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Advertising Regulatory Landscape: What In-House Counsel Need to Know

IT IS A FUNDAMENTAL business principle that every company—regardless of the product it is selling and the audience it is targeting—needs to advertise. It is therefore imperative that inside counsel have a basic understanding of the advertising and marketing laws that affect their businesses.

Advertising is governed by myriad federal, state and local regulations. In light of this complexity, some inside counsel may elect to take a “common sense” approach to marketing and advertising issues, relying on the assumption that being truthful, ethical and logical will insulate their company from liability. But advertising decisions involve more than truth, ethics or logic. Instead, such decisions require in-depth knowledge of the numerous federal, state and local regulations that govern specific industries and advertising practices.

This article, the first in a series of three on this topic, provides a general overview of the federal, state and local regulations that govern advertisers, and highlights recent developments in each of these areas. Subsequent articles in this

series will discuss steps that can be taken to insulate your company from regulatory investigations and examine how best to respond to a regulatory inquiry.

FEDERAL REGULATIONS

At the federal level, the Federal Trade Commission (“FTC”) regulates advertising pursuant to the FTC Act. In short, the FTC Act provides that advertising must be truthful and not deceptive, and that advertisers must have proper and sufficient evidence to support claims prior to making them, i.e. a “reasonable basis”. Inside counsel must carefully consider these requirements when developing and reviewing product claims and demonstrations.

Advertisers who fail to comply with the FTC Act may become subject to consent orders that place considerable

restrictions on their future advertising. For instance, the FTC recently concluded that a Nissan television commercial that featured a pickup truck pushing a dune buggy up a sand dune was deceptive because the truck was incapable of performing as depicted (in fact, both vehicles were towed up the hill using cables). The resulting consent order between the FTC and Nissan stipulates that for the next 20 years Nissan cannot misrepresent any material quality or feature of a pickup truck through the depiction of a test, experiment or demonstration.

Advertisers must also comply with FTC guidelines that pertain to specific marketing practices, such as environmental advertising, advertising of warranties and guarantees, and the use of endorsements and testimonials. Failing to abide by these guidelines can have serious consequences. For instance, the FTC recently reached a settlement with an advertising agency that had encouraged its employees to tweet positive comments about a client’s video

game console. Because the employees failed to disclose their connection with the client, their tweets violated the FTC's Endorsement Guidelines – an oversight that prompted the FTC to take action.

STATE REGULATIONS

Certain marketing practices are increasingly scrutinized and regulated on the state level. For example, as companies seek to establish or grow their online presence, many employ automatic renewal and free trial billing practices – both elements of what are called “negative option” programs. However, states, including California, New York, Washington and Florida have differing requirements for companies operating such programs. In general, companies must clearly disclose transaction terms before obtaining consumer billing information, ensure the consumer affirmatively consents to enter into an auto-renewal or free trial offer, and provide clear and simple cancellation policies, but the form, method and timing of such disclosures and notices vary by state. The spate of recent enforcement actions in this area highlights the importance of abiding by these state-specific principles. For example, the States of Washington, New York and Pennsylvania recently settled an action against Internet Order, LLC for its negative option marketing practices for the sale of a published content. The Washington case was brought under both the Washington Consumer Protection Act as well as the Federal Restore Online Shoppers' Confidence Act, for the company's failure to provide adequate disclosures with respect to continuous subscription practices and its use of deceptive marketing tactics.

Traditional marketing practices are also subject to a host of state regulations. Conducting a point-of-sale marketing campaign in California? The Song-Beverly Act sets forth strict guidelines with respect to the information that can be gathered from consumers at point-of-sale. Promotions, giveaways and gift cards are also subject to various state requirements, with recent state legislative activity focusing on the permissibility of imposing expiration dates and dormancy/service fees on gift cards. Moreover, escheat laws (remember those from law school) are alive and well, providing states with the basis to pursue unredeemed gift card balances and other promotional offer balances. Though such laws may not be at the forefront of companies' or consumers' minds, failure to account for them can have serious repercussions.

What about the products being sold? In addition to the host of regulations surrounding packaging information and retail pricing, one must also consider each of the product performance representations and warranty claims being communicated. There are many rules unique to specific product categories, which you might know because you are in the industry. But don't presume that what you know is all that you need to know. We live in a world of overlapping jurisdictions and regulatory frameworks.

Remember that the applicable state laws may vary depending on the type of product and the manner in which it is being marketed – whether via mail order, door-to-door sales, or in-store advertising.

LOCAL REGULATIONS

Finally, on the local level, certain

product offerings and advertising practices are governed by specialized rules. For instance, despite the fact that cruise ships are generally regulated by the International Maritime Organization, certain ports in Florida enforce specific local cruise ship advertising regulations. In addition to specific advertising regulations for manufacturers and dealerships, local county motor vehicle laws often govern various aspects of registering, titling, and leasing. Certain municipalities also have advertising regulations addressing specific industries, products, providers and operators. A good example is New York City's Department of Consumer Affairs – an agency with broad enforcement powers and detailed regulations and precedent. The medium of the advertising at issue also effects the regulations at play. For example, local codes may strictly regulate out-of-home advertising, often prohibiting the use of sidewalks and public spaces in advertising.

Remember, your best protection is knowing what you know and knowing what you do not know. Presuming that being smart and having common sense is all you need may lead to certain unintended consequences – such as a regulatory action or a consumer class action. ●

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