

MORE ON **CORPORATE GOVERNANCE** **DEPARTMENT OPERATIONS** by RONALD R. URBACH and AARON TAYLOR

Advertising Regulatory Landscape: What In-House Counsel Need to Consider when Responding to A FTC or State AG Action

THIS IS THE SECOND in a series of three articles examining the advertising regulatory landscape and the key issues affecting in-house counsel. This article discusses best practices when responding to a Federal Trade Commission or State Attorney General action.

I. THE LETTER

Picture this: you arrive at work on a Monday morning and there is a certified letter on your desk. It's from one of the following: (i) the Federal Trade Commission ("FTC"); (ii) a state Attorney General; or (iii) the National Advertising Division of the Better Business Bureau ("NAD"). The letter asserts that certain advertising practices spearheaded by your Chief Marketing Officer are false and misleading.

The letter may have been triggered by a consumer complaint, a petition, a request from a competitor, or simply a direct observation by the regulator in question. While certainly disconcerting, it is important to remember that a letter

from a regulator is not, in and of itself, a determination of a violation. The most important thing to do at this point is to review the regulator's assertions, assemble a knowledgeable legal team and determine how best to respond.

II. RESPONDING TO THE FTC OR STATE AG

Your response and its timing will set the tone for the rest of the FTC or State AG's investigation. Accordingly, the following are some key strategies to keep in mind:

1. Preserve Documents. Carefully review the letter to understand exactly what is being asked and

alleged. Thereafter, gather and preserve the key documents that concern the development and dissemination of the advertising materials and/or claims at issue, including by mining electronic backups and contacting IT teams to ensure that no key data from the relevant time period is erased.

2. Get the Background. Piece together the relevant background: who were the product team members, agencies or suppliers responsible for the marketing at issue? What representations and substantiation were relied upon? Where did the marketing run and in what media? How long did the marketing run (and is it still running)? What products were implicated? What consumers were targeted? This background information will be integral to your response.

3. Hire Outside Counsel with

Industry Expertise. Once you have assessed the situation internally, engage knowledgeable lawyers who understand the advertising and marketing industry. Counsel with regulatory experience, but no real advertising and marketing expertise will put you at a disadvantage. The right outside counsel can evaluate the allegedly misleading advertising materials, advise on the adequacy of the substantiation that supports challenged claims, leverage its relationships within the FTC or the State AGs office and develop a strategic and targeted response that effectively defends your company's interests.

4. Schedule Meetings. With the help of outside counsel, set up in-person meetings with the FTC or State AG. These meetings can help you negotiate the scope and the timing of the investigation. Moreover, these meetings are an excellent opportunity to seek clarification with respect to the regulator's concerns while demonstrating that your company is a good corporate citizen and committed to fair business practices. The goal is to limit the scope of any investigation.

5. Evaluate Your Risk Tolerance. Finally, there are a number of questions that you and your outside counsel will need to consider when developing a response and progressing forward. What is the Company's risk tolerance to litigation with regulators? Specifically, what are the potential benefits and risks

of taking an aggressive defensive stance? What are the risks and financial cost in defending and resolving the dispute? What will the effect be on future business practices? It is imperative that you and your outside counsel consider these risks and the Company's goals as you develop your response strategy. While a regulatory challenge is part of the cost of doing business, having the appropriate resources in place to review and respond to the allegations and approaching each step of an investigation carefully will give you the best chance of preserving that business.

III. RESPONDING TO THE NAD:

Responding to a letter from the NAD is considerably more straightforward due to the fact that the details of the response process are explicitly set forth in the NAD's procedures. Nevertheless, inside counsel should consider the following:

1. Confirm Jurisdiction. The NAD does not have jurisdiction over advertising that is not national in character; is the subject of a pending litigation or a court order; is the subject of a federal government agency consent decree or order; or has been permanently withdrawn from use prior to the date of the NAD's challenge letter. If your advertising falls into one of these exceptions the NAD must administratively close its inquiry.

2. Hire Outside Counsel with NAD Expertise. Knowledge of NAD procedures and NAD precedent is

essential to effectively responding to an NAD inquiry. Accordingly, seek out counsel with considerable experience defending cases before the NAD.

3. Pick Your Battles. NAD decisions and NAD press releases focus on the advertising claims that the advertiser elected to defend and typically ignore the claims that are voluntarily discontinued by the advertiser. Thus, in some instances – especially where the challenged claim is unsupported or inconsistent with NAD precedent – the best defense is no defense. Noting that a particular claim has been “discontinued for reasons unrelated to the NAD challenge” will enable you to avoid fruitless arguments and focus on those advertising claims that are truly worth defending.

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The most important advice is - know what you know and what you don't know. This is a highly sophisticated area where experience, expertise and specialized knowledge is critical to be able to even the odds in any dispute with a regulator. ●

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