

The Top 10 Advertising and Marketing Issues to Watch for in 2022

The Bottom Line

- All marketers should examine their current practices to ensure that they can comply with updated laws and guidance.
- We will continue to monitor compliance and enforcement trends throughout 2022.

2022 has the potential to be a major year for the advertising and marketing industry — new laws and guidance are going into effect, the Federal Trade Commission (FTC) is reviewing various guides, and new enforcement priorities have emerged. We expect that a number of trends will most likely continue — including the popularity of non-fungible tokens (NFTs), sponsorships navigating COVID-related issues, and heightened scrutiny of environmental marketing. Areas of the law governed by a patchwork of state regulations — including name, image and likeness rights, cannabis marketing, and subscription marketing — will be subject to heightened compliance obligations in certain states. We also anticipate that the FTC and state regulators will increase enforcement efforts, including with regard to endorsements, children's advertising, and supply chain issues.

The ten key areas that marketers should pay attention to in 2022 include:

1. NFTs

Non-fungible tokens, or NFTs, exploded in popularity in early 2021, and as the market has begun to mature, brands have been piling in to leverage the trend. NFTs give users the ability to own unique pieces of property in the digital space, and with the world becoming increasingly digital, brands can leverage NFTs as part of giveaways and sweepstakes prizes even though they cannot interact with users in person.

Meanwhile, iconic brands and IP owners like film studios have been leveraging NFTs to open up a new way to earn revenue by licensing their intellectual property. Though traditional IP, licensing, and promotional legal issues apply to NFTs as with any other marketing tactic, the unique nature of NFTs creates a host of new legal issues and requirements, and marketers need to ensure that their terms and conditions and licensing agreements appropriately reflect the nature of the NFT marketplace.

2. Cannabis Marketing

Recreational cannabis is now legal in more than a third of U.S. states, medical marijuana is legal in a majority of U.S. states, and cannabidiol or "CBD" — cannabis' non-intoxicating cousin — is legal in nearly every state. However, despite the dramatic rise in legality of marijuana and near ubiquity of CBD, both areas face complicated regulatory schema.

Marijuana is still illegal on the federal level, meaning that state-legal marijuana sales are still federally illegal, and though CBD is generally **legal** at the federal level, the food and drug administration prohibits the use of

CBD in foods and dietary supplements, including in drinks, gummies, tinctures or other ingestible products. In addition, those states that have legalized recreational or medical marijuana have detailed advertising guidelines governing disclosures, targeting, health and wellness claims, and other content-related considerations.

3. Influencers and Endorsements

If you do not know what a Tiktokker is, now is a good time to learn, as Tiktokkers will only grow in popularity in 2022, as brands continue to put their marketing dollars behind them and other influencers. But it is not all fun and games anymore, as brands need to ensure their influencers are complying with their disclosure and other obligations under the FTC Endorsement Guides. We expect to see increased enforcement as a response to the FTC having sent notices to more than 700 companies regarding misleading endorsements. Enforcement is expected to increase even further once the FTC releases its updated [Endorsement Guides](#) later this year. Brands are not the only ones that need to worry about the regulators – as influencers grow in popularity, they too will become the targets of regulatory actions, as well as competitor and consumer class actions.

4. Children's Advertising and Privacy

The Children's Advertising Review Unit (CARU) self-regulatory [guidelines](#) went into effect on January 1, 2022. The updated CARU guidelines replace CARU's TV-centric guidelines and address the new media formats that are popular with children these days, including digital media, influencer marketing, apps, games and social media. At the heart of CARU's guidelines is the principle that advertising must be truthful and non-misleading and material disclosures must be clear and conspicuous in language that children can understand (e.g., "this is an ad for x brand" in influencer marketing directed to children). CARU vowed to actively investigate non-compliance shortly after the updated guidelines went into effect. Now is a good time for children's marketers to review their marketing practices to ensure they are in compliance with CARU's updated guidance.

After a banner 2019 when the FTC brought actions against TikTok and YouTube for violations of the Children's Online Privacy Protection Act (COPPA), the FTC has been largely quiet on the COPPA front. We expect that to change in 2022 as enforcement ramps up against apps, websites, social platforms and other online services that are directed to children and violate the law.

5. Name, Image, and Likeness

By the end of 2021, more than half of U.S. states had passed legislation governing college athlete name, image and likeness (NIL) rights. 2022 will see the majority of the remaining states passing similar legislation. With no uniform federal legislation in sight, the NIL landscape is about to become significantly more complicated. As NIL sponsorship activity ramps up, ambiguous boundaries are certain to be pushed and sponsors and student-athletes will need to navigate a patchwork of state regulations and school rules to ensure that eligibility is not jeopardized.

The NCAA has already begun investigating NIL arrangements which may be potential violations of its amateurism rules and, on the horizon, a class action lawsuit in Florida indicates that the battle will shift to high school. Expect continued tension between what is permissible and what is not as schools, athletes and sponsors define the market for NIL rights and the parameters for compliant deals.

6. Sponsorship

A resurgent COVID-19 variant, once again, wreaked havoc on the sports and live event industry as 2021 came to a close. At the same time, the sports betting, crypto and NFT industries funneled new money into sponsorships, providing a lifeline for teams, leagues and facilities still coping with the effects of the pandemic.

2022 promises new challenges as sponsors in industries still impacted by the pandemic will be increasingly likely to seek to extricate themselves from sponsorship agreements impacted by two years of disruption in live events and a forecast where a return to normalcy remains uncertain. Meanwhile, teams and leagues will carve out new categories of sponsorship to embrace and leverage the meta-landscape.

7. Environmental Marketing

It may become harder to sustain those sustainability claims, as environmental marketing claims promise to be an area of heightened focus in 2022. The FTC has indicated that it intends to review its Guides for the Use of Environmental Marketing Claims, which were last updated in 2012, and lack clarity on some of today's most popular environmental marketing claims. In addition, a number of high profile class actions were filed late last year against brands with green-centric marketing, and green claims were challenged at the National Advertising Division (NAD, a self-regulatory adjudicative body) by both competitors and by the NAD as part of its independent marketplace monitoring — indicating an enforcement trend that we expect to continue.

At the state level, California passed sweeping legislation governing recyclability claims, which significantly limits the claims that can be made about the [recyclability](#) of a product or packaging, and New York introduced The Fashion Sustainability and Social Accountability Act, which generally seeks to impose sustainability reporting requirements on the fashion industry.

8. Automatic Renewal

States have continued to adopt (or update) automatic renewal laws, which generally impose disclosure, consent and notice requirements on sellers. We expect that state laws (and enforcement actions) will most likely reflect a heightened focus on disclosure and notice requirements for free-to-pay trial offer conversions, under which consumers receive goods or services for free during a limited trial period, and then automatically begin charging a fee unless consumers affirmatively cancel. We also expect cancellation methods to be an area of focus, as cancellation should generally should be easy to use, immediate and entirely online if the consumer is able to accept the automatically renewing offer online.

In addition to likely state enforcement (and continuing consumer class actions), this year could include increased federal enforcement. At the end of 2021, the FTC released an enforcement policy statement warning companies about their compliance obligations relating to negative option programs and against using website design features to deceive consumers into signing up for subscription services (i.e. by using “dark patterns”). While non-binding guidance, this statement is indicative of the FTC’s interpretation of existing law as it applies to negative option practices. The FTC has also indicated that it is [conducting rulemaking](#) on negative option marketing and operating.

9. Made in the USA

Products can only be advertised as “Made in the USA” if their final assembly occurred in the United States and all or virtually all inputs were sourced from within the United States. Though this is not a new

requirement, the FTC has significantly increased enforcement in recent years, and has assessed over \$3 million in monetary penalties between 2020 and 2021, including a \$1 million settlement with Williams Sonoma and a \$753,000 settlement with Nectar Sleep.

The FTC's new Made in the USA Labeling Rule came into effect in August 2021, giving the FTC authority to seek civil penalties of up to \$43,280 per violation. Given the significant monetary risks involved, brands, manufacturers and marketers need to understand the full picture of their manufacturing process and supply chain before claiming that their products are "Made in the USA."

10. Dealing with Supply Chain Issues

The disruption to the global supply chain caused by the pandemic is having far reaching impacts on the economy and consumers alike, and brands will feel the effect even more this year. As inventory levels decrease and shipping times increase, advertisers should pay careful attention to what they're telling their customers.

Remember that both state and federal laws and guidance generally prohibit advertising a product without having a sufficient supply to meet the reasonably anticipated demand for such product. The FTC's Guides Against Bait Advertising, in particular, advise against promoting a product that is not "available at all outlets listed in the advertisement a sufficient quantity of the advertised product to meet reasonably anticipated demands, unless the advertisement clearly and adequately discloses that supply is limited and/or the merchandise is available only at designated outlets."

Accordingly, if the quantity of items a company has on hand isn't sufficient to meet the "reasonable demand" standard, it's important to clearly and conspicuously disclose there this is limited availability. In addition, the FTC's Mail Order Rule requires that mail, internet and telephonic sellers have a reasonable basis for advertised shipping times. If sellers can't meet their promised shipping times, if there is no promised shipping time, or if they cannot ship within 30 days, they must offer consumers the option to consent to a delay or cancel their orders and receive a prompt refund. Sellers must remember to follow the rule and obtain consent from consumers for the delay, *when necessary*.

Possessing, using, distributing, and/or selling marijuana or marijuana-based products is illegal under federal law, regardless of any state law that may legalize or decriminalize such activity under certain circumstances. Although federal enforcement policy may at times defer to states' laws and not enforce conflicting federal laws, interested businesses and individuals should be aware that compliance with state law in no way assures compliance with federal law, and there is a risk that conflicting federal laws may be enforced in the future. No legal advice we give is intended to provide any guidance or assistance in violating federal law.

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