



Advertising Law TOOL KIT

VENABLE[®]LLP



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Advertising Law Tool Kit by Venable LLP

Today, advertisers, marketers and their service providers are under intense scrutiny. Federal and state regulators, as well as plaintiffs' attorneys, aggressively pursue enforcement of existing regulations, push for the adoption of new regulations, and narrow the scope of acceptable conduct by marketers.

Now, more than ever, advertising and marketing success depends on the practical application of regulatory and legal insight. With the largest advertising law practice in the nation, including some of the best-known attorneys in the direct response industry, several former senior government officials and former in-house counsel at leading consumer brands, Venable has the depth, experience and insight to assist marketers of every shape and size to manage regulatory and legal risks.

Though it cannot take the place of qualified, fact-specific legal advice, this collection of background information and checklists is designed to help marketers identify potentially problematic advertising practices. Over time, this guide will grow with the addition of more sections authored by attorneys across Venable's Advertising, Marketing and New Media practice, as well as other related areas of the firm.

To arrange a conversation about a specific legal need, or to suggest a topic for inclusion in a subsequent edition of the *Advertising Law Tool Kit*, please contact me or any of the attorneys listed in this booklet.

To download the most recent edition of Venable's *Advertising Law Tool Kit*, visit www.Venable.com/advertising/toolkit.

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Objective advertising claims require prior substantiation. Claims can be express or implied and generally relate to tangible characteristics of a product or service. If an ad contains claims about a product or service that can be measured or otherwise proved true or false, marketers must ensure there is a “reasonable basis” for those claims. A good rule of thumb for what constitutes a “reasonable basis” is the amount and type of substantiation experts in the field believe is reasonable to support the claim.

Special care is required for health and other claims that consumers can’t evaluate on their own, such as “reduces engine wear by 25 percent or more.” Advertising that includes health claims must be substantiated by “competent and reliable scientific evidence” in the form of well-controlled, double-blind human clinical studies.

[Click here to find additional resources on proper substantiation of advertising claims.](#)

If you’re making health claims to sell your product or service, you should ask yourself the following important questions:

- ☐ Does your ad contain express statements (e.g., “studies prove” or “two out of three doctors recommend”) about the amount or type of support you have for your product or service?
- ☐ If you answered “yes,” then: Do you actually have the amount or type of support you claim?
- ☐ Are you relying on studies of your product or of a product that has the same key ingredient(s) in the same quantity and quality?
- ☐ If using studies of other products, do the products studied contain the ingredients, in the same quantity and of the same quality as your product?
- ☐ Are there studies of the ingredients about which you are making claims, or similar products containing the ingredients that contradict the study you are relying on for substantiation?

When using endorsements or testimonials to market your product or service, you should ask yourself the following important questions:

- ☐ Does the endorsement fail to accurately represent the endorser's experience with the product?
- ☐ Is the endorser's experience atypical of what a user of the product or service can expect?
- ☐ Was a non-celebrity endorser aware of the possibility of payment prior to making the endorsement? Were they supplied with free product?
- ☐ Do you or your organization have an undisclosed relationship with the endorser that could lead to possible bias (e.g., a family member)?
- ☐ If your endorser is an "expert" with respect to the product or service, did he/she fail to actually evaluate the product or service?

If you answered "yes" to any of these questions, your advertising triggers the requirements of the FTC's endorsement and testimonial rules.



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The FTC's revisions to its *Guides Concerning the Use of Endorsements and Testimonials in Advertising (Guides)* have effectively changed the rules for product promotion and place significantly heavier burdens on advertisers and marketers to substantiate the claims made by endorsers of a product or service. Among the most important changes to the *Guides* are the requirements that marketers disclose material connections with endorsers and the removal of the long-standing "safe harbor" for endorsements.

The previous edition of the *Guides* included a "safe harbor" allowing advertisers to use testimonials reporting specific successful experiences with an advertised product or service as long as a disclaimer such as "results not typical" was included. The revised *Guides* require consumer testimonials that represent an atypical experience with a product or service as typical to disclose clearly the results that consumers can generally expect.

[Click here to find additional resources on how ensuring advertising endorsements and testimonials comply with the FTC's *Guides*.](#)



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Affiliate marketing offers cost-effective advertising with a broad reach. However, your affiliates' failure to comply with marketing laws can cause big problems for you. Marketers whose affiliates use email messages that violate the CAN-SPAM Act, web sites that make false claims about the marketer's product, and "flogs" and "farticles" that use deception to gain consumers' interest have all been the subject of legal enforcement actions.

In addition, companies have faced charges of secondary liability for the actions of affiliates, including bidding on Google keywords that include the trademarks of competitors and including competitors' marks in online advertisements placed by the affiliates.

Venable has worked with dozens of advertisers, affiliates, and affiliate networks to set up contractual arrangements and monitor programs to ensure that affiliate marketing remains a viable business initiative.

[Click here to find additional resources on managing risk when using affiliate marketers.](#)

When using online affiliates to market your products or services, consider using some of these risk management best practices:

- ☐ Know your affiliates and the affiliate networks to which they belong.
- ☐ Set the terms upon which affiliates are permitted to earn commission for advertising your products and services.
- ☐ Require legal compliance with consumer protection laws.
- ☐ Establish your own written list of "advertiser-specific" marketing compliance requirements.
- ☐ Contractually require affiliate networks to impose your terms on affiliates and sub-affiliates working under them.
- ☐ Monitor the marketing activities of affiliates working for you and be ready to suspend and terminate for non-compliance.

- ☐ Can the required information be incorporated into the underlying claim instead of requiring a separate disclosure?
- ☐ Are the ads' disclosures "clear and conspicuous" in terms of font size, wording and proximity to the claim? Are they "unavoidable"? Do other parts of the web page distract attention from the disclosures?
- ☐ Is the disclosure readily viewable on a particular device or platform?
- ☐ Is scrolling required to view the disclosure? Is horizontal scrolling, which could make the disclosure less prominent on smartphone screens, required?
- ☐ Are there visual or other cues that direct consumers to the disclosure?
- ☐ If hyperlinking to the disclosure, does the link label explicitly communicate the nature and the relevance of the information to which the link leads?
- ☐ Is the disclosure made before the consumer "adds" the item to a shopping cart?
- ☐ Are there space-reduced formats (e.g., Twitter), where it's better to not make the claim?



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The FTC and states are paying close attention to the clarity and prominence of online disclosures. The FTC's release of its updated *.com Disclosures* guidance in March 2013 demonstrate that online, mobile and social media advertising are on regulators' radar and will be for the foreseeable future.

The *Disclosures* give significant attention to online disclosures, including ensuring that any disclosures are clear and conspicuous across all devices and platforms that consumers may use to view the ad. If an advertisement requires a disclosure to avoid being deceptive, but that disclosure cannot be made clearly and conspicuously on a device or platform, then the FTC says marketers should not run the ad on that device or platform.

Given the heightened level of scrutiny the FTC is directing at marketing claims in general, and to online claims specifically, marketers should consider the following questions at left before launching an online advertising campaign.

Click [here](#) to find additional resources on how ensuring online disclosures are sufficient and FTC-compliant.



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The Food and Drug Administration (FDA) regulates the marketing of dietary supplements, over-the-counter (OTC) drugs, cosmetics, medical devices and functional foods. However, it may not always be clear to which category a product belongs. For instance, is a face wash an OTC drug or a cosmetic? Is an energy drink a dietary supplement or a conventional food? Many times, marketers are not aware that the FDA considers a type of product, such as heating pads, a medical device. The FDA's regulations governing these types of products, in combination with misunderstandings about those regulations, are a frequent source of trouble for marketers.

[Click here to find additional resources on marketing FDA-regulated products.](#)

When taking a product to market that is, or may be, regulated by the FDA, marketers should consider the following questions:

- ☐ Are you certain of the correct regulatory classification of the product?
- ☐ Do any claims for cosmetic products claim to affect the structure or function of the body?
- ☐ Do any claims for dietary supplements address a disease or disease condition?
- ☐ Are the claims for OTC drug products consistent with the appropriate monograph?
- ☐ For a medical device, is FDA clearance required prior to going to market?
- ☐ Have all claims for a medical device been checked against the appropriate regulation or clearance?
- ☐ Has the drug or medical device being marketed been appropriately listed with the FDA?

☐ Avoid general claims such as “green” or “earth friendly” unless they can be qualified to explain the specific benefits the product provides.

☐ If using seals of approval or certificates, tell consumers what they mean and disclose whether the award is from a third-party based on objective criteria.

☐ If the product is ordinarily disposed of in landfills, it cannot support a biodegradable claim.

☐ Support carbon offset claims with competent and reliable scientific evidence, and disclose if the emissions reduction is expected far into the future.

☐ Do not make “non-toxic” claims unless the product has been proven safe for people and the environment.

☐ Use renewable materials claims only when the material used is identified and the renewable amount of the product and method used are disclosed.

☐ Ensure that the product or package is recyclable by at least 60 percent of consumers. If it is not, qualify the claim by disclosing the limited availability of recycling for the product.

☐ Use recycled content claims only if the materials were actually diverted from the waste stream and the amount diverted is disclosed.



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Protecting the planet from global warming is a social movement—and big business. The FTC has issued detailed and specific guidance for marketers about how to substantiate green claims. Unsubstantiated green claims have been, and will continue to be, an enforcement priority.

Marketers planning to use “green” claims to promote a product should consider the best practices listed at left to avoid so-called “green washing” claims or spending hard-earned “green” on an FTC fine.

Click here to find additional resources on “green claims” and compliance with the FTC’s *Green Guides*.



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Both the FTC and state attorneys general are taking a close look at any consumer advertising and marketing that uses a negative option or continuity plan approach. Negative option marketing can include pre-notification negative option plans, continuity plans, automatic renewals and free-to-pay (or nominal fee-to-pay conversions).

The difference between continuing success and recurring FTC problems can be as simple as making clear and complete disclosures and then ensuring that refunds and cancellations are processed in accordance with disclosed policies.

[Click here to find additional resources on best practices in negative option and continuity marketing.](#)

Marketers using negative option or continuity plans to drive sales and marketing should consider these key questions before launching a campaign or offer:

- ☐ Are all the material terms of the negative option offer disclosed in an understandable manner, including existence of offer, price, and how to cancel?
- ☐ Are the disclosures clear and conspicuous (prominent, presented clearly, placed where they will be read, and proximate to where consumers' attention is likely to be focused), especially on mobile devices?
- ☐ Are the disclosures made before the consumer agrees to buy and enroll?
- ☐ Has the consumer indicated in a meaningful way that he or she consents to the offer?
- ☐ Is there a way to cancel enrollment that works?
- ☐ Are the cancellation and refund procedures disclosed to the consumer actually being honored?
- ☐ Has the company received complaints from consumers, the Better Business Bureau or state AGs that consumers do not understand that they are enrolling in the program or are having a difficult time cancelling?



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Businesses selling goods directly to consumers face an array of brand protection challenges in today's global marketplace. These include counterfeiting, diversion of products into unauthorized sales channels and distribution of "gray market" or "parallel import" goods.

Companies that sell products to consumers and want to minimize the impact of loss due to counterfeits, knockoffs or product diversion should consider the best practices at right.

[Click here to find additional resources on developing and deploying a brand protection program.](#)

- ☐ Conduct an internal brand protection audit to assess how well key brands and products are secured in terms of legal protection, security measures, supply chain and distribution through authorized channels.
- ☐ Register key trademarks and trade dress in countries where the products are sold (or will be sold), as well as in countries where the products are manufactured or assembled.
- ☐ Record key registered trademarks and trade dress with U.S. Customs & Border Protection (CBP).
- ☐ Provide the CBP with information on known or suspected distribution or import of counterfeits of the products or their components. Regularly provide the CBP with updated product identification manuals and arrange for training sessions to educate inspectors on how to discern counterfeits from authentic goods.
- ☐ Routinely monitor unauthorized use of the company's brands, and establish surveillance of distribution channels.
- ☐ Select and use anti-counterfeiting technology that is (a) appropriate for the product and business model (e.g., radio-frequency identification tags, holograms, watermarks, covert markings or inks); and (b) not burdensome to use for product authentication.
- ☐ Educate employees and sales forces about the importance of IP protection to the company's success. Provide employees and sales forces with training to help them better recognize and respond to counterfeiting issues.
- ☐ Hire experienced investigators to build enforceable cases against networks that counterfeit or divert the company's goods.
- ☐ Police the Internet and online marketplaces for the sale of counterfeit goods. Make full and regular use of the procedures offered by e-commerce sites and online marketplaces to de-list or take down infringing listings or websites.
- ☐ Work with legal counsel experienced in the handling and management of intellectual property enforcement programs that reduce the impact of counterfeiting, product diversion, piracy or other infringing activities.



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The use of celebrity and non-celebrity talent to represent your brand in marketing campaigns can build brand awareness and drive sales. Companies planning to use celebrity or non-celebrity talent to represent a brand in a marketing campaign should consider the questions and best practices at right when negotiating a spokesperson deal.

[Click here to find additional resources on best practices for spokesperson agreements.](#)

1. Services

- ☐ *Scope:* What are the types of services the talent may be required to perform and what are the campaign materials that will be created from such services (e.g. on-camera/voiceover for commercials, digital content, print ad, personal appearances); how many are permitted in each category?
- ☐ *Time commitment:* How many service days are required; how many of them are for production, photo shoot, personal appearances or PR?
- ☐ *Social Media:* What is the required commitment in terms of number of tweets, Facebook posts or other use of the talent's social media channels?

2. Term and Territory

- ☐ What are the service term and usage term? (Note: The two are not always the same; usage term can be longer.)
- ☐ Is there an option to extend term, either service term or the usage term?
- ☐ What territories are covered by the agreement (e.g., U.S., worldwide, etc.)? If digital is involved, then territory can be more tricky unless it's worldwide.

3. Usage Rights

- ☐ What distribution channels may be utilized for campaign materials (e.g., all forms of TV, mobile, transportation, online, in-stadium, in-cinema, in-flight, print, etc.)?
- ☐ How does the agreement provide for internal and trade use? Try to negotiate internal and trade use that is not limited to usage term.

4. Creative approval

- ☐ Does the agreement address the talent's participation in creative development, approval rights, etc.?
- ☐ Does the agreement address final approval rights? The advertiser should retain final approval of campaign materials.

5. Compensation

- ☐ Flat fee?
- ☐ If there is a term extension option, does the agreement include a term extension fee?
- ☐ If there is a possibility of needing additional service days from the talent, then add a day, half-day or hourly rate for additional time.
- ☐ If all or some of the services fall under SAG or AFTRA jurisdiction, then add an allocation provision. This is generally, at least 50% to union services if TV is involved.

6. Exclusivity

- ☐ Define the exclusive industry category as well as scope of exclusive services.
- ☐ Exclusivity can be only during the service/usage term or with a tail of some period following term expiration.

7. Termination

- ☐ Include standard for-cause termination that includes breach, violation of morals clause, death or disability, force majeure.
- ☐ Address termination for convenience (e.g., due to change in campaign strategy). This typically requires a "kill fee" or "early termination fee."
- ☐ What is the effect of early termination on compensation and usage rights?

8. Ownership

- ☐ Generally, the advertiser should own all campaign materials and anything produced in connection with the campaign, including all contributions made by the talent.
- ☐ If campaign materials include pre-existing material provided by the talent, add license from the talent to use such material in campaign materials, and the advertiser's ownership of campaign materials should be subject to the talent's ownership of pre-existing material.

9. Loan-out Letter

- ☐ If the talent is using a "loan-out" company instead of entering into the agreement directly, then the agreement should include a loan-out letter signed by the talent acknowledging and agreeing to the terms of the spokesperson agreement signed by the loan-out company.

10. Affidavit

- ☐ If services include TV commercials, include a sworn endorsement affidavit to be signed by the talent.

- ☐ Are consumers being asked or incentivized to do or say something about the product or service that the marketer would not be permitted to do or say on its own?
- ☐ Do the people writing about the product or service, whether “bloggers,” “influencers” or otherwise, have material connections to the marketer that may need to be disclosed?
- ☐ If the promotion is being run across multiple social media platforms, have the campaign materials been carefully reviewed to ensure that disclosures and claims appear appropriately on every platform?
- ☐ Is the promotion being run subject to special legal requirements and/or specific rules imposed by the social media platform? For example, sweepstakes are subject to specific legal requirements like registration and bonding under state (and federal) law, as well as the various rules imposed by the social media platforms, such as Facebook’s or YouTube’s rules for advertising prize promotions.
- ☐ Do the agencies/vendors executing the company’s social media campaigns have appropriate social media policies in place? Is proper monitoring being conducted to determine whether agencies, vendors and other third parties are complying with the social media policy and rules for disclosure of material connections?



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In today’s marketplace, social media is a hot channel for marketing products and services. Many companies fear being left behind if they do not launch campaigns via social media. While there are many advantages to using the medium to market a brand, there are just as many potential regulatory pitfalls.

The FTC, state AGs and even some of the social media platforms have published guidance, established rules and pursued enforcement actions against marketers that failed to comply with those requirements.

When developing a social media strategy, marketers should ask the questions at left to mitigate legal, regulatory and reputational risk.

If you answer “yes” to any of the questions at left, your social media advertising and promotion policies may deserve a harder look.

[Click here to find additional resources on compliance when using social media to promote your brand.](#)

Useful Advertising Law-Related Websites

- All About Advertising Law – www.Allaboutadvertisinglaw.com
- FTC Business Center Blog - <http://business.ftc.gov/blog>
- ASRC website – www.ASRCreviews.org
- ERA Knowledge Center (members only) - <http://myera.retailing.org/resources/list>
- U.S. Small Business Administration's Advertising Law Page - <http://www.sba.gov/category/navigation-structure/starting-managing-business/starting-business/business-law-regulations/advertising-law>
- Consumer Protection Law360 (subscription required) - <http://www.law360.com/consumerprotection/>



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