

FTC Enforcement Priorities in a New Administration

5th Edition: Trends in Marketing Communications Law

The changing of the guard for the federal government often signals changing priorities, especially where regulatory agencies are concerned. Unlike some agencies, which have decreased enforcement activities as a result of the Trump administration's deregulatory bent, the Federal Trade Commission (FTC), and in particular, the Bureau of Consumer Protection, have showed no sign of letting up on enforcement where it deems marketing practices to be unfair or deceptive.

For the past several years, the FTC has been cracking down on deceptive marketing practices for dietary supplements and weight-loss products. Although the FTC has tended to go after the marketers themselves, it has recently shown an increased willingness to take on the advertising agencies who participate in the preparation of false or misleading claims for such products.

In February 2018, the FTC obtained a \$2 million judgment against an advertising agency for publishing consumer testimonials about weight-loss pills in "health news" reports, where the "consumers" were in fact paid actors and their results were fabrications that were not backed by scientific evidence. The FTC, in particular, noted that the advertising agency was in possession of legal advice that the ads were "particularly risky" and would require substantiation, yet published the ads without receiving that substantiation. Similarly, in April 2017, the FTC settled with an advertising agency over the agency's preparation of radio ads that were deceptively formatted to sound like talk shows, and which featured "experts" who did not have the expertise they claimed to have.

In both cases, the FTC made clear that advertising agencies cannot rely on unsupported assertions from their clients and have a duty to ensure that they have a scientific basis to make any advertising claims they place in marketing materials.

Regardless of the regulatory priorities of the FTC's new slate of commissioners, confirmed on April 27, 2018, the agency has made clear that it will not let up on policing deceptive marketing practices. Rather, all indications suggest that the FTC will continue to enforce its mandate where it finds that marketers are causing real, tangible harm to consumers.

Key Takeaways

- Advertising agencies can be held responsible for the truth and accuracy of all marketing materials they disseminate and should not rely on the unsupported assertions of their clients.
 - The FTC's consumer protection mandate remains the same under Republican and Democratic administrations, and the agency will continue to bring enforcement actions where it believes consumers are being harmed by deceptive marketing practices.
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