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ADVERTISING ISSUES FOR FRANCHISE SYSTEMS: FROM "A" CUSTOMER TO PROSPECTIVE "ZEES"

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ADVERTISING ISSUES FOR FRANCHISE SYSTEMS: FROM "A" CUSTOMER TO PROSPECTIVE "ZEES"

I. INTRODUCTION

Any list of key legal concerns for franchisors and franchisees will, of course, include issues of disclosure, the terms of the franchise agreement, the contents of the operations manual, the maintenance of the relationship between the franchisor and its franchisees, and the resolution of disputes that may arise between them. Issues related to advertising may not make as many practitioners' or clients' lists. However, without some amount of advertising, there would be no franchise system. Advertising is integral to the growth of a franchise brand – in developing new customers, goodwill, and, for franchisors, prospective franchisees.

For most franchise brands, the franchisor uses ongoing advertising to promote its franchise opportunity to prospective franchisees, and advertising is almost certainly key to driving sales across the system. Many franchisors conduct marketing and advertising through administration of a brand development or marketing fund comprised of specific fees paid by franchisees and, possibly, franchisor-owned outlets. Franchisees are typically required by the terms of their franchise agreement to commit either specific amounts of their revenue to local marketing, or to meet certain performance metrics that likely cannot be satisfied without the franchisee engaging in marketing and advertising of the franchised outlet's product or service.

Given these various types of potential advertising activity, counsel for both franchisors and franchisees need to be capable of helping their clients understand the regulatory obligations and limits they will have to satisfy or abide by in crafting their marketing programs, and the risks that come with disregarding those obligations, or being ignorant of them. This is especially true as franchisors and franchisees increasingly rely on digital advertising to reach potential consumers and franchisees. Digital advertising is rapidly developing and, therefore, can give rise to more far-reaching legal concerns than more traditional forms of advertising.

This paper addresses issues of advertising compliance in four sections: Section II will provide a general summary of the legal and regulatory framework that applies to advertisements, whether directed towards consumers or prospective franchisees; Section III will summarize the proceedings and processes that are used to enforce compliance with those regulations; Section IV will address advertising issues relevant to the franchise industry; and Section V will address specific advertising issues relating to franchise sales, including those that may give rise to franchisee claims based on the Franchise Disclosure Document ("FDD") and compliance with state laws regulating franchise sales materials. While the content of Section V will be directed at issues relevant to franchisors, and the counsel who advise them, the content of Sections II-IV will be applicable and relevant to franchisors, franchisees, and their counsel.

II. THE LEGAL AND REGULATORY FRAMEWORK

This section provides a summary of the most significant federal, state, and industry regulations that franchisors and franchisees need to be aware of when developing their marketing strategies. The regulatory structures summarized below establish limitations, not just on the content of marketing, but on how that marketing is presented to the consumer. The regulatory schemes summarized here apply equally to franchisors and franchisees regardless of whether related to marketing of the concept's underlying products and/or services or the franchisor's promotion of the availability of franchises. Other legal considerations that may serve as limitations on a franchise network's advertising and marketing plans, such as copyright infringement, consumer privacy, or breach of contract concerns, are not within the scope of this paper.

A. <u>The Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 41-58</u>

Under the broad authority granted to it by the Federal Trade Commission Act[1], the FTC is the primary regulator for advertising and marketing on the federal level. Under the FTC Act, and especially Section 5.A. of the FTC Act, the FTC has rule making authority under which it promulgates consumer protection rules that seek to prohibit unfair and deceptive practices.[2] Under the FTC's interpretation of its authority, any person or entity that violates a rule promulgated by the FTC is deemed to have engaged in a prohibitive, unfair, or deceptive practice.[3]

Under the FTC Act, a "deceptive" practice is a material representation, omission or practice that is likely to mislead a consumer acting reasonably in the circumstances.[4] An "unfair" action is one that causes, or is likely to cause, substantial injury to consumers that is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.[5]

Under the FTC rules, advertising must generally be truthful and not misleading. Advertisers must have evidence to substantiate the claims they make in their advertising and marketing.[6] In determining whether an advertiser's substantiation is sufficient, the FTC considers the type of claim, the type or product being advertised, the consequences that a false claim would have on consumers, the benefits that a truthful claim would provide to consumers, the cost of substantiating the claim, and the amount of substantiation that experts in the field believe is reasonable.[7]

B. <u>The Communications Act, 47 U.S.C. § 151 *et seq*.</u>

The Communications Act created the Federal Communications Commission ("FCC").[8] Under the Communications Act, the FCC oversees the telephone, television, and radio industries as well as, to the extent that it exists, the telegraph industry. Specific to the topic of this paper, the FCC accepts complaints about broadcast advertising, the nature of products advertised

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[1] 15 U.S.C. §§ 41-58.

[2] *Id.* at § 41.

[3] *Id.*

[4] *See FTC Policy Statement on Deception*, FTC (October 14, 1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf [hereinafter *Statement on Deception*] (outlining factors the FTC will consider when determining whether a representation, omission or practice is deceptive).

[5] *See FTC Policy Statement on Unfairness*, FTC (December 17, 1980), https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness [hereinafter *Statement on Unfairness*] (outlining factors the FTC considered when applying the FTC Act's prohibition against consumer unfairness) (last visited September 1, 2022).

[6] *See FTC Policy Statement Regarding Advertising Substantiation*, FTC (November 23, 1984), https://www.ftc.gov/legal-library/browse/ftc-policy-statement-regarding-advertising-substantiation (last visited September 1, 2022) [hereinafter *Substantiation Policy Statement*].

[7] *Id*.

[8] 47 U.S.C. § 151 et seq.

through those regulated industries, the timing of certain types of adverting by those industries, and the volume and taste of the commercials broadcast through those industries.[9]

Under its authority, the FCC regulates the broadcast of obscene and indecent content by television and radio stations.[10] Obscene material is banned from the TV and radio waves at all times.[11] Indecent programming and programming that uses certain profane language are banned between the hours of 6 A.M. and 10 P.M. local time.[12] This partial ban on indecent programming and programming that uses profane language is intended to protect the free speech rights of adults, while also seeking to limit access to such broadcasts by children.[13]

C. <u>The Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227</u>

In 1992, Congress passed the TCPA to address public frustration with telemarketing calls.[14] The FCC is responsible for enforcement of the TCPA.[15] The TCPA restricts telemarketing calls, texts, and faxes.[16]

The TCPA also created a national do not call ("DNC") registry that is administered by the FTC. Additionally, the TCPA requires companies to maintain an internal DNC list of consumers who respond to calls from the company with requests to be omitted from future calls.[17] The TCPA prohibits calls made to numbers on the DNC registry or the company's internal DNC list.[18]

The TCPA prohibits telemarketing calls to residential landlines outside of the hours of 8:00 A.M. and 9:00 P.M. in the receiver's local time zone.[19] It also prohibits the use of artificial or prerecorded voice recordings in telemarketing calls to residential landlines unless the consumer has given prior express written consent.[20] Live person telemarketing calls are not prohibited. However, under the TCPA, the person making the call must give their name, the name of the

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[9] *Id.*

[10] *Obscene, Indecent and Profane Broadcasts*, FCC BUREAU OF CONSUMER & GOVERNMENTAL AFF. (January 13, 2021), https://www.fcc.gov/consumers/guides/obscene-indecent-and-profane-broadcasts (last visited August 24, 2022).

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] 47 U.S.C § 227.

[15] *Id.*

[16] Calls made for debt collection, by utility companies, for certain healthcare related purposes, for emergencies, and by common carriers are exempted from liability under the TCPA. *Telemarketing Sales Rule*, 16 C.F.R. § 310.6. Likewise calls made in error to consumers who are on the do not call ("DNC") registry or the company's internal DNC list are exempted as long as the company otherwise has procedures in place to ensure that it is not calling people on the DNC lists. *Id.* at § 310.4.

[17] 47 C.F.R. § 64.1200(c) - (d).

[18] *Id*.; 16 C.F.R. § 310.4(b)(1)(iii).

[19] *Id.* at § 310.4(c).

[20] 47.U.S.C. § 227(b)(1)(A).

entity they are calling on behalf of, and a telephone number or address where the entity may be contacted.[21]

The TCPA places the same prohibitions on telemarketing calls to wireless devices as are identified for residential landlines, plus the TCPA prohibits the use of automatic telephone dialing systems ("ATDS") to place calls or texts to wireless devices, unless the receiver has provided prior express written consent.[22]

To satisfy the law's written consent obligations, the advertiser must receive a consent signed by the consumer that establishes that the consumer received clear and conspicuous disclosure of the consequences of giving consent.[23] The consent must also demonstrate the consumer agreed unambiguously to receive the calls on the number that the consumer designated.[24] The consent must also note that the consumer is not required to provide consent as a condition of purchasing a product or service.[25] The FCC has ruled that consumers can revoke previously granted consent at any time as long as they do so in a reasonable manner or method, including both oral and written revocations.[26] Per the FCC, examples of reasonable methods of revocation include revocation through a consumer-initiated call, a response to a caller-initiated call, or at an in-store bill payment location.[27] Callers cannot limit a consumer's ability to revoke consent by designating an exclusive means to do so.[28]

In its 2021 decision in *Facebook v. Duguid*, the Supreme Court limited the application of the TCPA by restricting the scope of what devices qualify as an ATDS.[29] As a result of the ruling, predictive dialers and other devices that store lists of telephone numbers, and dial from those lists, are no longer included in the TCPA's definition of an ATDS, as long as the devices do not use a random number generator or a sequential number generator.[30] The ruling also threw out past FCC interpretations of the TCPA that relied on certain levels of human intervention or the speed of dialing to classify systems as ATDSs.[31] The *Duguid* ruling has not eliminated the risk of TCPA liability for automatic text messaging devices. Per the FCC, a texting platform does not

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[21] 16 C.F.R. § 310.4(a)(8).

[22] 47.U.S.C. § 227(b)(1)(A). The FCC has attempted to establish rules regarding calls made to numbers that had previously been assigned to consumers who had consented to the calls but had since been reassigned to different consumers. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 80 Fed. Reg. 61,129 (Oct. 9, 2015) [hereinafter *Rules and Regulations*]. However, in *ACA Int'l v. FCC,* 885 F.3d 687 (D.C. Cir. 2018), the DC Circuit Court of Appeals vacated the FCC's interpretation of TCPA liability for calls and texts made to reassigned numbers. Until the FCC addresses this issue again, it is unclear what liability companies have for calling numbers that have been reassigned.

[23] 16 C.F.R. § 310.4(b)(v)(A)(i).

[24] *Id.* at § 310.4(b)(v)(A).

[25] *Id.*

[26] *Rules and Regulations*, *supra* note 22, at 7996.

[27] *Id.*

[28] *Id.*

[29] Facebook, Inc. v. Duguid, 141 S. Ct. 1163, 1167 (2021).

[30] *Id.*

[31] *Id.*

constitute an ATDS if it requires a person to manually enter each recipient's number, transmits each message one at a time, and lacks the capacity to transmit more than one message without a human dialing each number.[32] However, if a system—such as a system that enables internet-to-phone text messages—has the capacity to randomly or sequentially generate numbers to text, it will be classified as an ATDS under the law regardless of how those numbers are dialed once they are on a stored list.[33]

D. Controlling the Assault of Non-Solicited Pornography and Marketing Act ("CAN-SPAM Act"), 15 U.S.C. §§ 7701-7713

The CAN-SPAM Act[34] regulates the use of unsolicited emails in advertising by requiring the companies who use email to promote their products or services to satisfy several requirements. The law applies to emails sent to individuals' email accounts and business accounts. The FTC enforces the CAN-SPAM Act as if emails that do not comply with the law's obligations are the products of unfair or deceptive actions or practices.[35]

The CAN-SPAM Act requires all unsolicited commercial emails be clearly and conspicuously identified as an advertisement or solicitation somewhere in the body of the email message and disclose the sender's valid and physical postal address.[36] The law prohibits the use of deceptive subject lines and false information about who sent the email, or who is the intended recipient.[37] Unsolicited emails also must include a clear and conspicuous electronic opt-out mechanism.[38] With the opt-out mechanism comes the obligation to track and honor the requests of recipients asking to be opted-out of future mailings.[39] The company responsible for the products or services being promoted must maintain a list of emails that cannot be used in future mailings and ensure that it honors any opt-out requests within 10 business days of receiving the request.[40]

The companies whose products or services are promoted in the email are liable for violations of the CAN-SPAM Act even if they engaged a third-party to draft and/or execute the email campaign.[41] Therefore, companies that engage third parties to conduct email campaigns should not only do their due diligence when choosing a third-party vendor, ensure their third-party agreements obligate the vendor to indemnify the advertising entity for violations of the Act, and then monitor the third-party's compliance with the CAN-SPAM Act's requirements after the vendor has been engaged.

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[32] *Rules and Regulations, supra* note 2, at 6528.

[33] *Duguid*, 141 S.Ct.at 1167.

[34] 15 U.S.C. §§ 7701-7713.

[35] *Id.* at § 7706(a).

[36] *Id*. at § 7704(a)(5)(A).

[37] *Id.* at § 7703.

[38] *Id.*

[39] *CAN-SPAM Act: A Compliance Guide for Business*, FTC (Sept. 2009), https://www.ftc.gov/tips-advice/business-center/guidance/can-spam-act-compliance-guide-business (last visited September 1, 2022).

[40] *Id.*

[41] *Id.*

E. The Food, Drug and Cosmetic Act ("FD&C Act"), 21 U.S.C. §§ 301-399

The FD&C Act[42] gives the Food and Drug Administration ("FDA") authority to oversee the safety of, and labeling of, food, drugs, medical devices, and cosmetics. The FD&C Act requires marketing relating to food, drugs, medical devices, and cosmetics to be true and complete.[43] It also requires that such products be properly branded.[44] The broad sweep of these regulations goes well beyond how these products are packaged and promoted.

Under the FD&C Act, the FDA regulates about 78% of the United States food supply with most of the remainder being regulated by the United States Department of Agriculture.[45] The FDA establishes labeling requirements for certain pre-packaged food products.[46]

Like the FTC, the FDA has scrutinized online and social media advertising of food, dietary supplements, cosmetics, drugs, and medical devices. For example, in 2015, the FDA sent a warning letter to a company called Duchesnay Inc. after it paid Kim Kardashian to endorse its morning sickness drug.[47] The FDA warning was a result of Ms. Kardashian's Instagram post, which touted the positive benefits of the drug but did not mention its side effects except for a link to the drug's safety information web page.[48]

F. Section 43(a) ff the Federal Trademark Act ("Lanham Act"), 15 U.S.C. § 1125(a)

While the FTC is the federal agency charged with establishing and enforcing prohibitions on deceptive or unfair practices in marketing and advertising, Section 43(a) of the Lanham Act[49] grants private parties a means of addressing instances of false advertising in court. Section 43(a) of the Lanham Act consists of two sections, each intended to address different types of claims. Section 43(a)(1)(A)[50] prohibits deceptive conduct that causes consumer confusion. Claims brought under Section 43(a)(1)(A) include claims for infringement of unregistered trademarks, claims for false designation of origin, and claims for false endorsement. Section 43(a)(1)(B)[51] prohibits deceptive commercial advertising. Claims under Section 43(a)(1)(B) are sometimes

[42] 21 U.S.C. §§ 301-399.

[43] *Id.* at §§ 343, 352, 362.

[44] *Id.* Since few franchise systems sell medical devices or pharmaceuticals, this paper is limited to briefly summarizing some of the requirements relating to food and cosmetic packaging and labeling.

[45] *Fact Sheet: FDA at a Glance*, U.S. FOOD & DRUG ADMIN. (Nov. 2021), https://www.fda.gov/about-fda/fda-basics/fact-sheet-fda-glance (last visited August 29, 2022).

[46] 21 U.S.C. § 343.

[47] Naja Rayne, *Kim Kardashian West Warned by FDA Over Promoting Morning Sickness Drug*, TIME (August 12, 2015), https://time.com/3993799/kim-kardashian-west-fda/ (last visited August 29, 2022).

[48] *Id.*

[49] 15 U.S.C. § 1125(a).

[50] *Id*. at § 1125(a)(1)(A).

[51] *Id*. at § 1125(a)(1)(B).

referred to as claims for unfair competition, trade libel, or trade disparagement. Claims brought under Section 43(a)(1)(B) are discussed in Section III.A. below.

A claim for false endorsement under Section 43(a)(1)(A)[52] arises when an advertiser misleads consumers to believe that an individual endorses the advertiser's product.[53] The increased use of social media in the promotion of products and services has expanded the population of people who may be the victims of false endorsements. Such claims historically have been made by celebrities whose images[54], voice[55], music,[56] or names have been associated with products without their permission.[57] However, the rise in popularity of influencers on social media platforms such as Instagram and YouTube have led to a new kind of "fame."[58] Enforcement under Section 43(a) is discussed in Section III.A. below.

G. <u>State Law Protections against False or Misleading Advertising</u>

In addition to the federal statutes and federal agency regulatory structures noted above, all fifty states and the District of Columbia also have statutes prohibiting deceptive and/or unfair marketing. These statutes are often generally referred to as Unfair and Deceptive Acts and Practices statutes ("UDAP"). They are also sometimes referred to as "Little FTC Acts," as they include consumer protections similar to those provided by the FTC Act and the FTC rules. While their colloquial name emphasizes their similarities to the FTC Act, many of these statutes vary from the FTC Act in important ways. UDAPs also vary significantly from state to state. While a state-by-state survey of UDAPs is outside the scope of this paper, the common elements frequently seen in UDAPs are set forth below.

UDAP's in some states prohibit both deceptive acts and practices and unfair acts and practices like the FTC Act, while some UDAPs only prohibit one or the other. Some UDAPs expressly list practices that violate their UDAP,[59] while others provide explicit exemptions for specific industries or transactions.[60] UDAPs also vary on whether they grant an agency or state

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[52] *Id*. at § 1125(a)(1)(A). Claims for trademark infringement and false designation of origin are beyond the scope of this paper. Because of this paper's focus on advertising, this section will address claims brought under Section 43(a)(1)(B) and false endorsement claims brought under Section 43(a)(1)(A).

[53] *See* ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 925 (6th Cir. 2003).

[54] Allen v. Nat'l Video, Inc., 610 F. Supp. 612 (S.D.N.Y. 1985) (portrayal of Woody Allen).

[55] Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992), *abrogated in part on other grounds*, Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014) (regarding the use of an impression of Tom Waits).

[56] Beastie Boys v. Monster Energy Co., 66 F. Supp. 3d 424 (S.D.N.Y. 2014).

[57] *See* Complaint at 2, Love Hewitt v. Marz Group, LLC, Case No. BC547539 (Cal. Sup. Ct. CA.) (filed June 4, 2014); Complaint at 2, Heigl v. Duane Reade, Inc., 14 cv 02502 (S.D.N.Y.) (filed April 9, 2014). Using people that look deceptively similar to the celebrity, or using robots dressed to resemble the celebrity may also give rise to a claim. *See* White v. Samsung Elecs. Am., Inc., 971 F.2d 1395 (9th Cir. 1992).

[58] *See* Mayes v. Summit Entm't Corp., No. 116CV06533NGGST, 2018 WL 566314, at *4 (E.D.N.Y. Jan. 18, 2018).

[59] *See*, *e.g.*, TEX. BUS. & COM. CODE ANN. § 17.50 (Texas UDAP).

[60] *See, e.g.,* MD. CODE ANN. COM. LAW §§ 13-101 – 13-501 (Maryland's Consumer Protection Act expressly applies to the extension of credit in addition to any consumer facing transactions. The statute defines "consumer" as any actual or perspective purchaser, lessee or recipient of consumer goods, consumer services, consumer realty or consumer credit; however, Maryland's Act also exempts those engaging in professional services, such as insurance companies that are authorized by the state, insurance producers who are licensed by the state, and utility companies); LA. REV. STATE ANN. §§ 51:1401 through 51:1420 (Louisiana's Unfair Trade Practices and Consumer Protection Law expressly

official rulemaking authority similar to the authority the FTC has under the FTC Act.[61] State agencies or officials that are granted rule making authority by their state's UDAPs frequently use that authority to provide guidance to companies on how to comply with the statutes or use their authority to facilitate the application of the UDAP to cover new or particularly troublesome deceptive or unfair practices.[62]

The mechanisms for enforceability also vary among UDAPs. Most, if not all, UDAPS grant the state's attorney general the authority to enforce the protections of the UDAP.[63] Typical remedies in those states include injunctions, cease and desist orders, restitution for consumers, and civil penalties that must be paid to the state government.[64] In other states, the UDAPs give consumers a private cause of action against entities that engage in deceptive and/or unfair practices.[65] The statutory hurdles consumers must clear to bring such claims vary by state. Some states require the plaintiff–consumer to show that they relied on the unfair deceptive conduct, while other states require consumers to provide advance notice to the potential defendant prior to filing suit.[66] Still other states require that the plaintiff show that the defendant not only harmed the plaintiff with its deceptive or unfair conduct, but that such conduct also broadly affected similarly situated consumers.[67] Generally, consumers that are granted a private cause of action can seek compensatory damages and attorneys' fees.[68] Consumers in some states are permitted to seek other forms of damages like punitive damages.[69] State laws vary on whether plaintiffs can bring class action claims for violations of UDAP statutes.[70]

The laws of California and New York focused on regulating advertising are especially well developed, broadly applicable, and litigiously active. While both states have multiple statues designed to protect consumers, they each have a pair of statutes that comprise the state's primary regulatory scheme directed at deceptive or misleading advertising; namely: the California Unfair

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exempts from its application any business regulated by a public utility regulatory body, a state commissioner, or certain financial regulators).

[61] *See, e.g.,* OHIO REV. CODE ANN. § 1345.05 (Ohio's Consumer Sales Practice Act gives the Ohio attorney general the authority to adopt substantive rules that further define acts or practices that violate the statute).

[62] *See, e.g.*, 940 MASS. CODE REGS. 3.00 (Mass. Regulations created by the state attorney general).

[63] *See, e.g.*, ALA. STAT. §45.50.501; N.Y. GEN. BUS. LAW §§ 349, 350-d.

[64] *See, e.g.*, ALA. STAT. §§ 45.50.471 - 45.50.561 (Alaska's Unfair Trade Practices and Consumer Protection Act permits the state attorney general to seek civil penalties between $1,000 and $25,000 for each violation of a substantive consumer protection); N.Y. GEN. BUS. LAW §§ 349 – 350(e) (The attorney general can seek up to $5,000 in civil penalties per violation).

[65] *See, e.g.*, IOWA CODE §§ 714.16 – 714.16A; TEX. BUS. & COM. CODE ANN. § 17.50 (Texas' UDAP).

[66] *Compare* Tismann v. Linda Martin Homes Corp., 637 S.E.2d 14 (Ga. 2006) (holding a showing of reliance is required for a UDAP claim in Georgia) *with* ALA. CODE § 8-19-10(e) (requires advance notice) *and* ALA. STAT. § 45.50.531 (only requires pre-suit notice when seeking an injunction and does not require a showing of reliance) *and* Hinchliffe v. Am. Motors Corp., 440 A.2d 810 (Conn. 1981) (holding Connecticut consumers need not prove reliance); further the Connecticut UDAP does not require pre-suit notice. CONN. GEN. STAT. §§ 42-110a – 10(q).

[67] *See, e.g.*, CONN. GEN. STATE § 42-110b(a) (broadly prohibiting deceptive acts).

[68] *See, e.g.*, MASS. GEN. LAWS ch. 93A, §9(4) (allowing for attorneys' fees for consumers).

[69] *See, e.g.*, LA. REV. STAT. ANN. § 51:11409(A) (allowing for punitive damages for knowing violations).

[70] *See generally* Mary J. Cavins, Consumer class actions based on fraud or misrepresentation, 53 A.L.R.3d. 534 (1973).

Competition Law,[71] the California False Advertising Law,[72] the New York Deceptive Practices Act,[73] and the New York False Advertising Law.[74]

H. Federal Regulations and State Laws Applicable to Promotions, Contests, and Sweepstakes

Promotions, contests, and sweepstakes are an engaging way for franchisors and franchisees to market to consumers. Generally, promotions, contests, and sweepstakes are regulated at the state level, discussed in Section IV(C) *infra*; however, depending on the medium a franchisor or franchisee chooses to conduct their contest, some federal laws may also apply, including the following.

1. The Telemarketing Sales Rule ("TSR") and the TCPA

The TSR[75] requires specific disclosure for all contests or sweepstakes that are advertised using telemarketing calls.[76] The caller must state: (1) that no purchase is necessary or required to win; (2) that payment will not increase the odds of winning; and (3) the odds of winning.[77] Any calls or text messages advertising the sweepstakes must also comply with the TCPA's prior consent rules addressed in Section II.C above.[78] Both the TCPA and the TSR prohibit all companies from advertising contests or sweepstakes to those numbers on the federal DNC registry, or on an internal DNC list, maintained by the company.[79]

2. The 900-Number Rule

If a company chooses to advertise the contest using a pay-per-call service, they must comply with the FTC's 900-Number Rules.[80] The 900-Number rule requires that the company using a pay-per-call service as its contest/sweepstakes medium comply with certain disclosures.[81] The 900-Number Rule provides detailed descriptions outlining how to make the required disclosures.

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[71] CAL. BUS. & PROF. CODE §§ 17200 – 17210.

[72] *Id*. at §§ 17500 to 17606.

[73] N.Y. GEN. BUS. LAW § 349.

[74] *Id*. at § 350.

[75] 16 C.F.R. §§ 310.1 – 10.9.

[76] *FTC Telemarketing Sales Rule*, 16 C.F.R. Part 310 et seq. (2010).

[77] *Id*. at § 310.3(a)(1)(iv).

[78] 47 U.S.C. § 227.

[79] *Id.*; 16 C.F.R. § 310.4(b)(1)(iii)(B).

[80] *Id.* at § 308.3(c).

[81] *Complying with the 900 Number Rule*, FTC (April 2013), https://www.ftc.gov/business-guidance/resources/complying-900-number-rule (last visited August 25, 2022).

3. The Communications Act of 1934

If a company chooses to advertise a contests or sweepstakes on broadcast radio or television, they must comply with the requirements of the Communications Act of 1934.[82] The law prohibits influencing, prearranging, or predetermining the outcome of contests of knowledge, skill, or chance.[83] Violating any of the law's prohibitions with respect to contests or sweepstakes can result in fines of up to $10,000 or imprisonment up to one year, or both.[84]

Under the FCC's rules for Broadcast Promotions, the radio and television broadcast licensees must also make the material terms of any promotion broadcasted publicly available.[85] Broadcast licensees may do this by either making the terms available on the licensee's or the station's website or broadcasting the terms during the promotional advertisement.

4. The Deceptive Mail Prevention and Enforcement Act ("DMPEA")

The DMPEA requires certain disclosures in all mailings that advertise sweepstakes or contest materials.[86] Under the DMPEA, the United States Postal Service has subpoena power, nationwide stop-mail authority, and the ability to impose civil penalties in its efforts to prevent deceptive practices involving sweepstakes and contests promoted, or conducted, by mail.[87]

I. Industry Specific Self-Regulatory Guidelines

1. Entitles That Establish and Enforce General Non-Industry Self-Regulatory Standards

The Better Business Bureau's National Programs, Inc. ("BBBNP") runs a self-regulatory system for advertising that administers several programs including: the National Advertising Division ("NAD"), the Children's Advertising Review Unit ("CARU"), the National Advertising Review Board ("NARU"), and the Digital Advertising Accountability Program ("DAA").[88] The NAD is the primary self-regulatory dispute resolution body for the advertising industry and has the mission of helping the industry maintain truth and accuracy in national advertising.[89] The NAD

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[82] 47 U.S.C. § 151 et seq.

[83] *Id.* at § 509.

[84] *Id.*

[85] *Broadcast Contests, Lotteries, and Solicitation of Funds*, FCC BUREAU OF CONSUMER & GOVERNMENTAL AFF. (Jan. 8, 2021), https://www.fcc.gov/consumers/guides/broadcasting-contests-lotteries-and-solicitation-funds#:~:text=Broadcast%20licensees%20of%20television%20and,be%20false%2C%20misleading%20or%20deceptive (last visited August 29, 2022).

[86] 39 U.S.C. §§ 3001 – 18.

[87] *Id.* at § 3002.

[88] *See National Programs*, BETTER BUS. BUREAU, https://bbbprograms.org/ (last visited August 25, 2022).

[89] *National Advertising Division*, BETTER BUS. BUREAU, NAT'L ADVERT. DIV. https://bbbprograms.org/media-center/newsroom/apartments.com-website-claims https://bbbprograms.org/programs/all-programs/national-advertising-division (last visited August 25, 2022).

reviews national advertising complaints from consumers and competitors; and monitors for truth and accuracy in advertising.[90]

Some other examples of industry self-regulation include the following:

- The Digital Advertising Alliance ("DAA"), which is a collaboration of several organizations from the advertising industry.[91] The DAA administers the self-regulated AdChoices Program based on online behavioral advertising ("OBA") principles.[92] The AdChoices Program requires options be displayed with ads that are based on information collected for OBA purposes that links to information about data collection and provides a mechanism to opt out of being shown targeted ads from DAA participants.[93] The AdChoices Program also requires companies engaged in OBA to provide notice and choice regarding their practices.[94]

- The Association of National Advertisers ("ANA") enforces the DAA's OBA Principles along with the BBBNP.[95] The ANA is made up of businesses and nonprofits that use data-driven direct marketing tactics.[96] The ANA also establishes the ethical business guidelines for collection, use and sharing of personal information from consumers for digital marketing and mobile marketing.[97]

- The National Advertising Initiative ("NAI") is a self-regulatory membership organization of third-party digital advertising companies.[98] Its members include Google, Microsoft, and Yahoo.[99] These companies collect and use consumer data for OBA.[100] The NAI has a code of conduct[101] that prohibits behavioral targeting of children under the age of 16 without verifiable parental consent, requires advertisers to obtain consumer opt in consent before collecting and targeting

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[90] *Id*.

[91] *About the Digital Advertising Alliance*, DIGIT. ADVERT. ALL. https://digitaladvertisingalliance.org/about (last visited August 27, 2022).

[92] *DAA Self-Regulatory Principles*, DIGIT. ADVERT. ALL. https://digitaladvertisingalliance.org/principles (last visited August 27, 2022).

[93] *Self-Regulatory Principles for Online Behavioral Advertising*, AM. ASS'N ADVERT. AGENTS, at 7 https://digitaladvertisingalliance.org/sites/aboutads/files/DAA_files/seven-principles-07-01-09.pdf (last visited August 29, 2022).

[94] *Id*.

[95] *OBA Background and Toolkit*, ASS'N NAT'L ADVERT,. https://www.ana.net/content/show/id/advocacy-obatoolkit (last visited August 27, 2022).

[96] *About* ASS'N NAT'L ADVERT., https://www.ana.net/about (last visited August 27, 2022).

[97] *Center for Ethical Marketing*, ASS'N NAT'L ADVERT., https://www.ana.net/accountability (last visited August 27, 2022).

[98] *About*, NETWORK ADVERT. INITIAT., https://thenai.org/about/ (last visited August 27, 2022).

[99] *Members*, NETWORK ADVERT. INITIAT., https://thenai.org/about/members/ (last visited August 27, 2022).

[100] *About Membership*, NETWORK ADVERT. INITIAT., https://thenai.org/about/members/about-membership/ (last visited August 27, 2022).

[101] *2020 Code of Conduct*, NETWORK ADVERT. INITIAT., https://thenai.org/accountability/code-enforcement/ (last visited August 27, 2022).

sensitive data such as geo location and health information, and requires members to disclose the political audience targeting segments they use for digital advertising.[102] The NAI also offers an opt out tool in conjunction with the DAA that gives consumers the ability to limit NAI members from offering OBA on the consumer's web browser and to help inform them about companies that collect information from cookies on their browser, and companies whose advertising they have already opted out from.[103] The NAI's opt out tool also allows consumers to view a list of NAI members and to opt out of cookie enabled OBA.[104]

2. Regulation And Self-Regulation Of Alcohol Advertising

There are several federal regulations applicable to the labeling and marketing of alcoholic beverages. However, certain industry groups also establish standards for the advertisement of alcohol.

The Federal Alcohol Administration Act regulates labeling and advertising of wine, distilled spirits, and malt beverages.[105] The Treasury Department's Alcohol and Tobacco Tax and Trade Bureau ("TTB") is empowered to establish regulations that prevent consumer deception and provide "adequate information" on the identity and quality of alcohol products and prohibit false and misleading statements in the advertising and promotion of alcohol products.[106] The TTB's regulations also require that manufacturers provide information as to the alcohol content of the product on its label.[107] The TTB requires that an advertisement for alcohol contain certain information depending on the classification of the beverage.[108] The TTB's advertising regulations generally prohibit false and untrue statements in the advertising of alcohol beverages.[109] They also prohibit statements that are inconsistent with the approved product labels, false or misleading statements that disparage a competitor's product, health related statements that are false or misleading, and misleading guarantees, though they do not prohibit offering money back guarantees. [110] The TTB offers a free, voluntary pre-clearance service for advertisers of alcoholic beverages to seek approval of any print or broadcast advertising.[111]

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[102] *2020 NAI Code of Conduct*, NETWORK ADVERT INITIAT., https://thenai.org/wp-content/uploads/2021/07/nai_code2020.pdf.

[103] *Opt Out*, NETWORK ADVERT. INITIAT., https://thenai.org/opt-out/ (last visited August 29, 2022).

[104] *Id*.

[105] 27 U.S.C. § 201 et seq.

[106] *Id.* at § 201.

[107] 27 C.F.R. § 19.3.

[108] *Advertising – Alcohol Beverage Advertising,* ALCOHOL & TOBACCO TAX & TRADE BUREAU, https://www.ttb.gov/advertising/alcohol-beverage-advertising (last visited August 27, 2022) [hereinafter *Alcohol Beverage Advertising*].

[109] 27 C.F.R. § 4.64; 27 C.F.R. § 5.235; 27 C.F.R. § 7.235.

[110] 27 C.F.R. § 7.235.

[111] *Alcohol Beverage Advertising*, *supra* note 108.

The Alcohol Beverage Labeling Act mandates that health warning statements appear on all alcoholic beverages that are offered for sale or distribution.[112] Producers must apply for a certification or exemption of labels/bottle approval and follow the labeling and advertising regulations of the Alcohol Beverage Labeling Act.[113]

Alcohol sold in chain restaurants is also subject to the FDA's rule requiring the disclosure of calorie information.[114] Finally, the Alcohol and Tobacco Tax and Trade Bureau banned subliminal advertising and alcohol advertising.[115]

The Beer Institute, an industry advocacy group that includes the nation's top brewers and distributors, has adopted a voluntary advertising and marketing code that specifically applies to online advertising as well as traditional advertising.[116] This code requires the group's members to portray beer responsibly, ensure that their advertisements are only targeting adults, and not use ads that portray or imply any illegal activity. The Distilled Spirits Counsel of the United States ("DISCUS") and the Wine Institute have both adopted similar voluntarily advertising and marketing guidelines.[117] In addition, the FTC publishes reports regarding the self-regulation of the alcohol industry and specifically focuses on the industry's efforts to reduce ads targeted to youths.[118] These reports have included recommendations that alcohol companies use age-gating technology offered by social media sites and in their own websites to ensure that the websites are only accessed by people 21 and older.[119] The recommendations also included making privacy policies brief, understandable and transparent regarding the data collected by the alcohol industry through its websites and how it uses that data.[120] Finally, the FTC has recommended that alcohol companies engage in blocking technology and implement frequent monitoring of user generated content on platforms that permit or enable user engagement to reduce the number of violations of the voluntary advertising and marketing codes established by their respective industry advocacy groups.[121] In addition to the FTC's recommendations, DISCUS recommends that

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[112] 27 U.S.C. § 215.

[113] *Id.*

[114] 21 C.F.R. § 101.11, *see also*, Comments and FDA Response on Proposed § 101.11(b)(1)(ii)—Food Not Subject to the Labeling Requirements, 79 Fed. Reg. 71,185, 71,186 – 87 (Dec.1, 2014) (explaining the FDA's conclusion that the disclosure requirements in § 403(q)(5) of the FD&C Act for standard menu items offered for sale in covered establishments apply to alcoholic beverages even though the labeling of alcoholic beverage containers under the Federal Alcohol Administration Act is regulated by the TTB).

[115] 27 C.F.R. § 7.235.

[116] *See Advertising/Marketing Code and Buying Guidelines*, BEER INST., https://www.beerinstitute.org/wp-content/uploads/2022/07/BEER-6735-2018-Beer-Ad-Code-Update-Brochure-for-web-2.pdf.

[117] *See Responsible Practices for Beverage Alcohol Advertising*, DISTILLED SPIRITS COUNCIL OF THE U.S., https://www.distilledspirits.org/code-of-responsible-practices/ (last visited August 29, 2022); *Wine Institute's Code of Advertising* Standards, WINE INST. (June 2011), https://wineinstitute.org/our-work/responsibility/social/ad-code (last visited August 29, 2022).

[118] Janet M. Evans & Richard F. Kelly, *Self-Regulation in the Alcohol Industry: A Federal Trade Commission Report to Congress* (1999), https://www.ftc.gov/reports/self-regulation-alcohol-industry-federal-trade-commission-report-congress.

[119] *Id.* at 14.

[120] *Id.* at 8.

[121] *Id.* at 11.

producers and distributors of distilled spirits clearly identify what online communications constitute advertising and incorporate social responsibility statements into all communications where practical.[122] DISCUS also encourages marketers to include instructions for any messages that are to be forwarded that they only be forwarded to individuals who are of legal age.[123]

3. Regulation And Self-Regulation Of Marijuana Advertising

Under federal law, it is still illegal to sell or advertise marijuana.[124] However, messages that simply encourage the use of marijuana have been excluded from the definition of an advertisement.[125] As states have begun decriminalizing, and legalizing, the recreational use of marijuana, they have also been implementing advertising laws governing how recreational marijuana can be marketed.[126] Advertising laws applicable to the use of recreational marijuana are separate from advertising restrictions that apply to medical marijuana. Common state restrictions on the advertising of recreational marijuana include: a prohibition on deceptive or misleading statements; a prohibition on tactics that may appeal to children (such as ads that include cartoons, toys, or mascots); a prohibition on claims of therapeutic or curative effects; a prohibition on the depiction of marijuana overconsumption; and a prohibition on the use of unsolicited popups to promote recreational marijuana.[127] Some states limit the use of internet advertising of recreational marijuana to sites where 85% or more of the audience is expected to be 21 years or older.

The National Association of Cannabis Businesses ("NACB") has attempted to establish industry wide standards for the promotion of marijuana.[128] The NACB has recommended marketers use age-gating on their websites to ensure users are over the age of 21, a prohibition on the use of popup ads, and a prohibition on false or misleading statements or prohibited content when using social media.[129] All major social media platforms, including Google ads, prohibit all advertising for marijuana.[130] However, marijuana businesses do create accounts on these

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[122] *See Responsible Practices for Beverage Alcohol Advertising*, DISTILLED SPIRITS COUNCIL (May 26, 2011) https://www.distilledspirits.org/wp-content/uploads/2018/03/May_26_2011_DISCUS_Code_Word_Version1.pdf.

[123] *Id.*

[124] *See* 21 U.S.C. § 802(32)(A).

[125] *NACB National Standards: Cannabis Industry Best Practices, Art. 2: Advertising Standards*, NAT'L ASS'N OF CANNABIS BUS. (Nov. 5, 2018), https://nacb.com/advertising/ (last visited September 1, 2022).

[126] *Id.*

[127] *State Medical Cannabis Laws*, NAT'L CONF. OF STATE LEG., https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx (last visited August 27, 2022).

[128] *Advertising Standards For Cannabis & Hemp Businesses*, NAT'L ASS'N CANNABIS BUS. (November 5th, 2018) https://nacb.com/wp-content/uploads/2022/04/nacb-02-Advertising-Standards-for-Cannabis-Hemp-Businesses.pdf.

[129] *Id.* at Standard 2.07 (setting forth the standard for digital advertising of cannabis).

[130] *Advertising Policies Help*, GOOGLE, *https://support.google.com/adspolicy/answer/6014299?hl=en* (last visited August 29, 2022).

platforms.[131] Those accounts are subject to being eliminated by the service platforms but see significant reach during the periods when they are active.[132]

J. Platform-Specific Rules and Requirements (Twitter, Facebook, Instagram, TikTok)

Social media advertising is a hyper-directed method of growing, or advertising to, a brand's customer base. It has completely transformed the way that companies engage with their customers and advertise their products or services. It also presents novel legal challenges. This section provides an overview of the issues raised by the specific social media platform's rules and requirements that companies must address when advertising on those platforms.

1. Terms of Service and Community Guidelines

All major social media platforms have Terms of Service and/or Community Guidelines that govern the content shared on the platform. These guidelines are designed to control the direction of the platform. Content that violates the guidelines may be removed. For example, Instagram summarizes its community guidelines by stating, "[w]e want Instagram to continue to be an authentic and safe place for inspiration and expression. Help us foster this community. Post only your own photos and videos and always follow the law. Respect everyone on Instagram, don't spam people or post nudity."[133] Similarly, Facebook's Community Standards state that it "recognizes how important it is for Facebook to be a place where people feel empowered to communicate, and we take our role seriously in keeping abuse off the service. That's why we developed standards for what is and isn't allowed on Facebook."[134] These Guidelines help to shape what content is allowed on the platforms and allow the platforms to eliminate unwanted or harmful content. Advertisers should keep the platform's community guidelines in mind when developing content for social media.

2. Advertising Guidelines

Beyond community guidelines, most social media platforms have created advertising guidelines to help businesses create effective advertisements while complying with the platform's specific rules. For example, Tik Tok has very specific advertising guidelines[135] that dictate certain language requirements, image and video specifications, establish ad landing page requirements, and prohibit certain products and services from being advertised altogether (e.g., cigarettes, political ads, military equipment, animals, and funeral services). If an ad is not compliant with these requirements, it will not be approved by the platform.

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[131] *Top 10 Cannabis Facebook Pages to Follow*, HIGH TIMES (Oct. 30, 2019) https://hightimes.com/sponsored/top-10-cannabis-facebook-pages-to-follow/ (last visited September 1, 2022).

[132] *See, e.g.*, *Proper Cannabis MO*, FACEBOOK (Aug. 27, 2022), https://www.facebook.com/ProperCannMo (a Facebook business page operated by a dispensary in St. Louis Missouri who, as of August 27, 2022, had 2,900 followers) (last visited August 29, 2022).

[133] *Community Guidelines*, INSTAGRAM, https://help.instagram.com/477434105621119/?helpref=hc_fnav (last visited August 27, 2022).

[134] *Community Standards*, FACEBOOK, https://transparency.fb.com/policies/community-standards/ (last visited August 27, 2022).

[135] *Advertising Policies – Ad Creatives and Landing Page*, TIK TOK, https://ads.tiktok.com/help/article?aid=9552 (last visited August 27, 2022).

Many platforms also provide an "Ad Review Checklist" to help ensure compliance with the platform's policies. Tik Tok's checklist asks the advertiser to:

- Ensure language in your ad creative and copy are accepted in your target location(s).
- Remove any symbols, incorrect spelling, or gimmicky use of spelling in your ad creative, ad copy, and display name.
- Avoid copy or creative which advises users to take actions that aren't supported on the app, like swiping up to download or displaying a mouse cursor.
- Make sure you're using high quality media that meets our image specifications and video specifications.
- Make sure that your ad creative and display name are consistent with your landing page.
- Ensure that any products featured in an ad are consistent with those shown on your landing page.
- Avoid using any elements without required permission in both your ad and your landing page. This includes brands, hashtags, copyrighted media, imitations and replicas. If you have proper authorization, upload your authorization documentation in the Account Settings under Business Verification.
- Ensure your video ad includes background audio (music or sound) that is clear and coherent. Audio is required for video ads."[136]

By complying with these checklists and advertising requirements, advertisers are more likely to have their ads approved by the platform. Reviewing these prior to creating an ad can help advertisers ensure that an ad is compliant and cut down on the amount of time spent making changes to get approval.

3. <u>Promotions</u>

Most social medial platforms have specific Promotion Guidelines that govern promotions run on the platform. These guidelines generally impose greater restrictions than state and federal law. Franchisors and franchisees *cannot* assume that if their promotion complies with state and federal law it also complies with a platform's internal guidelines. Advertisements that are shared or posted on social media platforms cannot violate that platform's Community Guidelines and must comply with the Promotion Guidelines.

For example, Meta's (Facebook and Instagram's parent company) promotion guidelines outline how a company may use its platform to run a Promotion.[137] A company may conduct a

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[136] *Id.*

[137] *Facebook Advertising Policies,* FACEBOOK, https://www.facebook.com/policies_center/pages_groups_events (last visited August 27, 2022).

promotion within Meta's apps and on Facebook Page Timelines by: (1) collecting entries by having users post on the page, comment, direct message the post, or like the post, (2) collecting entries by having users message the page, or (3) using likes as a voting mechanism.[138] However, Tik Tok, Snapchat, and Twitter have different requirements that are not as explicit as Meta's requirements.[139] Brands should understand the requirements for each platform on which they would like to run a promotion.

III. ENFORCEMENT BODIES, PROCEDURES, AND REMEDIES

A. Complaints under Section 43(a) of the Lanham Act

A threshold issue in claims brought under the deceptive advertising prong of Section 43(a) is standing. To bring a deceptive advertising claim under Section 43, a plaintiff must have both standing under Article III of the United States Constitution and statutory standing under the Lanham Act.[140] To establish Article III standing, the plaintiff must allege and show an injury that plaintiff has suffered, or will imminently suffer, that is fairly traceable to the defendant's conduct and can likely be redressed by a favorable decision.[141] To establish statutory standing, the plaintiff must allege an injury to its commercial interest in reputation or sales, and that the defendant's deceptive conduct proximately caused the plaintiff's economic or reputational injury.[142] The issue of standing limits who can state a claim for deceptive advertising under the Lanham Act. As an illustration, a hotel chain advertises that it uses "state of the art technology that makes its rooms the cleanest in the industry," but in fact implements cleaning procedures that are no different from those of its competitors. A guest who gets sick following a stay at the hotel would not have standing to bring a claim for deceptive advertising under Section 43(a) because the guest would not be able to allege an injury to her commercial interest in reputation or sales. However, a neighboring hotel, which lost sales to the deceptively clean hotel *would* have standing to bring a claim under Section 43(a) assuming it could show that its decreased sales were the result of the deceptive hotel's advertising campaign.

The issue of statutory standing is what bars individual consumers from bringing claims for deceptive advertising under Section 43(a)(1)(B), even though the purpose of the statute is to protect consumers from such advertising. Section 45 of the Lanham Act limits standing under Section 43(a)(1)(B) to those who engage in interstate commerce and whose competitive or commercial interests have been harmed.[143] Individual consumers who want redress for deceptive advertising must seek remedies under state consumer protection laws, or by filing complaints with the FTC.

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[138] *Id.*

[139] Jennifer Hibbs, *How to Run a Legal TikTok Contest or Sweepstakes*, MARDEN-KANE DIGIT. PROMOTIONS (Jan. 3, 2020), http://www.mardenkane.com/articles/how-to-run-a-legal-tiktok-contest-or-sweepstakes.html (last visited August 27, 2022).

[140] Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 126 (2014).

[141] *Id.* at 125.

[142] *Id*.

[143] 15 U.S.C. § 1127.

Most federal courts require plaintiffs to plead five elements to state a claim under Section 43(a)(1)(B):

1. That the defendant made a false or misleading statement of fact in a commercial advertisement about a product or service;

2. That the statement deceived, or had the capacity to deceive a substantial segment of the defendant's potential customers;

3. That the deception was material, and thus was likely to influence a consumer's purchasing decisions;

4. That the statement was made in interstate commerce; and

5. That the statement injured, or is likely to injure, the plaintiff.[144]

These elements are briefly expanded upon, below.

1. Element One: False or Misleading Statement in a Commercial Advertisement

As implied by the two-part phrase "false or misleading statements," courts recognize two types of statements that can satisfy the first element: statements that are literally false and statements that may not be literally false but are implicitly false and therefore misleading.[145] A statement is literally false only if it can be reasonably interpreted as a statement of objective fact, is specific and measurable, and is capable of being proven false.[146] If a statement is proven to be materially false, that proof can give rise to a presumption of consumer deception that can help plaintiff satisfy the second element.[147] A statement will not be deemed to be literally false if it can be reasonably interpreted in different ways, or if the claim it makes is implied, attenuated, or merely suggestive, and thus requires the consumer to draw a conclusion.[148] However, statements that are not literally false can still be shown to be misleading. For example, a claim that a motor oil will give consumers "longer engine life and better engine protection" may imply that the product is superior to its competitors' products even though it never references the competitors' products.[149] Similarly, naming a product "NIGHTTIME STRENGTH" may be deemed to imply that the product is specially-formulated to treat a condition at night, even though the advertisement did not represent any specific formulation.[150]

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[144] *See* Compulife Software Inc. v. Newman, 959 F.3d 1288, 1316 (11th Cir. 2020); Skydive Ariz., Inc. v. Quattrocchi, 673 F.3d 1105, 1110 (9th Cir. 2012); Highmark, Inc. v. UPMC Health Plan, Inc., 276 F.3d 160, 171 (3rd Cir. 2001); Pizza Hut, Inc. v. Papa John's Int'l, Inc., 227 F.3d 489, 495 (5th Cir. 2000).

[145] 15 U.S.C. § 1127.

[146] Time Warner Cable, Inc. v. DIRECTV, Inc., 497 F.3d 144, 152 (2d Cir. 2007).

[147] Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc., 299 F.3d 1242, 1247 (11th Cir. 2002).

[148] *Id.*

[149] Castrol Inc. v. Pennzoil Co., 987 F.2d 939, 941, 946-48 (3d Cir.1993).

[150] Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumers Pharm. Co., 290 F.3d 578, 590 (3d Cir. 2002).

Assuming a plaintiff can show that a statement was false or misleading, the plaintiff must still show that the statement was made in a commercial advertisement about a product or service in order to prove the first element.[151] The scope of what is a "commercial advertisement" is broader than what consumers might consider traditional advertising. It generally includes any commercial speech, made for the purpose of influencing consumers to purchase the defendant's goods or services, which is disseminated sufficiently to the relevant purchasing public.[152] Depending on the market for the particular product or service, the "relevant purchasing public" may be a small group of potential consumers.[153]

2. Element Two: The Statement Deceived, or Had the Capacity to Deceive a Substantial Segment of the Defendant's Potential Customers

A failure to disclose facts does not generally give rise to a claim for deceptive advertising unless the factual statements in the advertisement become materially misleading without the additional facts.[154] Some courts require proof of actual deception to satisfy the second element.[155] Others permit a showing of likely deception.[156] However, showing a tendency of likely deception still requires a showing that *someone* was deceived.[157] Plaintiffs must also show how consumers react to the advertisement, rather than just asserting that the advertisement, in theory, could deceive a consumer.[158] Plaintiffs typically use a survey or some other testimony to show actual deception occurred. There is no statutory definition of what constitutes a "substantial segment" of the customer population, but courts commonly use 15% as a guideline for an adequate deception rate.[159] Proving that the defendant intended to deceive can create a presumption that the plaintiff has met its burden regarding the second element.[160]

Mere puffery is insufficient to support a claim for deceptive advertising, but it can be difficult to discern what constitutes puffery and what is a potentially actionable claim. Examples of the types of statements that courts have found to be definite enough to not be puffery are:

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[151] 15 U.S.C. § 1125(a).

[152] Grubbs v. Sheakley Grp., Inc., 807 F.3d 785, 801 (6th Cir. 2015); Boule v. Hutton, 328 F.3d 84, 90-91 (2d Cir. 2003).

[153] Glob. Tubing LLC v. Tenaris Coiled Tubes LLC, Civil Action No. 4:17-CV-3299, 2018 WL 3496739, at *5 (S.D. Tex. July 20, 2018).

[154] JTH Tax, Inc. v. H&R Block E. Tax Serv., Inc., 28 F. App'x 207 (4th Cir. 2002).

[155] *See, e.g., Pizza Hut*, 227 F.3d 489, at 497.

[156] *See, e.g.*, Sandoz Pharm. Corp. v. Richardson-Vicks, Inc., 902 F.2d 222, 228-29 (3d Cir. 1990).

[157] *Pizza Hut*, 227 F.3d 489, at 497.

[158] *Id.* at 503.

[159] *See, e.g.*, *Novartis*, 290 F.3d 578, at 594.

[160] *See* Clorox Co. Puerto Rico v. Proctor & Gamble, 228 F.3d 24, 36 n.9 (citing Johnson & Johnson-Merck Consumer Pharm. Co. v. Rhone–Poulenc Rorer, 19 F.3d 125, 131–32 (3d Cir. 1994); Johnson & Johnson-Merck Consumer Pharm. Co. v. Smithkline Beecham Corp., 960 F.2d 294, 298–99 (2d Cir.1992); and J. THOMAS MCCARTHY, 5 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 27:58 (Deception Presumed From Intent) (5th ed. June, 2022) [hereinafter MCCARTHY].

- A detergent manufacturer claiming that its detergent gets clothes whiter than chlorine bleach;[161]

- A motor oil company claiming that its product offers better engine protection than a competitor;[162] and

- A lawn seed company claiming that its seed will require 50% less mowing.[163]

3. <u>Element Three: Materiality</u>

To show that the statement was material, the plaintiff must show that it is likely to influence a consumer's purchasing decisions.[164] A determination of materiality is based on:

- The importance of the product or service feature referenced in the statement to consumers;[165]

- The statement's degree of falsity;[166] and

- The likelihood that consumers will actually perceive the statement (*i.e.*, a false statement on the packaging of a product purchased online may not be material if the customer did not see the packaging before making the purchase).[167]

4. <u>Element Four: The Statement Was Made in Interstate Commerce</u>

Advertisements disseminated across multiple states clearly are made in interstate commerce. However, intrastate advertisements can still affect interstate commerce if the impact on the competitor's business expands beyond the defendant's state's borders.[168] However, truly local advertisements can make this element fatal to a plaintiff's claim.[169]

5. <u>Element Five: Injury</u>

Because consumers do not have standing to bring claims under Section 43(a), the injury at issue in such claims is not the costs the consumer incurred to purchase the product or service due to the deceptive advertisement. Rather, plaintiffs in Section 43(a) cases are other businesses

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[161] *Clorox*, 228 F.3d 24, at 38-39.

[162] *Castrol*, 987 F.2d 939, at 941, 945-46.

[163] Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1145 (9th Cir. 1997).

[164] *See, e.g.*, *Johnson & Johnson Vision Care*, 299 F.3d 1242, at 1250-51; Cashmere & Camel v. Saks Fifth Avenue, 284 F.3d 302,311-12 n.10 (1st Cir. 2002).

[165] *See, e.g.*, Nat'l Basketball Assoc. v. Motorola, Inc., 105 F.3d 841, 855 (2d Cir. 1997).

[166] *See, e.g.*, Pom Wonderful LLC v. Welch Foods, Inc., 737 F. Supp. 2d 1105, 1113 (C.D. Cal. 2010).

[167] *See, e.g.*, Rice v. Fox Broad. Co., 330 F.3d 1170, 1181 (9th Cir. 2003), overruled on other grounds, Skidmore v. Led Zeppelin, 952 F.3d 1051, 1067 (9th Cir. 2020).

[168] Highmark, Inc. v. UPMC Health Plan, Inc., 276 F.3d 160, 165 (3rd Cir. 2001).

[169] McMahon v. Refresh Dental Mgmt., LLC, No. CV 16-170, 2016 WL 7212584, at *9 (W.D. Pa. Dec. 13, 2016).

who have suffered economic or reputational damage as a result of the deceptive ad. For example, the plaintiff in the case of the motor oil company that implied that its product gave better protection and longer engine life than the competitor, would need to be the competitor, who would be required to show that it suffered economic damages (for example, reduced sales) as a result of the defendant's deceptive advertisement, or that it suffered reputational damage (for example a perception that it was no longer a top-of-the-line motor oil) due to the defendant's deceptive advertisement.[170]

B. Complaints under the FTC Act Made to the FTC, Either by the Public or a Competitor

Complaints made to the FTC by the public or by a competitor who believes that an advertiser has violated the Act can be investigated by the FTC, but no private cause of action exists under the FTC Act.[171] If the FTC determines that a violation of the FTC Act, or the FTC Rules promulgated thereunder, has occurred, it can initiate an enforcement action,[172] or may attempt to resolve the claims through settlement and the entry of a consent order.[173] Consent orders do not require the advertiser to admit to a violation,[174] but consent orders do require the advertiser to agree to stop any practices deemed to be deceptive or unfair and agree to the enforcement of an order prohibiting them from engaging in deceptive or unfair practices in the future.[175]

If the FTC is unable to reach a settlement with the responsible party, the enforcement action can go before an administrative law judge,[176] or the FTC may file a civil action against the responsible party in district court.[177] The FTC's remedies include requesting cease and desist orders to either stop running the deceptive advertisement or engaging in a deceptive practice.[178] Such an order may also include orders to permit FTC oversight of claims made in future advertisements.[179] Fines for violating cease and desist orders can total up to $46,517 per day per violation.[180] The FTC can also seek civil penalties, consumer redress, or other monetary

[170] *See, e.g.*, Castrol Inc. v. Pennzoil Co., 987 F.2d 939, 941, 945-46 (3d Cir.1993).

[171] As discussed above, private causes of action are often brought by competitors harmed by deceptive advertising under Section 43(a) of the Lanham Act, and consumers can pursue remedies through state consumer protection statutes.

[172] 15 U.S.C. § 45.

[173] 16 C.F.R. § 2.31 – 2.34.

[174] 16 C.F.R. § 2.32.

[175] 16 C.F.R. § 2.33.

[176] 15 U.S.C. § 45.

[177] 15 U.S.C. §§ 53, 57b.

[178] 15 U.S.C. § 54; *see also* Dolcin Corp. v. FTC, 219 F.2d 749 (D.C. Cir. 1955).

[179] *See* FTC v. Colgate-Palmolive Co., 380 U.S. 374, (1965).

[180] *FTC Published Inflation – Adjusted Civil Penalty Amounts for 2022*, FTC (Jan. 6, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/01/ftc-publishes-inflation-adjusted-civil-penalty-amounts-2022 (last visited on August 28, 2022).

remedies.[181] These remedies can include full or partial refunds to consumers who purchased products or services as a result of the violative advertisements.[182] However, in 2021, the United States Supreme Court restricted the FTC's ability to seek monetary remedies when it ruled that the FTC could seek injunctive relief under Section 13(b) of the Act, but it could not seek monetary remedies under that section.[183] As a result, the FTC may only pursue monetary remedies under Section 19 of the FTC Act, which requires the FTC to have a final cease and desist order in place under Section 5 before pursuing monetary relief.

C. Complaints to the FCC

Consumers can submit complaints to the FCC about ads that they believe are offensive due to obscenity, indecency, or profanity. The FCC also prohibits broadcasters from knowingly broadcasting programming that includes subliminal messaging, which is messaging that includes words, images, or sounds that are of such a brief nature that they cannot be perceived at a normal level of awareness.[184] If the FCC determines that a broadcaster has violated the Communications Act, it can issue a warning, impose monetary forfeiture on the broadcaster, or revoke a station's license, however the FCC can also fine parties other than the broadcaster if it provides the party with notice that the party's behavior violates the FCC regulations and the party subsequently commits the same act again.[185] Federal courts can impose fines or even require imprisonment for up to two years for criminal violation of the Communications Act[186].

D. Complaints to the National Advertising Division ("NAD") of the Better Business Bureau's National Programs ("BBBNP") Made by Consumers or Competitors or Cases Initiated by the NAD Itself

The NAD reviews claims made by advertisers in marketing materials and can ask the advertiser for substantiation when the claims are challenged by consumers or competitors. [187] The NAD makes its own determination regarding the accuracy of the communication after reviewing the information the advertiser assets substantiates the claims made in the ad, and evidence of how consumers perceive and understand the advertising when determining whether claims are accurate and adequately substantiated.[188] Under the NAD's standard procedure for review, it can

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[181] 15 U.S.C. § 57b.

[182] *See, e.g. Advertising FAQ's: A Guide for Small Businesses*, FTC (Jan. 2022), https://www.ftc.gov/tips-advice/business-center/guidance/advertising-faqs-guide-small-business (last visited August 25, 2022) [hereinafter *Small Business Guide*].

[183] AMG Cap. Mgmt., LLC LC v. FTC, 141 S. Ct. 1341 (U.S. 2021).

[184] *The Public and Broadcasting: Business Practices in Advertising*, FCC (Sept. 2021), https://www.fcc.gov/media/radio/public-and-broadcasting (last visited August 28, 2022) ("Subliminal programming is designed to be perceived on a subconscious level only. Regardless of whether it is effective, the broadcast of subliminal material is inconsistent with a station's obligation to serve the public interest because it is designed to be deceptive.").

[185] 47 U.S.C. § 503(b)(5).

[186] 47 U.S.C. § 501.

[187] *See NAD Challenges*, BETTER BUS. BUREAU, NAT'L ADVERT. DIV., https://bbbprograms.org/programs/all-programs/national-advertising-division#challenges (last visited August 28, 2022) [hereinafter *NAD Challenges*].

[188] *See, e.g. National Advertising Review Board Recommends CoStar Group Discontinue Apartments.com Claim "The Most Popular Place to Find a Place,"* BETTER BUS. BUREAU, NAT'L PROGRAMS NEWSROOM (May 4, 2022), https://bbbprograms.org/media-center/newsroom/apartments.com-website-claims (last visited August 29, 2022).

take up to four to six months for the NAD to determine whether an ad is accurate and adequately substantiated.[189] If the NAD determines that an ad does not meet its standards, it frequently works with the advertiser to either make acceptable modifications to the ad or to pull the ad from circulation. In addition to the NAD standard procedure, it has established two other options for review.[190] The first is the Fast-Track SWIFT process. Under the Fast-Track SWIFT process, the NAD issues an opinion about an advertisement within twenty business days of the claim's initiation.[191] The Fast-Track SWIFT process is limited to three types of challenges: the prominence or sufficiency of disclosures (which includes review of influencer marketing, native advertising, and incentivized reviews of products); misleading pricing or sales claims; and misleading express claims that do not require the review of evidence or other studies to substantiate the validity of the claim.[192] The Fast-Track SWIFT process is fully conducted online, and requires challengers to pay lower filing fees than the standard process.[193] The second process is called the Complex Track Process. This process is used for challenges that involve multiple expert reports that explain or rebut evidence submitted to substantiate an advertisement's claims (such as consumer protection surveys and scientific or technical studies) or that challenge numerous claims for a variety of products.[194] Neither process involves what litigators would consider a "discovery" process. Rather the parties can provide documentation (such as studies or tests when utilizing the standard or complex process) with their written submissions.[195] The advertiser always bears the burden of proof.[196]

NAD proceedings are private.[197] Decisions are issued in writing, and if the claim is substantiated, the decision will include recommendations on how the ad should be modified, or if it should be discontinued.[198] The NAD cannot award monetary damages, enforce their recommendations, or impose injunctive relief.[199]

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[189] *See NAD Standard Track,* BETTER BUS. BUREAU, NAT'L ADVERT. DIV., https://bbbprograms.org/programs/all-programs/national-advertising-division/NAD-Standard-Track (last visited August 28, 2022).

[190] *See NAD Challenges*, *supra* note 187

[191] *NAD Fast-Track SWIFT*, BETTER BUS. BUREAU, NAT'L ADVERT. DIV., https://bbbprograms.org/programs/all-programs/national-advertising-division/NAD-Fast-Track-SWIFT (last visited August 28, 2022).

[192] *Id*.

[193] *Id*.

[194] *NAD Complex Track*, BETTER BUS. BUREAU, NAT'L ADVERT. DIV., https://bbbprograms.org/programs/all-programs/national-advertising-division/NAD-Complex-Track (last visited August 28, 2022).

[195] *Id*.

[196] *NAD Frequently Asked Questions: The Process,* BETTER BUS. BUREAU, NAT'L ADVERT. DIV., https://bbbprograms.org/programs/all-programs/national-advertising-division/faqs#process (last visited August 28, 2022).

[197] BBB NAT'L PROGRAM, THE ADVERTISING INDUSTRY'S PROCESS OF VOLUNTARY SELF-REGULATION 6 (2021).

[198] *NAD Frequently Asked Questions: Meetings, Discussions, Announcements,* BETTER BUS. BUREAU, NAT'L ADVERT. DIV., https://bbbprograms.org/programs/all-programs/national-advertising-division/faqs#mda (last visited August 28, 2022).

[199] BBB NAT'L PROGRAM, *supra* note 197, at 14 – 15 (which provides information regarding what the NAD does if the claim is substantiated).

Appeals of the NAD's decisions can be made to the National Advertising Review Board (NARB) which is jointly sponsored by the BBBNP and Advertising Industry Trade Associations.[200] The NARB is made up of a panel of advertising professionals. Advertisers that refuse to comply with the NARB appeals process have their advertising claims referred to the FTC or other applicable government agency as a complaint.[201]

The NAD has also used its authority to monitor good advertising practices to establish standards for native advertising. Native ads "often resemble the design, style, and functionality of the media in which they are disseminated," and they "may appear on a page next to non-advertising content [or be] embedded in entertainment programming."[202] In one example, it found that Taboola (an online content recommendation widget appearing on editorial websites) was required to ensure its use of disclosures for links to sponsored content and that the disclosures were of a sufficient size and in an adequate proximity to the content.[203] It required the disclosures identify the content as "sponsored content by Taboola."[204] NAD has also required American Express to change labels for its "OPENForum.com" to more clearly indicate that the forum is associated with American Express.[205] In response to the NAD's decision, American Express began identifying its OPENForum.com website as the American Express Open Forum.[206] Finally, the NAD has required People magazine to include more express and explicit disclosures that the content of its "stuff we love" video feature on its website constitutes advertising content for the items featured in the video.[207]

IV. SPECIFIC ADVERTISING ISSUES RELEVANT TO THE FRANCHISE INDUSTRY

A. Claim Clearance

While franchise systems continue to utilize more traditional marketing methods such as television, radio, print, and point of sale collateral, many franchisors view digital marketing – and the related customer data underlying such marketing – as the prime area of investment for the future.[208] Franchisors are also increasingly applying digital advertising strategies and

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200 *Id.*

201 *Id. at 22*.

202 *Native Advertising: A Guide for Businesses*, FTC (Dec. 2015), https://www.ftc.gov/business-guidance/resources/native-advertising-guide-businesses (last visited August 28, 2022) [hereinafter *Native Advertising Guide*].

203 *NAD Reviews Taboola's Native Ad Widget*, BETTER BUS. BUREAU, NAT'L PROGRAMS ARCHIVE (May 20, 2014), https://bbbprograms.org/archive/nad-reviews-taboola-s-native-ad-widget-recommends-clearer-disclosures (last visited on August 28, 2022).

204 *Id*.

205 *Id*.

206 *American Express Modified 'Native Advertising' Practices to Provide Greater Transparency*, BETTER BUS. BUREAU, NAT'L PROGRAMS ARCHIVE, https://bbbprograms.org/archive/american-express-modifies-native-advertising-practices-to-provide-greater-transparency (last visited on August 28, 2022).

207 *Native Advertising: NAD Reviews Joyus' Product Videos at Magazine's Online Edition, Recommends Modifications*, BETTER BUS. BUREAU (May 25, 2016), https://bbbprograms.org/archive/native-advertising-nad-reviews-joyus-product-videos-at-magazine-s-online-edition-recommends-modifications (last visited on August 28, 2022).

208 *See, e.g.*, Ben Coley, *Focus Brands' New Digital Strategy Could Be a Game Changer*, QSR MAGAZINE, May 16, 2022, https://www.qsrmagazine.com/exclusives/focus-brands-new-digital-strategy-could-be-game-changer (last visited August 25, 2022); Antonia K. Scholz & Mark VanderBroek, *Avoiding and Litigating Claims in Advertising*

sophisticated data analytics to target and attract prospective franchisees. While digital marketing has undeniable benefits, the "emphasis on speed" inherent in this method of advertising can result in rushing, or even bypassing, either or both legal clearance of the advertising materials and when necessary, registering the advertisements with the proper state agencies, "exposing the brand to greater risk."[209] Now more than ever, it is important that franchisors understand the combination of federal, state, and local laws, as well as self-regulatory codes of conduct and common law, that govern digital advertising in the United States.

This section of the paper identifies the general legal principles that franchisors should use to conduct business and legal review of all marketing campaigns prior to dissemination, whether they be directed to consumers or prospective franchisees. It also provides practical guidance on legal risks and best practices for certain types of digital advertising. This paper does not address issues relating to use of marketing funds for digital ad campaigns, or liability and potential indemnification obligations, as between the franchisor and franchisee, for violations of marketing laws.[210]

1. <u>Unfair or Deceptive Practices</u>

As addressed in Section II of this paper, the most fundamental rule for advertising is that all material claims made to consumers, regardless of the medium, must be truthful and non-deceptive and cannot be unfair.[211] Examples of material claims include representations about a product's performance, features, safety, price, or effectiveness.[212] According to the FTC, practices that have been found misleading or deceptive include "false oral or written representations, misleading price claims, sales of hazardous or systematically defective products or services without adequate disclosures, failure to disclose information regarding pyramid schemes, use of bait and switch techniques, failure to perform promised services, and failure to meet warranty obligations."[213]

Franchised Products and Services, ABA 42ND ANNUAL FORUM ON FRANCHISING W-10, at 1 (2019) ("Going forward the majority of advertising will be done digitally and electronically, through methods such as social media advertising (through platforms including Facebook, Twitter, and Instagram), content marketing (*e.g.*, through blog posts), pay-per-click search engine advertising, email marketing, affiliate marketing, marketing through social media influences and endorsers, and native advertising.").

[209] Leita Walker, Jeff Norris & Kathleen Ugalde, *The Digital Economy: Friend of Foe to Franchising?*, INT'L FRANCHISE ASS'N 51ST ANNUAL LEGAL SYMP., at 4 (2018); *cf. id.* ("Sometimes referred to as 'newsjacking,' real-time marketing occurs when a brand, usually through its social media pages, attempts to interject itself or its products and services into conversations regarding current events or trends.").

[210] For information on these topics, the authors suggest the following resources: Thomas R. Ayres & Beata Krakus, *Advertising and Marketing Funds: What Are You Doing With 'My' Money?*, ABA 43RD ANNUAL FORUM ON FRANCHISING W-23 (2020); Marlen Cortez Morris, Jim Goniea & Gerald Wells, *How to Develop a Comprehensive and Balanced Social Media Policy*, ABA 42ND ANNUAL FORUM ON FRANCHISING W-15 (2019); Edward Chansky, Michael Laidhold & Jill Suwanski, *The Ins and Outs of Franchise Advertising Programs*, INT'L FRANCHISE ASS'N 49TH ANNUAL LEGAL SYMP. (2016); Steven Claussen, Chad Finkelstein & Shannon McCarthy, *Tweet, Like, Share, Repeat – Effective Management of a Franchise Brand's Social Media Program*, INT'L FRANCHISE ASS'N 49TH ANNUAL LEGAL SYMP. (2016). *See also* Gary R. Batenhorst, Lindsey Cooper & Daniel Graham, *Mobile Apps, Remote Ordering, and Loyalty Programs; Risks and Opportunities*, ABA 42ND ANNUAL FORUM ON FRANCHISING W-7 (2019); Walker, et al., *supra* note 209.

[211] 15 U.S.C. § 45(a)(1); *see also Small Business Guide*, *supra* note 182; *see also* Jennifer B. Moore & Linda K. Stevens, *Avoiding False Advertising Claims*, ABA 29TH ANNUAL FORUM ON FRANCHISING W-2, at 7 (2006).

[212] *See Small Business Guide*, *supra* note 182.

[213] *Id*.

When conducting a clearance review, it is important to consider the advertisement from the appropriate perspective and to determine the overall message that the advertisement could convey. "Cautious advertisers will screen not only the words and phrases used in an advertisement, but will also take into consideration pictures, graphs, and voice-overs [as well as] the size, content, and location of applicable qualifiers, disclosures and disclaimers."[214] In determining if an advertisement is unfair or deceptive, the FTC reviews advertising claims from the point of view of a reasonable consumer; however, if the advertisement is targeted to a particular audience, the FTC will review the advertisement based a reasonable member of the targeted group.[215] If an advertising claim can be interpreted in multiple ways, then each reasonable interpretation must be true.[216] The FTC's determination is based on the "net impression" conveyed by the advertisement, including words, phrases, and pictures.[217] "Put another way, both what the ad says *and* the format it uses to convey that information will be relevant."[218] Thus, it is possible that a truthful claim can have a deceptive or unfair implication when viewed in the context of the entire advertisement.[219] Additionally, the FTC also analyzes what information is omitted from the advertisement.[220] The failure to include certain information in the advertisement may leave the consumer with an inaccurate impression of the product.[221]

Advertisements should not mislead consumers about the commercial nature of the content.[222] "Advertisements or promotional messages are deceptive if they convey to consumers expressly or by implication that they're independent, impartial, or from a source other than the sponsoring advertiser – in other words, that they're something other than ads."[223] The use of native advertising raises unique challenges in this regard. Native ads "often resemble the design, style, and functionality of the media in which they are disseminated," and they "may appear on a

[214] *See* Moore, et al., *supra* note 211, at 13.

[215] *Id.* at 11.

[216] *Statement on Deception*, *supra* note 4; *see also*, Moore, et al., *supra* note 210, at 8 ("If a claim is susceptible to two or more interpretations, one of which may be deceptive or untrue, it may be found deceptive").

[217] *Native Advertising: A Guide for Businesses*, FTC (Dec. 2015), https://www.ftc.gov/business-guidance/resources/native-advertising-guide-businesses (last visited August 25, 2022) [hereinafter *Native Advertising Guide*]; *see also Small Business Guide*, *supra* note 182.

[218] *Id.*; *see also* Walker, et al*., supra* note 209, at 10 (stating that native advertising often goes "beyond mere 'similarity,'" as it "is designed to be seamless and to appear that it is not a separate advertisement, but actually an organic part of the content," and noting that native advertising typically has a higher click through rate than traditional advertising); *see also*, Moore, et al., *supra* note 211, at 9 (noting that a claim may convey a different message to consumers depending on the context in which it appears).

[219] *Native Advertising Guide*, *supra* note 217 (stating that the FTC considers "misleadingly formatted ads to be deceptive regardless of whether the underlying product claims that are conveyed to consumers are truthful"); *see also* FTC, ENFORCEMENT POLICY STATEMENT OF DECEPTIVELY FORMATTED ADVERTISEMENTS 2 (Dec. 22, 2015), https://www.ftc.gov/system/files/documents/public_statements/896923/151222deceptiveenforcement.pdf [hereinafter POLICY ON DECEPTIVELY FORMATTED ADVERTISEMENTS] (noting that it is becoming increasingly prevalent for advertisers to use native advertising or sponsored content, "which is often indistinguishable from news, feature articles, product reviews, editorial, entertainment and other regular content").

[220] *See e.g.,* Kraft, Inc. v. FTC, 970 F.2d 311 (7th Cir. 1992) (noting that "an omitted piece of information led to an implication which turned an ad that was literally true into a potentially deceiving ad.").

[221] *See Small Businesses Guide*, *supra* note 182.

[222] *See Native Advertising Guide*, *supra* note 217.

[223] *Id*.

page next to non-advertising content [or be] embedded in entertainment programming."[224] These ads usually consist of a headline, a thumbnail image, and a short description. If the consumer clicks on the ad, then they are taken to additional advertising content. The FTC is clear that "advertisers cannot use 'deceptive door openers' to induce consumers to view advertising content," and that advertisers are responsible for ensuring that native ads are clearly identifiable to consumers as advertising.[225]

2. Express vs. Implied Claims

All advertising claims are either express or implied. "Express claims" are those claims that directly state a proposition within the advertisement itself.[226] "Implied claims" are those claims that are reasonably inferred from a combination of express claims, depictions, and from what was omitted from the advertisement.[227] Express claims are typically easier to identify than implied claims because they are clear from the face of the ad. It is important to review all advertisements for implied claims because the advertiser is ultimately responsible for ensuring that all claims, whether express or implied, comply with the law; this is true regardless of whether the advertiser intended to make a particular claim.[228]

The NAD provides the following example of the difference between express and implied claims:

> [A]n ad for a "Wonder Widget" that is described as both "durable and able to withstand the toughest conditions" makes an express claim about the product itself, but also may include an implied claim that the Wonder Widget is nearly indestructible. Consumers reviewing the claim would reasonably expect that the Wonder Widget holds up to bad weather, poor maintenance, and generally will withstand the ways in which the Wonder Widget can be used and even foreseeably misused.[229]

It is important to note that an advertisement may have a series of individually true express or implied claims, but when taken together, they imply an additional reasonable interpretation that is false and misleading.[230] Thus, any review of advertising should include not only identification of all potential express and implied claims but also analysis of the overall impression that a consumer could take from the ad.

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[224] *Id.*

[225] *Id.*

[226] *See Small Businesses Guide*, *supra* note 182.

[227] *Id.*

[228] *See* Katherine Armstrong & Laura Brett, *Substantiating Advertising Claims in Three Steps: A How-To Checklist for Advertisers*, BETTER BUS. BUREAU, NAT'L ADVERT. DIV. (April 8, 2021), https://bbbprograms.org/media-center/blog-details/insights/2021/04/08/checklist-for-substantiating-advertising-claims (last visited August 25, 2022).

[229] *Id.*

[230] *See e.g.,* Kraft, Inc. v. FTC, 970 F.2d 311 (7th Cir. 1992) (holding that ad for cheese product contained multiple claims that were independently true but also implied claims for which the advertiser did not have substantiation).

3. **Monadic vs. Comparative Claims**

"Monadic claims" are claims which tout the alleged benefits of the product itself, based on its own attributes, without comparison to any competition; however, monadic claims can be self-comparative (*e.g.*, a manufacturer touting its product as being "Now Even Better").[231] Examples of monadic claims include claims relating to product performance and benefits and claims relating to the product's attributes. An advertiser should substantiate monadic claims with the appropriate testing to reflect the nature of the claim.

Alternatively, "comparative claims" are those that describe an attribute or performance of the advertiser's product or service in comparison to that of a competitor or the market category generally.[232] "Provided that it is 'truthful and non-deceptive,' the FTC views comparative advertising as 'a source of important information to consumers and assists them in making rational purchase decisions.'"[233] While comparative advertising claims are commonplace,[234] advertisers who are not careful in structuring such claims can find themselves subject to regulatory enforcement activity and industry self-regulatory actions, as well as false advertising lawsuits from competitors under the federal Lanham Act or state laws.[235]

In a comparative advertisement, an advertiser may generally use its competitor's trademark so long as the use is limited to what is necessary to identify the trademark owner or its goods or services.[236] For example, the advertiser may choose to include the name of its competitor but not to use the competitor's logo. Courts dub such use "nominative" or "referential"

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[231] *See, e.g., NAD Finds General Mills Can Support "Now Even Better" Claim for Progresso Soup; Claim Challenged by Campbell*, BETTER BUS. BUREAU, NAT'L PROGRAMS ARCHIVE (Feb. 9, 2011), https://bbbprograms.org/archive/nad-finds-general-mills-can-support-now-even-better-claim-for-progresso-soup-claim-challened-by-campbell (last visited August 25, 2022) ("A claim that a product is 'better' may be a comparative superiority claim or a monadic claim of product improvement depending on the context in which it appears.").

[232] *See* Marc Lieberstein & Michael J. Lockerby, *Mine is Better Than Yours! The Risks and Rewards of Comparative Advertising*, ABA 39TH ANNUAL FORUM ON FRANCHISING W-4, at 1 (2016) (noting that the FTC and FDA encourage product comparisons). This paper provides a thorough exploration of the laws governing comparative advertising claims and required substantiation; *see also* Moore, et al., *supra* note 211, at 23 (noting that advertisers are free to pick the target of their comparative advertising claim "provided that the target is clearly identified and, if appropriate, differences between the products that may affect a consumer's purchasing decision are disclosed").

[233] Lieberstein, et al., *supra* note 232, at 1.

[234] *Id*.; *see also Statement of Policy Regarding Comparative Advertising*, FTC (August 13, 1979), https://www.ftc.gov/legal-library/browse/statement-policy-regarding-comparative-advertising (last visited August 25, 2022) .

[235] *See* Bryan P. Couch, Constantine T. Fournaris & Quentin R. Wittrock, *Litigation Against Competitors*, INT'L FRANCHISE ASS'N 50TH ANNUAL LEGAL SYMP. (2017); *see also* Scholz, et al., *supra* note 208, at 4 ("Many false advertising claims arise in the context of allegedly misleading 'comparative advertising' where the defendant claims that its product is equivalent or superior to its competitor's product or has a quality for which its competitor's product does not.").

[236] Scholz, et al., *supra* note 208, at 4 ("Courts generally permit the use of a competitor's name, trademark, or logo as part of comparative advertising to accurately identify the competitor and its good or services, so long as 'it does not contain misrepresentations or create a reasonable likelihood that purchasers will be confused as to the source, identity or sponsorship of the advertiser's product.'" (quoting SSP Agric. Equip., Inc. v. Orchard-Rite Ltd., 592 F.2d 1096, 1103 (9th Cir. 1979)); *see also* Lieberstein, et al., *supra* note 232, at 20 ("Some common missteps to avoid in comparative advertising include: (1) displaying the competitor's trademark in a larger font than the other descriptive text or one's own trademark; (2) placing the competitor's mark in more prominent positions than one's own trademark; or (3) replicating the designs, logos, stylizations, special fonts, or color combinations of the competitor's mark.").

use, and it is not infringing so long as the advertiser does not use the competitor's trademark to imply or suggest sponsorship, endorsement, or affiliation with the trademark owner.[237]

Generally, claims involving comparative advertising are analyzed under the same legal principles applicable to other types of advertising. Comparative advertising carries added risk because it "create[s] an obvious plaintiff under the Lanham Act's false advertising section."[238] Thus, it is of particular importance that a company engaging in comparative advertising have proper substantiation to back up all claims. There are a few categories of claims for which the courts and the FTC require specific substantiation. One such category is generally referred to as "better than" or "superiority" claims in the context of Lanham Act litigation.[239] The FTC refers to these claims as "efficacy claims." Essentially, these are any claims where an advertiser represents that their product or services is "better than" what is offered by competitors. Under the FTC Act, "the advertiser must have a 'reasonable basis' for making the efficacy claim."[240] Another category of claims requiring a specific level of substantiation is referred to as "test prove claims" in the Lanham Act context or "establishment claims" in the FTC Act context. These are essentially claims that "suggest a product's effectiveness or superiority has been scientifically established."[241] Any practitioner reviewing advertising materials for clearance should pay special attention to any claims that fall into the aforementioned categories and ensure that the advertiser has proper substantiation of the claims before the advertisement is disseminated. It is important to note that a comparative claim that was accurate when it was first made may become inaccurate if the competitor changes its formulation or other product attributes. When that happens, a company

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[237] *See* J. David Mayberry, *Nominative Trademark Use: Affirmative or Negative Defense to Infringement?*, LANDSLIDE (March 30, 2022), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2021-22/march-april/nominative-trademark-use-affirmative-negative-defense-infringement/ (last visited August 25, 2022).

[238] Carol Anne Been & Sarah J. Yatchak, *A Basic Overview of Franchise and Consumer Advertising Standards,* ABA 31ST ANNUAL FORUM ON FRANCHISING W-2 (2008); *see also*, Lieberstein, et al., *supra* note 232, at 12-16 (discussing differences in standards for substation under Lanham Act and FTC Act).

[239] Lieberstein, et al., *supra* note 232, at 12-16; *see also* Castrol, Inc. v. Quaker State Corp., 977 F.2d 57, 62-63 (2nd Cir. 1992); Rhone-Poulenc v. Marion Merrell Dow, 93 F.3d 511, at 514 (8th Cir. 1996) ("…to establish that claim of superiority violates Lanham Act ban on false advertising, plaintiff must prove that defendant's claim of superiority is false"); Pom Wonderful, LLC v. FTC, 777 F.3d 478, at 490 (D.C. Cir. 2015) ("…if an advertisement conveys an efficacy claim, the advertiser must possess a reasonable basis for the claim; the FTC examines that question under the so-called *Pfizer* factors, including the type of product, the type of claim, the benefit of a truthful claim, the ease of developing substantiation for the claim, the consequences of a false claim, and the amount of substantiation experts in the field would consider reasonable").

[240] Lieberstein, et al., *supra* note 232, at 13; *see also* Mead Johnson & Co. v. Abbot Laboratories, 201 F.3d 883 (7th Cir.), opinion amended on denial of reh'g, 209 F.3d 1032 (7th Cir.), cert. denied, 531 U.S. 917 (2000).

[241] Lieberstein, et al., *supra* note 232, at 13-14; *see also* Rhone-Poulenc v. Marion Merrell Dow, 93 F.3d 511, at 514 (8th Cir. 1996) ("…to challenge claim of superiority attributed to results of scientific testing, plaintiff must prove only that tests relied upon were not sufficiently reliable to permit one to conclude with reasonable certainty that they established proposition for which they were cited"); Pom Wonderful, LLC v. FTC, 777 F.3d 478, at 491 (D.C. Cir. 2015) (stating that, for establishment claims under the FTC Act, "the advertiser must possess the specific substantiation claimed, but if an advertisement instead conveys a non-specific establishment claim, e.g., an advertisement stating that a product's efficacy is 'medically proven' or making use of 'visual aids' that clearly suggest that the claim is based upon a foundation of scientific evidence, the advertiser must possess evidence sufficient to satisfy the relevant scientific community of the claim's truth").

can no longer make the claim.[242] For that reason, companies should exercise caution when making comparative claims on product packaging that may be difficult to change.

4. Claim Substantiation

A fundamental tenet of advertising law is that an advertiser must have a "reasonable basis" for all express and reasonably implied claims that appear in an advertisement.[243] A "reasonable basis" generally means objective evidence that supports the claim.[244] The type and amount of evidence required varies depending upon the nature of the claim, the product, the consequences of a false claim, the benefits of a truthful claim, the costs of developing substantiation for a claim, and the amount of substantiation that experts in the field believe is reasonable.[245] If the advertisement sets out a specific level of support for the claim (*e.g.*, "clinical studies prove ABC Mouthwash kills germs"), then the law requires that the advertiser have at least that level of substantiation in its possession before the advertisement is disseminated.[246] For example, if an advertisement states that "two out of three dentists recommend ABC Mouthwash," then the advertiser must have a reliable and sufficient survey to support that claim. As the NAD explained, "the goal is to find a 'good fit' between the claim and the support for the claim so that the advertising is truthful, consumers are not misled, and there is a level playing field for businesses."[247]

Advertisements that make health and safety claims receive the highest level of scrutiny from the FTC and must usually be supported by scientific evidence, such as "tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in a manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results."[248] Advertisers should be careful to ensure any wellness claims do not convey that the product provides a greater benefit than that which is supported by the evidence. "The bar for supporting a health-related claim is high because consumers rely on such claims to make important decisions that impact their health."[249]

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[242] Moore, et al., *supra* note 211, at 17 ("Product performance claims involving technological issues, are short-lived due to rapid changes in certain industries… as a result, ads need to be based on current, reliable evidence or appropriate qualifiers must be added to avoid deception,").

[243] *Substantiation Policy Statement*, *supra* note 6; Armstrong, et al., *supra* note 228.

[244] Armstrong, et al., *supra* note 228.

[245] In re Pfizer Inc., 81 F.T.C. 23, 1972 WL 127465, at *30 (1972).

[246] *Substantiation Policy Statement*, *supra* note 6; Armstrong, et al., *supra* note 228.

[247] Armstrong, et al., *supra* note 228.

[248] *Dietary Supplements: An Advertising Guide for Industry*, FTC (Apr. 2001), https://www.ftc.gov/business-guidance/resources/dietary-supplements-advertising-guide-industry; *see also* Christine A. Varney, Comm'r, FTC, Speech at The 1996 International Consumer Product Health and Safety Organization Symposium: To Your Health: An FTC Review of Safety Related Marketing (February 29, 1996) (published at https://www.ftc.gov/news-events/news/speeches/your-health-ftc-review-safety-related-marketing) ("If you make a safety claim in your advertising, whether it relates to a toy, a car seat, lawn equipment, or beauty aids, that safety claim must be supported.").

[249] Zeng Wang, *Six Tips to Properly Advertise Your Health and Wellness Claims*, BETTER BUS. BUREAU, NAT'L ADVERT. DIV. (March 31, 2021), https://bbbprograms.org/media-center/blog-details/insights/2021/03/31/tips-to-advertise-health-and-wellness-claims (last visited August 25, 2022); *see also* Lesley Fair, *5 Principles to Help Keep Your Health Claims*

Additionally, if an advertiser uses endorsements or testimonials in its advertising, the advertiser must substantiate the claim as if it were making the claim itself.[250] The FTC's Endorsement Guides[251] define an endorsement as "any advertising message . . . that consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser."[252] Endorsements are usually provided by a celebrity or other public personality, while testimonials are typically provided by individual consumers. For purposes of enforcement, the FTC treats endorsements and testimonials identically.[253] It is important to understand that the use of endorsements and testimonials involves not only the underlying claims made by the person giving the endorsement or testimonial, it also gives rise to the claim that the person's experience is representative, or typical, of the results that consumers can generally expect to achieve. If the endorsement or testimonial is not substantiated, the claim needs to be qualified by a clear and prominent disclosure of the generally expected results for users of the product or the limited applicability of the endorsers experience to what consumers may generally expect to achieve.[254]

5. Objective Claims vs. Puffery

Advertisers use puffery to avoid making a claim that requires substantiation. Puffery refers to the use of exaggeration or hyperbole to promote a product or service, and it generally comes in two varieties: "(1) grossly exaggerated advertising claims which no reasonable buyer would believe are true, and (2) a general claim of superiority that is so vague and indeterminate that it will be understood as a mere expression of opinion."[255] "Examples of puffing include claims that a product or service is 'new,' 'improved,' 'the favorite,' or 'original.'"[256] This definition may seem straightforward but, in practice, the line between puffery and an actionable claim for false advertising can be difficult to identify.[257] Federal courts have applied varying definitions of puffery,

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Healthy, FTC: BUS. BLOG (December 3, 2015), https://www.ftc.gov/business-guidance/blog/2015/12/5-principles-help-keep-your-health-claims-healthy (last visited August 25, 2022).

250 Kat Dunnigan, *5 Tips: How to Successfully Use Product Reviews in Advertising*, BETTER BUS. BUREAU, NAT'L ADVERT. DIV. (June 23, 2021), https://bbbprograms.org/media-center/blog-details/insights/2021/06/23/product-reviews-in-advertising (last visited August 25, 2022); *see also* Fair, *supra* note 249 (noting that "a statement from a consumer endorser that ('ABC Product cured my xyz!') likely conveys the implied claim that the advertiser has proof to support the underlying efficacy representation" and, if the advertiser doesn't have this substantiation, then it should not use this endorsement).

251 16 C.F.R. § 255; *see also The FTC's Endorsement Guides: What People Are Asking*, FTC (Aug. 27, 2020), https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking (last visited August 25, 2022) [hereinafter *What People Are Asking?*].

252 16 C.F.R. § 255.0(b).

253 16 C.F.R. § 255.0(c).

254 *See What People Are Asking?*, *supra* note 251.

255 Scholz, et al., *supra* note 208, at 5 (citing MCCARTHY, *supra* note 160, § 27:38 (The Puffing Defense); Guidance Endodontics, LLC v. Dentsply Int'l, Inc., 708 F. Supp. 2d 1209, 1241 (D.N.M. 2010)).

256 Leiberstein, et al., *supra* note 232, at 9.

257 *See generally* Roger Collazi, Chris Crook, Claire Wheeler & Taylor Sachs, *The Best Explanation and Update on Puffery You Will Ever Read*, ANTITRUST, Summer 2017, at 86; *see also id.* at 87 ("Generally speaking, claims that assert a product is 'incredible' or 'fine quality,' for instance, will usually be tolerated as 'mere puff.' However, when outlandish

and the FTC "has established its own definition of puffery, limiting the defense to marketing claims 'that ordinary consumers do not take seriously.'"[258] For a claim to constitute puffery, it cannot be objectively measurable; otherwise, it will require substantiation just like any other objective advertising claim. Ultimately, "the more the claim resembles a measurable fact, the more likely the claim will require substantiation and, if not supported, the advertiser will be held strictly liable."[259]

6. Disclosures & Disclaimers

In certain instances, it is appropriate to include a disclosure or disclaimer in an advertisement to prevent the advertisement from being deceptive. Disclosures and disclaimers must be clear and conspicuous, such that a consumer will both notice and understand them.[260] And importantly, disclosures or disclaimers cannot "contradict other statements in an ad" or "clear up misimpressions that the ad would leave otherwise."[261]

The FTC cautions that "a fine-print disclosure at the bottom of a print ad, a disclaimer buried in the body of text unrelated to the claim being qualified, a brief video superscript in a television ad, or a disclaimer that is easily missed on a website are not likely to be effective."[262] Thus, to avoid presenting disclosures or disclaimers in a deceptive fashion, the FTC suggests that advertisers should:

- use clear and unambiguous language—not legalese or technical language;
- place any qualifying information close to the claim being qualified;
- avoid using small type or any distracting elements that could undercut the disclosure; and
- prominently display the disclosure.[263]

Advertisers should also consider whether the advertisement is so lengthy that the disclosure needs to be repeated, whether visual disclosures appear for a sufficient period of time, and whether disclosure in audio messages are presented with adequate volume and cadence.

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or exaggerated marketing claims move closer to something that can be measured, the risk the claim will be considered actionable false advertising under the Lanham Act increases.").

[258] *Id.* at 87 (quoting In re Cliffdale Assocs., 103 F.T.C. 110, 174 (1984) (citing *Statement on Deception*, *supra* note 4)).

[259] *Id.* at 89.

[260] *Small Business Guide*, *supra* note 182; *see also* FTC, .COM DISCLOSURES: HOW TO MAKE EFFECTIVE DISCLOSURES IN DIGITAL ADVERTISING (Mar. 2013), https://www.ftc.gov/system/files/documents/plain-language/bus41-dot-com-disclosures-information-about-online-advertising.pdf [hereinafter.COM DISCLOSURES].

[261] *Small Business Guide*, *supra* note 182.

[262] *Id.*

[263] *Id.*

7. Children's Advertising

In addition to health and safety claims, another area that receives a high level of scrutiny from the FTC is advertising aimed at children. In evaluating whether a particular advertisement aimed at children is deceptive or unfair, the ad is considered from a child's point of view, not an adult's.[264] The Supreme Court has affirmed this practice, reasoning that the "determination whether an advertisement is misleading requires consideration of the legal sophistication of its audience."[265] With respect to children's advertising, the FTC works with and looks to the Children's Advertising Review Unit ("CARU"), which issues "industry standards to assure that advertising directed to children is not deceptive, unfair, or inappropriate for its intended audience."[266] CARU is a private, self-regulatory group affiliated with the Council of Better Business Bureaus.[267]

The FTC is also tasked with enforcing the Children's Online Privacy Protection Act ("COPPA"), a federal law that imposes certain requirements on operators of websites and other online services directed to children that collect personal information online from children under thirteen years of age.[268] Among other things, COPPA requires such operators and service providers to obtain verifiable parental consent before collecting, using, or disclosing personal information from children.[269]

B. Social Media Marketing

Social media platforms provide franchised brands with a variety of channels through which they can communicate directly with consumers and build excitement about their brand. As an initial matter, even if a franchisor is not actively using social media to conduct marketing, it should nonetheless consider registering for accounts on the major social media platforms using its primary trademark or trade name.[270] This prevents others, including franchisees, from misappropriating the marks to create an account. It is important to remember that, even though social media may look different than more traditional forms of marketing, the same general legal principles apply – marketing must be truthful and not misleading. The challenge with utilizing social media is to determine what aspects constitute "marketing" from a legal perspective, especially when it comes to features that foster informal communications with consumers. This section of the paper addresses specific legal considerations that franchisors and franchisees

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[264] *Statement on Deception*, *supra* note 4, at 3; *see also Small Business Guide*, *supra* note 182.

[265] Bates v. Arizona, 433 U.S. 350, 383 n.37 (1977).

[266] *Children's Advertising Review Unit Issues Revised Guidelines for Responsible Advertising to Children, Effective January 1, 2022*, BETTER BUS. BUREAU, NAT'L PROGRAMS NEWSROOM (July 29, 2021), https://bbbprograms.org/media-center/newsroom/CARU-revised-guidelines-for-advertising-to-children (last visited August 25, 2022).

[267] *See Small Business Guide*, *supra* note 182.

[268] 15 U.S.C. §§ 6501-6505; *see also* 16 C.F.R. Part 312.

[269] *See generally Complying with COPPA: Frequently Asked Questions, A Guide for Business and Parents and Small Entity Compliance Guide*, FTC (July 2020), https://www.ftc.gov/business-guidance/resources/complying-coppa-frequently-asked-questions (August 25, 2022).

[270] *Cf.* Claussen, et al., *supra* note 210, at 6.

should keep in mind when determining how to integrate social media into their digital advertising plans.[271]

1. Right of Publicity/ False Association

With so much of our lives online, it is almost too easy for advertisers to obtain and disseminate a person's name, image, likeness, or voice on social media. If that advertiser did not obtain consent to use this content, then they may have violated the individual's right to publicity. The right of publicity is the right of a person to control the commercial exploitation of his or her identity (*e.g.*, name, image, likeness, and voice) and prevent its commercial appropriation by others without permission.[272] Rights of publicity are governed by "sometimes conflicting state laws developed in part from common law and statutory invasion of privacy tort."[273] Who is entitled to a right of publicity and what elements are necessary to prove a legal claim vary by state. The state laws also vary when it comes to which situations are exempt from the right to publicity; however, generally the right does not apply to the use of a person's identity in "news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses" because they are protected under the First Amendment.[274]

False association claims (also sometimes referred to as false endorsement claims) under the Lanham Act are similar to right of publicity claims because they both involve the unauthorized use of a person's name, image, likeness, or other aspects of identity for commercial purpose. False association occurs when a person or entity's identity is connected with a product or service in such a way that consumers are likely to be misled about the person or entity's sponsorship or approval of the product or service.[275] In assessing false association claims, courts must weigh the alleged false association with free speech policies under the First Amendment. Courts are divided as to whether non-celebrities can maintain claims for false endorsement.[276] However, advertisers should keep in mind that, "although not expressly called out in the Lanham Act's prohibition on false designations of origin, the statutory language in Section 43(a) of the Lanham Act has been found to be broad enough to provide a vehicle for 'false endorsement' claims; *i.e.*,

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[271] In systems where the franchisees conduct their own social media marketing, each franchisee will need to ensure that their posts comply with all applicable law. Discussion of the pros and cons of allowing franchisees to conduct such marketing, and what guidance should be provided to franchisees, is outside the scope of this paper; however, the authors suggest the following paper for guidance on establishing a social media policy: Morris, et al, *supra* note 210; Bruno Floriani, Ama Romaine & Clay A. Tillack, *Your Ad Here; The Perils and Rewards of Advertising in Social Media,* ABA 38TH FORUM ON FRANCHISING W-24 (2015).

[272] *See* Jason Adler & Mark VanderBroek, *Right of Publicity Claims in a Digital Age,* ABA 39TH ANNUAL FORUM ON FRANCHISING W-7, at 3-4 (2016) ("The right of publicity evolved from but is distinct from the right of privacy, which generally protects against extensive or unwarranted invasion of a person's privacy or public disclosure of private and embarrassing information about a person.").

[273] *Id.* at 3.

[274] RESTATEMENT (THIRD) OF COMPETITION § 47; *see also* Adler, et al., *supra* note 272, at 18-22 (outlining various exemptions to the right of publicity).

[275] *See* Walker, et al., *supra* note 209, at 5 (addressing several instances of brands trying to leverage celebrities to amplify their brand without first obtaining the celebrity's permission); Adler, et al., *supra* note 272, at 27.

[276] Adler, et al., *supra* note 272, at 32.

claims of falsely implying the endorsement of a product or service by a celebrity or other person."[277]

In light of this potential liability, a conscientious advertiser should always err on the side of obtaining consent before they use a person's name, image, likeness, or voice in their social media posts.[278] Consent may be implied from a person's actions. For example, imagine a celebrity visited a franchised business and agreed to pose for a photo holding the product. The location owner then posts the photo to the location's social media account with a caption thanking the celebrity for visiting. In this instance, it can be argued that the celebrity impliedly consented to the post. Relying on implied consent has its risks and limitations; the celebrity who visited the franchised business certainly did not consent to having their photo featured in the brand's next television commercial. The safest course of action is to obtain express, written consent.[279]

3. <u>Influencers</u>

One of the most frequent uses of endorsements in advertising is for advertisers to enlist social media influencers to (hopefully favorably) review the advertiser's products on social media. The stamp of approval from an influencer with a large, devoted following can help build brand awareness and drive sales. If an advertiser uses endorsements or testimonials in its advertising, the advertiser must substantiate the claim as if it were making the claim itself.[280] The advertiser may be liable for false statements made by the endorser and for the failure of the endorser to disclosure material connections.[281] The use of testimonials and endorsements continues to be an area of focus for the FTC, especially when it comes to the FTC's requirement that influencers disclose any "material connection" that they have to a particular brand.[282] "A 'material connection' exists when there is a relationship 'between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement.'"[283] Examples of what might constitute a "material connection" include but are not limited to a: "(1) payment/monetary compensation, (2) gifts, free products, and/or substantial discounts, (3) business relationship, (4) familial relationship."[284]

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[277] Scholz, et al., *supra* note 208, at 10.

[278] Adler, et al., *supra* note 272, at 36.

[279] *Id.* at 37.

[280] Dunnigan, *supra* note 250.

[281] *See What People Are Asking?*, *supra* note 251; *see generally* 16 C.F.R. § 255.

[282] *See e.g., FTC Puts Hundreds of Businesses on Notice about Fake Reviews and Other Misleading Endorsements*, FTC (Oct. 13, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-puts-hundreds-businesses-notice-about-fake-reviews-other-misleading-endorsements (last visited August 25, 2022)

[283] Morris, et al., *supra* note 210, at 8; *see also* Ellen T. Berge, Susan Crane & Dominic Mochrie, *Reddit and Weep? Protecting Your Brand and Reputation in Social Media – A Continuum of Approaches from Engagement to Litigation*, INT'L FRANCHISE ASS'N 50TH ANNUAL LEGAL SYMP. (2017) (addressing importance of disclosing material connection between brand and endorser, especially "when the connection between the endorser and the seller of the product or service would not be reasonably known to or expected by the consumer").

[284] Morris, et al., *supra* note 210, at 8.

The general rules for an advertiser using endorsements are that:

- Endorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser.

- Endorsements must not include representations that are deceptive or that cannot be substantiated.

- Endorsements must not be presented out of context or reworded to distort the endorser's opinion or experience with the product.

- When the advertisement represents that the endorser uses the endorsed product, the endorser must be a bona fide user of the product at the time it gives the endorsements.

- Any material connection between the endorser and the advertiser must be disclosed clearly and conspicuously.[285]

The FTC Endorsement Guides and the FTC's related explanatory materials provide specific guidance on how to present disclosures on endorsements given the sometimes-limited space and capabilities of certain social media platforms.[286] For example, the FTC requires that disclosures be placed with the endorsement message itself rather than on the influencer's profile pages so that the disclosure is not overlooked by consumers.[287]

4. <u>User-Generated Content</u>

Many advertisers invite their consumers to interact with their brand by submitting original content online. This user-generated content might be submitted in connection with a contest or sweepstakes, or it could simply be an unsolicited review posted to the company's social media page. Advertisers frequently want to use this user-generated content to further promote the brand. For example, the advertiser may want to feature a winning contest submission on its website, or it may want to incorporate a positive consumer review posted on its social media page into a new post. Advertisers must remember that user-generated content is owned by the user and, in certain circumstances, may be subject to copyright protection.[288] Thus, a conscientious advertiser will seek permission from the user before incorporating the user's content into an advertisement. The manner in which advertisers obtain that permission varies in practice, with some advertisers choosing to take on more risk in the interest of time and resources. Formal, written permission could involve everything from entering into a license agreement to contacting the owner via social media and asking them to send a certain reply to indicate permission for use. For contests and

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[285] 16 C.F.R. § 255.1.

[286] *See* FTC, DISCLOSURE 101 FOR SOCIAL MEDIA INFLUENCERS 4 (2019), https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf (last visited September 7, 2022) [hereinafter DISCLOSURE 101].

[287] *Id.*

[288] Morris, et al., *supra* note 210, at 10 ("Copyright is a form of protection grounded in the U.S. Constitution and granted by law for works of authorship (i.e. photography, music, art, books, videos, etc.) in a tangible medium of expression. . . . Work is under copyright protection the *moment* it is created and fixed in tangible form that is perceptible either directly or with the aid of a machine or device.").

sweepstakes, the advertiser should include language in the promotion's terms and conditions whereby any user generated content submitted in conjunction with the promotion is deemed licensed to the advertiser.[289]

In certain circumstances, advertisers can also be held liable for user generated content that is posted on the advertiser's social media account or webpages and which violates the law.[290] The Digital Millennium Copyright Act ("DMCA") and the Communications Decency Act of 1996 ("CDA") both provide limited protections against liability for problematic content posted by consumers.[291] However, both statutes require the advertiser to take certain steps, such as addressing unlawful user-generated content when it is brought to the advertiser's attention.[292] Advertisers should also clearly disclose in all communications soliciting user-generated content what types of content consumers are permitted to submit.

5. <u>Proper Use of Franchise System Trademarks</u>

As is true for more traditional advertising, franchisors must maintain brand guidelines that dictate how the franchise system's trademarks may (and may not) be used on social media platforms. Such guidelines are important from a business perspective in that they promote brand consistency, strength, and goodwill. But from a trademark law perspective, such guidelines avoid abandonment of a franchisor's trademark rights (either in part or in whole), and they serve to put competitors and other third parties on notice of a franchisor's claim to trademark rights in a particular name or logo associated with the franchise system.

With respect to loss of trademark rights through abandonment, that abandonment can occur in the context of "genericide," due to the franchisor, its franchisees, its competitors, and/or the general consuming public being permitted to widely use the franchisor's trademark as a generic name of a product or service—commonly cited victims of genericide include the coined terms "Aspirin," "Cellophane," and "Escalator."[293] But that abandonment can also occur where repeated and prolonged inconsistent use of franchise system's marks results in the weakening or even destruction of a mark, because the franchisor has effectively discontinued use of the original mark or the mark has lost its significance as a mark.[294]

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[289] Scholz, et al., *supra* note 208, at 40.

[290] *Id.* at 39.

[291] The DMCA provides a safe harbor protection from potential liability arising from publishing content that infringes on a third party's copyrights if that content was posted by another person. 17 U.S.C. § 512. The CDA provides protections if consumers post content that includes defamatory statements or false claims. 47 U.S.C. § 230.

[292] *See* Morris, et al., *supra* note 210, at 11 (outlining steps to take advantage of protections under DMCA); Scholz, et al., *supra* note 208, at 40 (addressing false advertising claims brought by Subway against Quiznos relating to an ad campaign in which Quiznos asked consumers to submit videos of why Quiznos sandwiches are better).

[293] *See, e.g.,* BellSouth Corp. v. DataNational Corp., 60 F.3d 1565, 1570 (Fed. Cir. 1995) (holding that the "Walking Fingers" logo became generic where "AT&T allowed any and all competing publishers of telephone directories to use the logo on their directories," such that the logo "now identifies the product – classified telephone directories – generally"); RESTATEMENT, *supra* note 159, at § 11:9 (Risk of genericness of coined word marks for new products).

[294] *See* MCCARTHY, *supra* note 160, § 17:1 (*How does a trademark become abandoned?*).

6. **Advertising Disclosure Considerations**

As addressed in Section IV.A.6 above, it may be necessary to include a clear and conspicuous disclosure or disclaimer to address advertising claims that would otherwise be misleading or inaccurate. Determining what disclosure is sufficient and how to present that disclosure can be complicated, especially in the context of digital advertising on social media.[295] In 2013, the FTC updated its disclosure guidelines for mobile and other online advertisers to address issues such as scrolling, hyperlinks, banner ads, and pop-ups.[296] Pursuant to the FTC's guidance, disclosures should be placed "as close as possible to the triggering claim" and in a font, size, and color that is easy to read.[297] If it is not possible to include the appropriate disclaimer due to character or formatting limits on a particular social media platform, then the FTC states that "either the claim should be modified so the disclosure is not necessary or the ad should not be disseminated."[298]

C. **Contests and Sweepstakes**

In addition to the legal considerations discussed in Section II above, advertisers conducting contests and sweepstakes must make sure to structure their promotions to avoid running afoul of anti-lottery and anti-gambling laws.[299] Generally, a promotion will be found to be a lottery if it includes: (1) a prize, (2) awarded by chance, (3) for consideration.[300] In contrast to a lottery, a sweepstakes eliminates the element of required consideration and a contest eliminates the element of chance—the prize is instead awarded based on skill instead of chance.[301]

Generally, when running a contest or sweepstakes, an advertiser will issue official rules that address topics including who is sponsoring the contest, eligibility, requirements for entry, judging criteria, and conditions for claiming a prize.[302] When promoting the contest or sweepstakes on social media, advertisers must make it clear that the post is related to a contest or sweepstakes. Given the space/character restraints, this is usually accomplished by the

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295 *See* Berge, et al., *supra* note 283, at 6; Walker, et al., *supra* note 209, at 7.

296 *See generally* .COM DISCLOSURES, *supra* note 260; *see generally* POLICY ON DECEPTIVELY FORMATTED ADVERTISEMENTS, *supra* note 219.

297 POLICY ON DECEPTIVELY FORMATTED ADVERTISEMENTS, *supra* note 219, at 6; *see also* Walker, et al., *supra* note 209, at 10 (noting that brands should consider a variety of factors in creating and placing disclosures, such as whether a disclosure may be too small to read on a mobile device, or whether the device allows for vertical or horizontal scrolling, or both).

298 .COM DISCLOSURES, *supra* note 260, at 6.

299 *See generally* Maral Kilejian, Michael S. Levitz & Robert E. Vinson, Jr., *Click to Win: Boosting the Brand with Sweepstakes and Contests*, ABA 40TH ANNUAL FORUM ON FRANCHISING W-20 (2017) (This paper provides a thorough overview of laws generally applicable to contests and sweepstakes, including requirements to register the promotion and secure a bond in certain states.); *see also* Scholz, et al., *supra* note 208, at 38.

300 Kilejian, et al., *supra* note 299, at 3 ("The element of 'prize' is generally defined broadly as 'anything of value.' The element of 'chance' means that the prize is awarded by a process involving random selection of the winner. Under the broadest interpretation of some states, the element of 'consideration' means 'anything that is a commercial or financial advantage to the promoter or a disadvantage to any participant.").

301 *Id.* at 4.

302 *See generally Id.* (addressing various laws that place requirements on substance of official rules for contests and sweepstakes). Sweepstakes and contests are also governed by state law, the Deceptive Mail Precent and Enforcement Act administered by the U.S. Postal Service, and the FCC. *See supra* Section II.H.

language of the post in combination with "#sweepstakes" or "#contest."[303] Advertisers also generally include a short-form URL link to the official rules in the body of the social media post.[304] If a contest or sweepstakes requests that consumers make a social media post and it is not otherwise clear that the posts are part of a promotion, then the advertiser should take affirmative steps to help make sure appropriate disclosures are made.[305] For example, the advertiser may require the consumer caption their post with certain language that includes the words "sweepstakes," "contest" or "entry."

If an advertiser runs a promotion on a third-party platform, it must also determine whether that platform has its own requirements that will apply to the promotion.[306] Many popular social media platforms have rules and guidelines that apply to contests and sweepstakes. If a promotion violates platform guidelines, the advertiser may be prohibited from using the platform.[307] Companies should note that compliance with platform guidelines does not mean that the promotion complies with legal requirements.[308]

D. <u>Text Messages and Email Blasts</u>

Franchisors may obtain consumer phone numbers through a variety of channels, such as when a consumer places an online order, enters a mobile number for discounts or loyalty point programs, or enters a contest. From an advertising perspective, it can be tempting to leverage this trove of contact information to drive sales. What could be the harm in shooting out a brief message about an upcoming promotion? As explained in Section II.C of this paper, however, this type of message could violate the TCPA and subject the advertiser to enormous exposure. Thus, before engaging in any text message marketing, it is vital that the advertiser ensure that (i) it obtained the proper consent from each consumer under the TCPA, and (ii) none of the consumers have subsequently opted out of receiving text messages from the advertiser. The advertiser should also scrub its list of phone numbers against the federal Do Not Call Registry. On an ongoing basis, the advertiser must have a system in place for obtaining consent for any newly obtained phone numbers and timely handling opt out requests so that consumers who have opted out are not inadvertently sent additional messages.[309]

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[303] Kilejian, et al., *supra* note 299, at 4.

[304] *See generally id.* at 14 (discussing how official rules can give rise to contractual liability for advertiser).

[305] Chansky, et al., *supra* note 210; *see also See What People Are Asking?*, *supra* note 251 (recommending that, if advertisers require consumers to make a social media post in order to enter a contest or sweepstakes, the advertiser should require the consumer to tag the post with the words "contest" or "sweepstakes" as hashtags in order to educate the viewer that the post was incentivized).

[306] Kilejian, et al., *supra* note 299, at 31.

[307] *See e.g., Promotion Rules*, SNAPCHAT SUPPORT, https://support.snapchat.com/en-US/a/promotions-rules (last visited August 25, 2022); *Advertising Guidelines*, PINTEREST, https://policy.pinterest.com/en/advertising-guidelines (last visited August 25, 2022); *Guidelines for Promotions on Twitter*, TWITTER, https://help.twitter.com/en/rules-and-policies/twitter-contest-rules (last visited August 25, 2022); *Promotion Guidelines*, INSTAGRAM, https://help.instagram.com/179379842258600/?helpref=uf_share (last visited August 25, 2022); *Terms and Policies: Pages, Groups and Events*, FACEBOOK, https://www.facebook.com/policies_center/pages_groups_events (last visited August 25, 2022).

[308] Morris, et al., *supra* note 210, at 5.

[309] *See* Chansky, et al., *supra* note 210, at 21 (outlining methods for obtaining prior consent under the TCPA).

Due to the high stakes of TCPA litigation and the complexities of compliance, many franchisors choose to manage all text messaging at the franchisor-level[310] and utilize an outside vendor or technology solution designed to manage TCPA compliance. As a best practice, any agreements with vendors that relate to running text message campaigns, should clearly state that the vendor will (i) comply with the TCPA, (ii) carry appropriate insurance, and (iii) indemnify the franchisor for any violations of the law.

As mentioned in Section II.D, transactional and commercial emails are regulated under the CAN-SPAM Act. The good news is that, unlike text messages, advertisers can generally send unsolicited commercial emails to the addresses in their possession without the need to obtain prior consent.[311] However, the emails must include certain disclosures and the ability to "unsubscribe."

V. ADVERTISING ISSUES SPECIFICALLY-RELATED TO FRANCHISE SALES

A. The Franchise Disclosure Document

In addition to the laws generally applicable to marketing, franchise sales are also subject to franchise-specific regulation at the federal and state level.[312] The Federal Trade Commission's Rule on Franchising, (the "Franchise Rule"), was enacted in 1979 and amended in 2007.[313] The Franchise Rule seeks to ensure that franchisors provide prospective franchisees with certain information about key aspects of the franchise business opportunity before entering into a contract. The Franchise Rule sets out twenty-three specific areas of information (each referred to as an "item") that must be disclosed in a document referred to as the "Franchise Disclosure Document" or "FDD." The items covered in the FDD include information about the franchisor (*e.g.*, business experience, relevant litigation matters, audited financial statements), the costs associated with the franchise (*e.g.*, initial fees and ongoing fees), the relationship between the parties (*e.g.*, the support provided by the franchisor to the franchisee, the franchisee's obligations under the franchise agreement) and the agreements that the prospective franchisee will execute.[314]

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[310] Anne H. Baroody, Kathryn Kotel & Charles S. Marion, *Death By 1,000 Cuts: Defending Against Non-Franchise Specific Lawsuits Over ADA Website Compliance, Biometric Privacy, TCPA Violations, IP Infringement, and Other Ancillary Claims*, ABA 44TH ANNUAL FORUM ON FRANCHISING W-6 (2021) (noting that "franchisors must balance the interests in uniform TCPA compliance across the system with the risk of a finding of vicarious liability against the franchisor when considering how involved to be in franchisee test message campaigns and whether to instruct franchisees on the use of text message campaigns and possible third party vendors); *see also* Chansky, et al., *supra* note 207, at 22 (noting that the general approach of the courts has been to apply traditional principal-agent law concepts to determine whether a given text messaging program was being conducted independently by the franchisee for its own benefit).

[311] Chansky, et al., *supra* note 210 (noting that the FCC does prohibit commercial emails without prior consent sent to email addresses provided by a wireless carrier (e.g., johndoe@[WIRELESS CARRIER].com)).

[312] *See generally* Stephanie J. Blumstein & Elizabeth M. Weldon, *Eureka or Gotcha Moment? Reliance, Materiality, and Loss Causation: Analysis of Key Elements of Franchisee Claims for Franchise Disclosure*, ABA 44TH ANNUAL FORUM ON FRANCHISING W-1 (2021); Danell Caron, Brian Schnell & Max Schott II, *Item 19 In A New World*, INT'L FRANCHISE ASS'N 54TH ANNUAL LEGAL SYMP. (2022).

[313] 16 C.F.R. § 436.

[314] *See generally* FTC, FRANCHISE RULE COMPLIANCE GUIDE (2008), https://www.ftc.gov/system/files/documents/plain-language/bus70-franchise-rule-compliance-guide.pdf [hereinafter, COMPLIANCE GUIDE].

The FDD is essentially a highly-regulated advertisement for the franchise brand – it must comply with general advertising laws while also meeting the regulatory standards of the FTC and various state regulators. This is unsurprising given that the Franchise Rule was promulgated via §5 of the FTC Act and the overarching goal of the Franchise Rule is consumer protection. As with any other advertising claims, statements in the FDD must accurate and substantiated. The Franchise Rule expressly prohibits franchise sellers from making any statement that contradicts the contents of FDD. According to the FTC, "this prohibition is necessary to prevent deception and to preserve the integrity of the [FDD]."[315] The necessity for adequate substantiation "is especially true of Item 19 earnings claims… indeed, the FTC Franchise Rule Compliance Guide ("Compliance Guide") devotes an entire section to what is prohibited in an Item 19 disclosure, *i.e.*, "representations that are not substantiated."[316] With limited exceptions, franchise sellers are prohibited from making any financial performance representations that are not contained in Item 19 of the FDD.[317]

It has become common for franchisors to use franchisee testimonials in their franchise sales advertisements. Again, these testimonials must comply with all laws generally applicable to advertising, including regulations regarding the use of testimonials and endorsements addressed above. Any franchisee testimonials must be truthful and not misleading.[318] The Franchise Rule also expressly prohibits the use of "shill" testimonials in franchise sales.[319] "Specifically, it prohibits franchise sellers from misrepresenting that any person has purchased or operated one of the franchisor's franchises, when that is not the case, or that any person can give an independent and reliable report about the experience of any current or former franchisee, when that is not the case."[320] This prohibition also extends to the use of "institutional shills" (i.e., "companies that purport to provide consumers with 'independent' reports on franchisors that are their members").[321]

The Franchise Rule does not provide a private right of action arising out of a franchisor's noncompliance; instead, the FTC is solely tasked with enforcing the Franchise Rule.[322] Unsurprisingly, the focus and frequency of the FTC's enforcement activities has fluctuated over the years; however, in February 2022, the agency announced that it had added a franchise-

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[315] *Id.* at 138 (noting that prohibited contradictory statements include those made orally, visually, or in writing). The term "franchise seller" encompasses not only the franchisor and its employees, but also extends to agents of the franchisor such as brokers, subfranchisors and area representatives. *Id.*

[316] Lieberstein, et al., *supra* note 232, at 16 (noting that a franchise seller that makes a financial performance representation that is inconsistent with the Item 19 disclosure could face liability under the FTC Act §5); *see also* COMPLIANCE GUIDE, *supra* note 314, at 92 (stating that franchisors must have written substantiation to support all financial performance representations in Item 19 and make such substantiation available to prospects upon reasonable request).

[317] COMPLIANCE GUIDE, *supra* note 314, at 86. This prohibition encompasses any financial performance representations made in any advertisement or on a website directed at prospective franchisees. *Id.*; *see also* Jamila Granger, Benjamin A. Levin & Charles S. Modell, *Advanced Disclosure Issues: Pushing the Envelope*, ABA 33RD FORUM ON FRANCHISING W-2 (2010) (addressing when a franchisor can properly provide information that is not in the FDD).

[318] Lieberstein, et al., *supra* note 232, at 17.

[319] COMPLIANCE GUIDE, *supra* note 314, at 138.

[320] *Id.*

[321] *Id.* at 139 ("Information provided by shills is inherently false and unreliable").

[322] *See generally* 16 C.F.R. § 436.

specific option to its online reporting tool, ReportFraud.FTC.gov.[323] The new option is ostensibly intended to make it easier for consumers to report unlawful practices by franchisors. The reporting tool now allows consumers to select an option for "franchise" and prompts consumers to describe "any unfair or unreasonable contract terms, misleading statements made during the sales process, or other problems."[324]

In addition to the disclosure obligations required under the Franchise Rule, there are fifteen states (the "Registration States") with laws that impose additional state-level disclosure and registration requirements for franchisors.[325] The registration process varies from state to state; however, the Registration States have generally adopted the same requirements for the FDD as codified in the Franchise Rule with a few exceptions. Certain Registration States require the franchisor to include additional disclosures in the FDD and/or to provide the FDD to prospective franchisees earlier in the sales process.[326]

Unlike the Franchise Rule, many of the Registration States' laws do provide franchisees with a private right of action for the franchisor's noncompliance with applicable state law. Remedies for violations of federal and state franchise sales laws include actual damages (*e.g.*, recovery of the franchisee's investment and operational losses) or rescission and restitution, which involves the cancellation of the franchise agreement and restoration of the parties to their economic positions prior to the execution of the franchise agreement.[327]

B. Regulation of Advertising for Franchise Sales

To attract viable prospects and grow their systems, nearly all franchisors create and disseminate franchise sales marketing materials through a wide variety of advertising mediums. Even though such advertising is specifically directed at prospective franchisees rather than consumers at large, it must still comply with all generally applicable marketing laws.[328] Franchisors frequently want to include claims regarding financial performance in franchise sales materials; however, it is important to remember that financial performance representations[329] made in the

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[323] *See* FTC Sues Burger Franchise Company That Targets Veterans and Others With False Promises and Misleading Documents (February 8, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/02/ftc-sues-burger-franchise-company-targets-veterans-others-false-promises-misleading-documents (last visited August 25, 2022)

[324] *Id.; see also* Beth Ewen, *Attorneys Take Note as FTC Turns Focus to Franchising*, FRANCHISE TIMES (March 29, 2022),https://www.franchisetimes.com/issue-archive/2022/april/attorneys-take-note-as-ftc-turns-focus-to-franchising/article_d01d58e2-aa20-11ec-943c-3fd85bf34ac6.html (last visited August 25, 2022).

[325] *See* CAL. CORP. CODE § 31000 *et seq.*; HAW. REV. STAT. § 482-E1 *et seq.*; ILL. COMP. STAT. ANN. Ch. 815, § 705/1 *et seq.*; IND. CODE § 23-2-2.5-1 *et seq.*; MD CODE REGS. § 14-201 *et seq.*; MICH. COMP. LAWS § 445.1501 *et seq.*; MINN. STAT. ANN. § 80C.01 *et seq.*; N.Y. GEN. BUS. LAW § 680 *et seq.;* N.D. CENT. CODE § 51-19-01 *et seq.;* OR. REV. STAT., § 650.005 *et seq.*; R.I. GEN. LAWS § Section 19-28.1-1 *et seq.*; S.D. CODIFIED LAWS, tit. 37, Ch. 37-5B, § 37-5B-1 *et. seq.;* VA. CODE, ANN. § 13.1-557 *et seq.,* WASH. REV. CODE § 19,100.010 *et. seq.;* and WIS. STAT. ANN. § Section 553.01 *et seq.* The Oregon Franchise Transaction law does not require registration. The different levels of review that Registration States apply to the contents of the FDD are outside the scope of this paper.

[326] Blumstein, et al., *supra* note 312, at 2-5 (summarizing key statutory provisions of state laws governing franchise sales).

[327] *Id.*

[328] *See generally* Been, et al., *supra* note 238, at 2-6 (addressing different types of advertising to solicit franchisees, including internet, referrals from existing franchisees, broker networks, print, television, radio, trade shows).

[329] A financial performance representation is "any representation, including any oral, written or visual representation, to a prospective franchisee, *including a representation in the general media*, that states, expressly or by implication, a

"general media" (i.e., all forms of advertising) trigger the disclosure and substantiation requirements addressed above.[330] Under the Franchise Rule, financial performance representations made in the general media must state:

- the number and percentage of outlets from which supporting data for the representation were gathered that actually attained or surpassed the represented level of financial performance;
- the time period when the performance results were achieved; and
- a clear and conspicuous admonition that a new franchisee's results may differ from the represented performance.

If a franchisor updates the financial information in an advertisement, then it must ensure that the updated information is contained in Item 19 of the FDD. This issue frequently arises when some aspect of the system improves (e.g., an increase in average unit sales) but the information in Item 19 of the FDD is based upon data from the prior fiscal year. In such instances, the franchisor cannot include the new financial data in franchise sales materials because it is not included in the FDD.

The Franchise Rule provides some exceptions to what constitutes a "general media" representation, such as press releases and speeches, so long as they are *not directed at members of the public interested in purchasing a franchise.*[331] "The mere fact that those interested in purchasing a franchise can find such information in a newspaper or online does not make it a general media claim."[332] However, the Compliance Guide cautions franchisors not then incorporate such press releases and speeches into its franchise sales advertising because this will trigger the requirement that any financial claims in the press release or speech comply with the requirements for general media claims set forth above.

Additionally, eleven of the Registration States have requirements regarding the content of franchise sales advertising.[333] Seven of those states also require that franchisors register their franchise sales marketing materials prior to its dissemination to the public, unless the materials meet certain exemptions from registration. These states are California, Maryland, Minnesota, New York, North Dakota, Rhode Island, and Washington.[334] Some of these states impose additional

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specific level or range of actual or potential sales, income, gross profits, or net profits." 16 C.F.R. § 436.1(e) (2008) (emphasis added).

330 COMPLIANCE GUIDE, *supra* note 314, at 132.

331 *Id.* SEC filings are also expressly excluded. *Id.*

332 *Id.*

333 *See* CAL. CODE REGS. tit. 10, § 310.156.1; 815 ILL. COMP. STAT. ANN. 705/14; IND. CODE § 23-2-2.5-26; MD. CODE REGS. 02.02.08.09; MICH. COMP. LAWS. § 445.1525, sec. 25; MINN. STATE. ANN. § 80C.09(2) ; MINN. R. 2860.4100; N.Y. COMP. CODES. R. & REGS. tit. 13, § 200.9; N.D. CENT. CODE. § 51-19-11(1); R.I. GEN. LAWS § 19-28.1-17(8); S.D. CODIFIED LAWS § 37-5B-3; WASH. REV. CODE § 19.100.110; WASH ADMIN. CODE 460-80-500.

334 *See* CAL. CORP. CODE § 31156; MD. CODE ANN., BUS. REG. § 14-225(1); MD. CODE REGS. 02.02.08.09; MINN. STAT. ANN. § 80C.09, subdiv. 1; N.Y. COMP. CODES R. & REGS. tit. 13, § 200.9; N.D. CENT. CODE § 51-19-10; R.I. GEN. LAWS § 19-28.1-12; WASH. REV. CODE § 19.100.100. These states have the power to modify or waive filing requirements and waiting periods by rule or order. Additionally, Michigan and South Dakota reserve the right to impose advertising filing requirements. *See* MICH. COMP. LAWS § 445.1524, sec. 24(1) ("The department may by rule or order require the filing of any advertisement or other sales literature or advertising communication addressed or intended for distribution to

disclosure requirements on franchise sales advertising, such as (i) specific disclaimers to include in the ad, (ii) inclusion of information about the franchisor, (iii) requirements regarding public figure endorsements, and (iv) necessity to provide written transcripts for audio and video ads.[335] Thus, a franchisor should ensure that its franchise sales advertising meets all unique state requirements before it submits the advertising to the state for review.

In order to determine what franchise sales materials must be submitted to the state, the first question is whether the materials are an "advertisement" under state law.[336] The definition of what constitutes advertising can vary by state; however, the applicable Registration States generally define advertising as "[a]ny written or printed communication or any communication by means of recorded telephone message or spoken on radio, televisions, or other similar communications media, published in connection with the offer or sale of a franchise."[337] The second question in the analysis is whether the advertisement constitutes an offer to sell an franchise. Most of the states 'define an "offer" as any attempt to dispose of or sell a franchise, or interest in a franchise, for value."[338] The final question is whether the offer falls within the jurisdiction of one of the states that requires registration of advertising.

Each state imposes a statutory waiting period after the franchisor has submitted its franchise sales advertising for review.[339] If the state examiner issues comments on the advertising, then the franchisor must address those comments to the state's satisfaction before it can begin using the relevant franchise sales materials in that state. If the examiner does not comment on the advertising within the number of days prescribed in the state's statute, then the advertising is deemed approved for use in the state.

Some states have adopted exemptions from registration for advertising the sale of franchises on the internet.[340] In order to qualify for these exemptions, the advertisements must (i)

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prospective franchisees"); S.D. CODIFIED LAW § 37-5B-23 ("Unless the director requests the filing of an advertisement, there is no requirement to file the advertising with the division").

[335] Been, et al., *supra* note 238, at 13-19 (providing an overview of unique state requirements for franchise sales advertising); *See e.g.,* CAL. CODE REGS. tit. 10, § 310.156.1(c)(requiring all franchise sales advertising to include disclaimer that registration with the state does not constitute a finding that advertisement is true, complete, and not misleading); WASH. ADMIN. CODE. 460-80-500(d)(requiring disclosure of any benefit given to a public figure in exchange for an endorsement in franchise sales advertising); MINN R. 2860.4100 (requiring inclusion of franchisor's name and address in franchise sales advertising); MD. CODE REGS. 02.02.08.09 (requiring submission of written transcripts for all franchise sales advertising conducted in the state via videotape, audiotape or other electronic or recorded means); ILL. ADMIN. CODE tit. 14, § 200.301 (prohibiting use of the words "success," "profits," or "potential profits" in franchise sale advertising unless they are "reasonably qualified").

[336] Been, et al., *supra* note 238, at 7.

[337] *Id.*

[338] *Id.* at 8.

[339] The statutory waiting periods are as follows: California – 3 business days, CAL. CORP. CODE § 31156; Maryland – 5 calendar days, MD. CODE ANN., BUS. REG. § 14-225(1); Minnesota – 5 business days, MINN. STAT. ANN. § 80C.09; New York – 7 calendar days, N.Y. COMP. CODES R. & REGS. tit. 13, § 200.9; North Dakota – 5 business days, N.D. CENT. CODE § 51-19-10; Rhode Island – 5 business days, R.I. GEN. LAWS § 19-28.1-12; Washington – 7 calendar days, WASH. REV. CODE § 19.100.100.

[340] *See* CAL. CODE REGS. tit. 10, § 310.100.3; MD. CODE REGS., § 02.02.18; N.Y. COMP. CODES R. & REGS. tit. 13, § 200.13; Minn. Dep't Com., Offers of Franchise Made on the Internet, Bus. Franchise Guide (CCH) ¶ 5230.81; ILL. ADMIN. CODE tit. 14, § 200.306; N.D. Secs. Dep't, Admin. Order Regarding Franchise Advertising on the Internet (Apr. 2, 2002)

"contain[] a disclaimer that the franchise is not being offered to residents of the applicable state, provided the offer is not otherwise directed to a resident of the state, and no franchises are sold in the state until the franchisor's franchise disclosure document is registered in the state," and (ii) not in fact be directed to any person or resident of the state.[341] Additionally, these states generally exempt franchise sales advertising (i) via radio or television programs that originate outside the state but nevertheless are received by residents of the state, and (ii) via a "bona fide newspaper or other publications of general, regular and paid circulation" where more than two thirds of its subscribers are located outside of the state within the past twelve months.[342]

C. Use of Testimonials

It has become common for franchisors to use franchisee testimonials in their franchise sales advertisements. Again, these testimonials must comply with all laws generally applicable to advertising, including regulations regarding the use of testimonials and endorsements addressed above. Any franchisee testimonials must be truthful and not misleading.[343] The Franchise Rule also expressly prohibits the use of "shill" testimonials in franchise sales.[344] "Specifically, it prohibits franchise sellers from misrepresenting that any person has purchased or operated one of the franchisor's franchises, when that is not the case, or that any person can give an independent and reliable report about the experience of any current or former franchisee, when that is not the case."[345] This prohibition also extends to the use of "institutional shills" (i.e., "companies that purport to provide consumers with 'independent' reports on franchisors that are their members").[346]

D. Advertising Franchise Sales Through Social Media

Franchisors are increasingly turning to social media and other digital marketing strategies to recruit prospective franchisees. Social media channels present some unique challenges to franchise sales advertising compliance because franchisors may not recognize that a post qualifies as an advertisement and triggers filing requirements. If the franchisor has not filed its social media posts with the applicable states, it should not direct posts to residents of those states (e.g., touting development opportunities in Minnesota on Facebook prior to filing the posts with the state and waiting the statutory period for approval) and it should avoid communicating directly with any prospects in those states that might comment on the post.

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available at https://www.securities.nd.gov/department-information/orders (last visited August 25, 2022); R.I. GEN. LAWS § 19-28.1-6.10; Wash. State Sec. Admin. Policy Statement 6, Bus. Franchise Guide (CCH) ¶ 5470.90.

[341] Morris, et al., *supra* note 210, at 9; *see also* Been, et al., *supra* note 238, at 20 (noting that, in addition to the basic requirements, Rhode Island requires franchisors to have procedures to control the timing of any subsequent direct communications with prospects and California requires franchisors to file a notice of exemption for internet advertising).

[342] *See* CAL. CORP CODE § 31013(c)(1); 815 ILL. COMP. STAT. ANN. 705/3(20)(b); IND. CODE § 23-2-2.5-2 (2008); MD. CODE REGS. § 14-203(b)(2); MICH. COMP. LAWS. § 445.1504(4); MINN. STATE. ANN. § 80C.19(4); N.Y. COMP. CODES. R. & REGS. tit. 13, § 200.9(g); N.Y. GEN. BUS. LAWS. § 681(12)(C); N.D. CENT. CODE. § 51-19-02(14)(b)(3); R.I. GEN. LAWS § 19-28.14(e); S.D. CODIFIED LAWS § 37-5B-3; WASH REV. CODE § 19.100.020(4).

[343] Been, et al., *supra* note 238, at 17.

[344] COMPLIANCE GUIDE, *supra* note 314, at 313.

[345] *Id.*

[346] *Id.* at 139 ("Information provided by shills is inherently false and unreliable").

More broadly, if the franchisor does not have its FDD registered in all states, it should be cautious about communicating directly with prospects over social media. Social media makes it easy for prospects to get in touch with the brand and there is an expectation that brands monitor these communications and will respond quickly. The unknowing franchisor that jumps to respond to each prospect may find itself in violation of federal and state franchise laws. Franchisors need to be prepared to appropriately handle inquiries from prospective franchisees that come in through social media channels, including those that come from states where the franchisor may not be currently able to sell. The best practice is to funnel all communications through a corporate social media account as opposed to asking development personnel to use their personal social media pages.[347] Personnel responsible for monitoring the franchisor's social media channels should be cautioned that all franchise sales laws apply to communications over social media just as they would to more traditional methods of communication.[348]

VI. CONCLUSION

As the broad scope of this paper demonstrates, having experienced and knowledgeable marketing personnel, or vendors, is key to promoting a brand and a franchise system in a way that does not expose that brand, and its franchisees, to unnecessary liability risk. What a new business owner, or inexperienced marketing person, does not know *can* hurt them – and the brand, and the brand's franchisees. "Good" marketing requires more than a snappy slogan and eye-catching imagery. Many creatives may resist working with legal counsel due to the perception that lawyers lack the "vision" needed to value good advertising. They may also believe that no one can ruin an effective, pithy, slick ad faster than a lawyer. However, that is not the case. The list of people who can ruin a "good" ad faster than a lawyer includes federal regulators, state attorneys general, a social media platform's oversight department, angry customers who feel misled, and, last, but not least, disgruntled franchisees who feel they bought into an opportunity that was less than advertised.

Therefore, counsel needs to have a sufficient understanding of the regulatory obligations that are applicable to their clients' advertising. In systems that permit franchisees to create their own local advertising, franchisors should obtain good legal counsel regarding what standards to apply when reviewing franchisee advertising and should be prepared to educate franchisees on the standards that will be applied to local advertising. Franchisees need a sufficient understanding of their obligations when it comes to advertising in order to minimize the risk to their businesses, and to their franchise system, which could result from their use of unapproved, or poorly monitored, advertising campaigns. Finally, both franchisors and franchisees who retain third-party vendors to handle their advertising campaigns, especially campaigns involving text messages, emails, or phone calls, should ensure that their vendor agreements obligate the vendors to comply with all applicable laws and regulations, including the CAN-SPAM Act and the TCPA, and then be prepared to monitor the campaigns implemented by those vendors to ensure their compliance.

Failing to obtain good legal counsel regarding advertising, and to ensure compliance with advertising regulations, can turn a franchise system's greatest growth initiatives into big liabilities.

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[347] Claussen, et al., *supra* note 210, at 10 (noting that the one exception may be LinkedIn, which provides for a professional social networking environment, and which may provide for a more appropriate forum for franchisors' employees to engage directly and personally with a prospective franchisee).

[348] *Id.*

BIOGRAPHIES

Annie Caiola[349]

Annie Caiola is the managing partner of Caiola & Rose, LLC, an Atlanta-based national law firm focused on representing franchisors in regulatory compliance, litigation, real estate, trademarks and bankruptcy. As an experienced trial attorney, Annie has litigated hundreds of franchise disputes enforcing brand standards and post-termination obligations related to intellectual property and noncompetition covenants, while defending claims alleging fraudulent inducement and violation of consumer protections laws. Annie also served as national counsel and crisis quarterback to a franchisor during an international foodborne illness outbreak that led to multi-district mass tort litigation, international litigation related to indemnification and recovery of economic losses, and system-wide insurance coverage disputes. Annie also leads the firm's transactional practice preparing FDDs, negotiating develop deals and supply chain agreements, and advising clients on multi-unit and system-wide acquisitions.

In addition to serving as outside counsel to franchisors, Annie has also served as in-house General Counsel to many of her clients on an interim basis. In her in-house roles, Annie has served on the executive team, developed franchisee compliance programs, implemented crisis and risk mitigation plans, and spearheaded aggressive franchise growth targets in partnership with chief development officers.

Annie graduated Phi Beta Kappa from the University of North Carolina in Chapel Hill, where she also received her law degree with honors. Before co-founding Caiola & Rose, Annie was an associate in the complex commercial litigation practice group at Troutman Sanders. Annie has been recognized as a "Rising Star" by Georgia Super Lawyers Magazine, a "Top 40 Under 40" by The Daily Report, and a "Legal Elite" by Franchise Times Magazine. Annie has served on the Board and as Board Chair for the Franchise & Distribution Section of the Georgia Bar, and she is currently on the Women's Caucus Committee for the ABA Forum on Franchising. Annie's most recent publication was *Protecting Real Estate Rights When the Franchise Relationship Ends*, 37 FRANCHISE L.J. 553 (Spring 2018), and she previously presented at the ABA Forum on Franchising in 2018 and 2020.

Paul Woody[350]

Paul Woody is a business attorney with Greensfelder, Hemker & Gale, P.C., where he is a member of the firm's Franchising and Distribution Industry Group. At Greensfelder, Mr. Woody represents established and emerging franchisors in a variety of industries located throughout the United States, and internationally.

Mr. Woody is an adjunct professor of Franchise Law at Saint Louis University School of Law in St. Louis, Missouri. He is also a Certified Franchise Executive.

Mr. Woody previously served as general counsel for a large sports and recreation franchisor with over 300 franchises throughout the U.S., Canada, Japan and Singapore. In that role, he, of course, provided legal guidance, oversaw compliance and litigation strategies,

349 Ms. Caiola would like to thank the following people for their assistance in the preparation of this paper: Jimmy Faris, Partner at Caiola & Rose, LLC, and Meredith Barnes, Senior Counsel at Caiola & Rose, LLC.

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contributed to strategic planning and key decisions, and managed franchisee relationships, including franchise transfers, rectifying compliance issues, and franchise terminations.

Mr. Woody's experience also includes all stages of corporate and employment litigation, including arguments before appellate courts.

Prior to practicing law, Mr. Woody served as a Special Assistant to the Missouri Governor, and as the Director of Communications for the Minority Caucus of the Missouri House of Representatives.