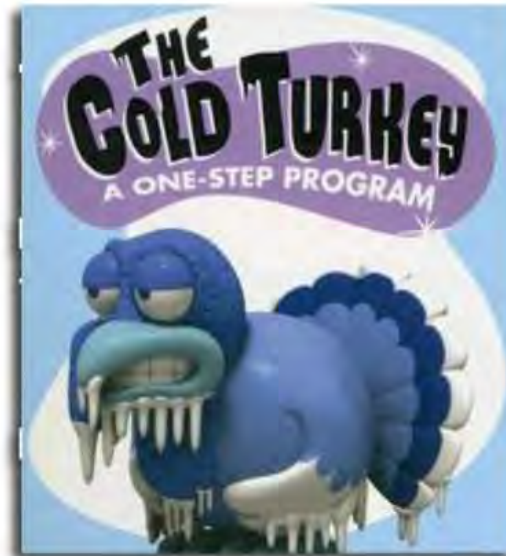


"Drop the hyperbole - 'incredibly' 'facetious' 'baseless' - it adds nothing to the argument and usually communicates the weakness of the argument it prefaces, not - as intended - its strength."

“Do not make frivolous First Amendment arguments. Not every enforcement action violates Central Hudson. Our eyes will roll at that.”

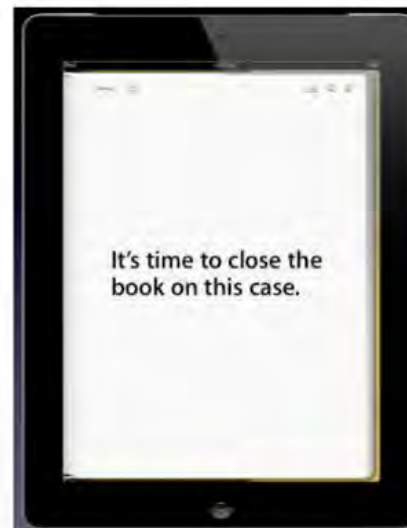
#6

**What if the Company stops the claims
(or the conduct at issue) during the
investigation?**



#7

**What are best practices for meeting
with the Division or Regional Director
to try to have the investigation
closed?**



"I have heard a judge say he asks each side one hard question and if he doesn't get a straight forward answer he knows he can't trust the rest. That put advocates in a tough place but seems like a good maxim to live by. Certainly advocates who acknowledge the weaknesses as well as strengths of their positions tend to do better, although nothing comes less naturally to a lawyer than conceding a point"

#8

How does the Staff get "consent authority" and what is involved in trying to negotiate a resolution?



“In a multi-defendant case do not wait it out and be the last to settle and want a better deal. Not going to happen. You should get a worse deal because you wasted resources the longest. I will not punish you but you will not get rewarded for delay.”

Big Questions

#9

How does a company go up the chain to engage the Bureau and the Commission?



"Know the facts cold and don't shade them. Before the Commission or the Commission staff, always nothing is easier to get you than your misstatements. Misstatements including the facts. It is my experience that the Bureau will almost always believe anything that someone expects them to believe."

"What falls very far is to attack staff. It is not a good idea but it happens with regularity. The Bureau is not full of perfect plans. We are vested in the process. If you are going to attack staff you better be right. If you shoot at the king you do not want to miss."

"Imaging the professional, trustfulness or ethics of the staff. This is one of the most troubling approaches to advocacy I have encountered and may constitute malpractice. It is a tactic that can undermine even an otherwise meritorious position for no proponent can gather the possible psychic satisfaction of the advocate."

"Tell me about creative ways to settle cases. If a Company has a better way to settle the case, I want to hear about it and not be blindsided in a Commission meeting. You can tell me about equitable issues. In 7-8 cases this changed the nature of the relief. But some of those I regret now."

"Would they and shouldn't they. 800 soap powerplants into the water. I know about the case. Tell me why staff is all about the law. We can learn new things. Things happen at Bureau meetings that can change the process. But we also have a lot of meetings by skilled advocates at very good law firms that advocate and around the table just to make the clients feel better. And that never works. If you have a good argument, bring it on but just being tough will not work."

#10

What does the FTC member informants with its orders and what are best practices for a company to ensure compliance?



"Don't ask 'Why me? Do not whine. Do you get out of a speeding ticket by asking 'Why me?' No, it is a waste of time. It is time to talk out others but it is not going to get you off of the hook."

#11

What sorts of arguments can work and what just do the firms?



"We will not retreat from the redress program. Unless there is the real direct of redress, we will not be taken seriously. And likewise, compensation must be taken seriously. No person handles an issue here."

#12

If there the FTC is seeking monetary redress, how often and there are very few arguments can be made. Considered is this a potential change?



"There before you go before the FTC Commission. Sometimes companies, people they have nothing to lose but I have seen a lot of people. When they have been made to understand that generally there is no appeal. There is a class of people who are best off and the Bureau know what to do. I am not suggesting a company's mistakes if they have a good record of the FTC. We will not be made a scapegoat if they are not getting the best they can get. But we will not be made a scapegoat if they are not getting the best they can get. Sometimes things get better, sometimes things get worse."

#9

How does a company go up the chain to engage the Bureau and the Commission?



"Know the facts cold and don't shade them. Before the Commissioners or Commission staff, almost nothing is surer to get you sued than misunderstanding, misstating or shading the facts. In my experience decision makers are almost always better prepared than counsel expect them to be."

"What falls very flat is to attack staff. It is not a good idea but it happens with regularity. The Bureau is not full of potted plants. We are vetted on the issues. If you are going to attack staff you better be right. If you shoot at the king you do not want to miss."

"Attacking the professionalism, truthfulness or ethics of the staff. This is one of the most puzzling approaches to 'advocacy' I have encountered and may constitute malpractice. It is a tactic that can undermine even an otherwise meritorious position for no perceptible gain other than the possible psychic satisfaction of the advocate."

“Tell me about creative ways to settle cases. If a Company has a better way to settle the case, I want to hear about it and not be blindsided in a Commission meeting. You can tell me about equitable issues. In 7-8 cases this changed the nature of the relief. But some of these I regret now.”

“Avoid dog and pony shows. 800 page powerpoints miss the mark. I know about the case. Tell me why staff is wrong on the facts or the law. We can all learn new things. Things happen at Bureau meetings that can change the outcome. But we also have a lot of meetings by skilled advocates at very good law firms that advocate and pound the table just to make their clients feel better. And that never works. If you have a good argument, bring it out but just being tough will not work.”

“Think before you go before the full Commission. Sometimes companies think they have nothing to lose but I have seen it get worse. Offers that have been made to companies have generally been vetted because division managers do not have authority to settle cases. There is a clearing process with the front office and the Bureau knows what is going on. I am not suggesting a company is punished if they do not accept an offer of settlement but there is some rolling of the dice. We do want to encourage people if they are not getting the deal they should get to go up, but think carefully if it really is the deal you should not get. Sometimes things get better; sometimes things get worse.”

#10

It seems the FTC is seeking monetary redress more often and there are very few injunctive only, sin no more consent orders. Is this a permanent change?



"We will not retreat from the redress program. Unless there is the real threat of redress, we will not be taken seriously. And adequate substantiation must be taken seriously. No partisan hackles are raised here."

#11

What sorts of arguments can work
and what just fan the fire?



"Don't ask 'Why me? Do not whine. Do you get out of a speeding ticket by asking "why me". No, it is a waste of time. It is fine to rat out others but it is not going to get you off of the hook.

#12

How does the FTC monitor enforcement with its orders and what are best practices for a company to ensure compliance?



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Amy R. Mudge

amy.mudge@venable.com

Phone: 202.344.3700

Mary K. Engle

mary.engle@ftc.gov

Phone: 202.343.2800

Thomas A. Cohn

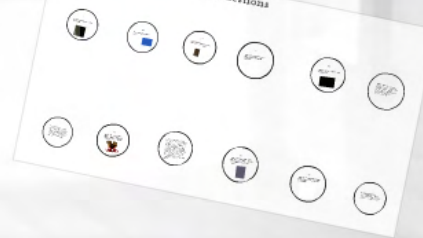
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Phone: 301.507.1700

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Amy R. Mudge

Email: armudge@venable.com

Phone: 202.344.4743

Mary K. Engle

Email: mengle@ftc.gov

Phone: 202.326.3161

Thomas A. Cohn

Email: ThomasCohn@nbty.com

Phone: 631.200.7306