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Tiffany Woo is a staff attorney in the Federal Trade Commission's Division of Advertising Practices, where she works on a variety of consumer protection matters. Before joining the FTC, Ms. Woo was an associate at a large law firm in New York City. Ms. Woo holds a Bachelor of Arts from Yale University and a Juris Doctor from Columbia Law School.

FEDERAL TRADE COMMISSION

FTC Update

New York Intellectual Property Law Association
"Hot Topics in Trademark & Copyright Law"

June 26, 2024

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Federal Trade Commission

Disclosure

My views are my own and do not necessarily reflect the views of the Commission or any individual Commissioner.

Background & Advertising Basics

- FTC Act
  - Section 5 (15 U.S.C. § 45) prohibits "unfair or deceptive acts or practices"
- More than 70 other laws
- Trade Regulation Rules
- Rules promulgated under specific grants of authority from Congress

Background & Advertising Basics

- Section 5 of the FTC Act prohibits unfair or deceptive acts or practices

- An act or practice is ***unfair*** if:
  - it causes substantial consumer injury – physical, economic, or otherwise
  - not reasonably avoidable by consumers
  - and not outweighed by countervailing benefits to consumers or to competition

Background & Advertising Basics

- Section 5 of the FTC Act prohibits unfair or deceptive acts or practices

- An act or practice is ***deceptive*** if:
  - it's likely to mislead consumers
  - acting reasonably under the circumstances
  - and it would be material to their decision to buy the product

Background & Advertising Basics

- Under the law, claims in advertisements must be ***truthful***, ***cannot be deceptive or unfair***, and must be ***evidence-based***.
- An advertiser is responsible for all objective claims – ***express and implied*** – that are conveyed to reasonable consumers.
- All objective claims must be ***substantiated at the time they are made***.
- Fine print or buried “disclosures” won’t cure an otherwise deceptive ad.

Health Products Compliance Guidance

- For objective claims about health, safety, or efficacy, the advertiser must have ***competent and reliable scientific evidence***
- Methodologically sound based on expertise of professionals in the field, objectively conducted by qualified people, using procedures accepted in the field
- Not: anecdotal evidence, popular press articles, sales material from manufacturer, low return rate, money-back guarantee

Recent Warning Letters

https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-sends-cease-desist-letters-fda-companies-selling-edible-products-containing-delta-8-thc

(Less) Recent Warning Letters

https://www.ftc.gov/news-events/news/press-releases/2018/05/ftc-fda-take-action-against-companies-marketing-e-liquids-resemble-childrens-juice-boxes-candies

Endorsements/Testimonials: General Principles (16 CFR Part 255)

- Advertisers must have substantiation for claims made through endorsements
- Endorsements should reflect the honest beliefs, opinions, and experiences of the endorser
- Endorsements should clearly and conspicuously disclose material connections
- Consumer testimonials will usually be interpreted to depict typical results

Endorsements/Testimonials: 2023 Revisions

- Revised definitions:
  - “Clear and conspicuous” must be difficult to miss and unavoidable
    “Endorsement” can include social media tags, fabricated endorsers
- Liability:
  - Subsection 255.1(d) on advertiser liability: best practices
  - New subsection 255.1(e) on endorser liability: when they make representations they know or should know are deceptive
  - New subsection 225.1(f) on intermediary liability (ad agencies, PR firms)
- Review manipulation:
  - New subsection 255.2(d) that advertisers should not take actions with respect to consumer reviews that distort/misrepresent what consumers think of products
- New subsection 255.6 says endorsements to children are of special concern

Recent Initiatives

https://www.ftc.gov/news-events/news/press-releases/2023/11/ftc-warns-two-trade-associations-dozen-influencers-about-social-media-posts-promoting-consumption

iHeart employee to Google: "We … cannot require talent to use 'I' in voiced spots when they have not physically used the product …."

Google's media buying agent to iHeart: "Just heard back from [Google] in regards to sending Pixels to your talent. Unfortunately, this is not feasible for [Google] at this time…."

In the Matter of Google LLC and iHeart Media (consent orders)

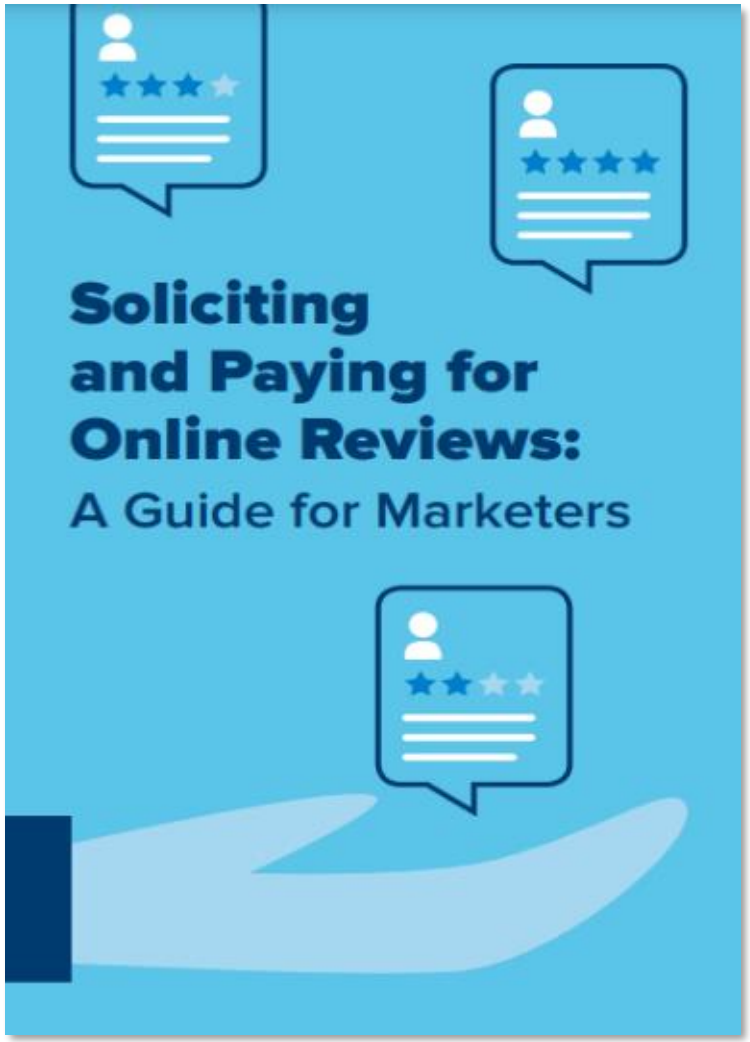
Proposed Rule on Use of Reviews and Testimonials (16 CFR 465)

- Proposal announced in June 2023 and was open for comments until Sept. 29 (Oct. 2022 ANPR received 42 comments)
- Practices that would be declared to be deceptive or unfair:
  - Fake or false reviews
  - Reviews for one product repurposed for a different product
  - Buying positive or negative reviews
  - Undisclosed insider reviews by employees or agents
  - Company-controlled review websites that appear to be independent
  - Review suppression
  - Sale or purchase of fake indicators of social media influence

Consumer Reviews

Fashion Nova (consent order) and FTC v. Hey Dude, Inc. (stipulated order)

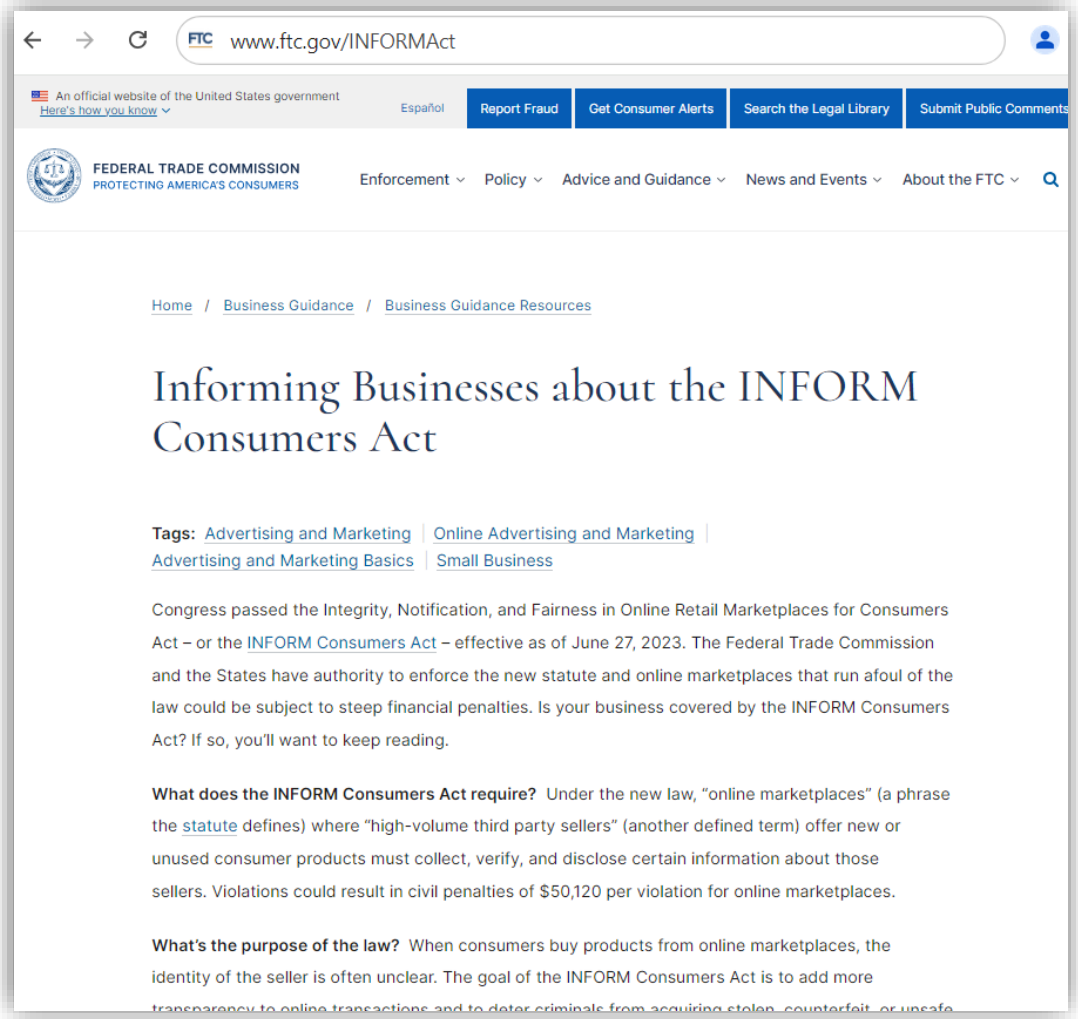
Resources on reviews and influencers



INFORM Consumers Act (15 U.S.C. 45f)

Online marketplaces must collect, verify, and disclose certain information from “high-volume third party sellers” and provide a reporting mechanism for consumers to report suspicious marketplace activity.

www.ftc.gov/INFORMAct



Negative Options and Dark Patterns

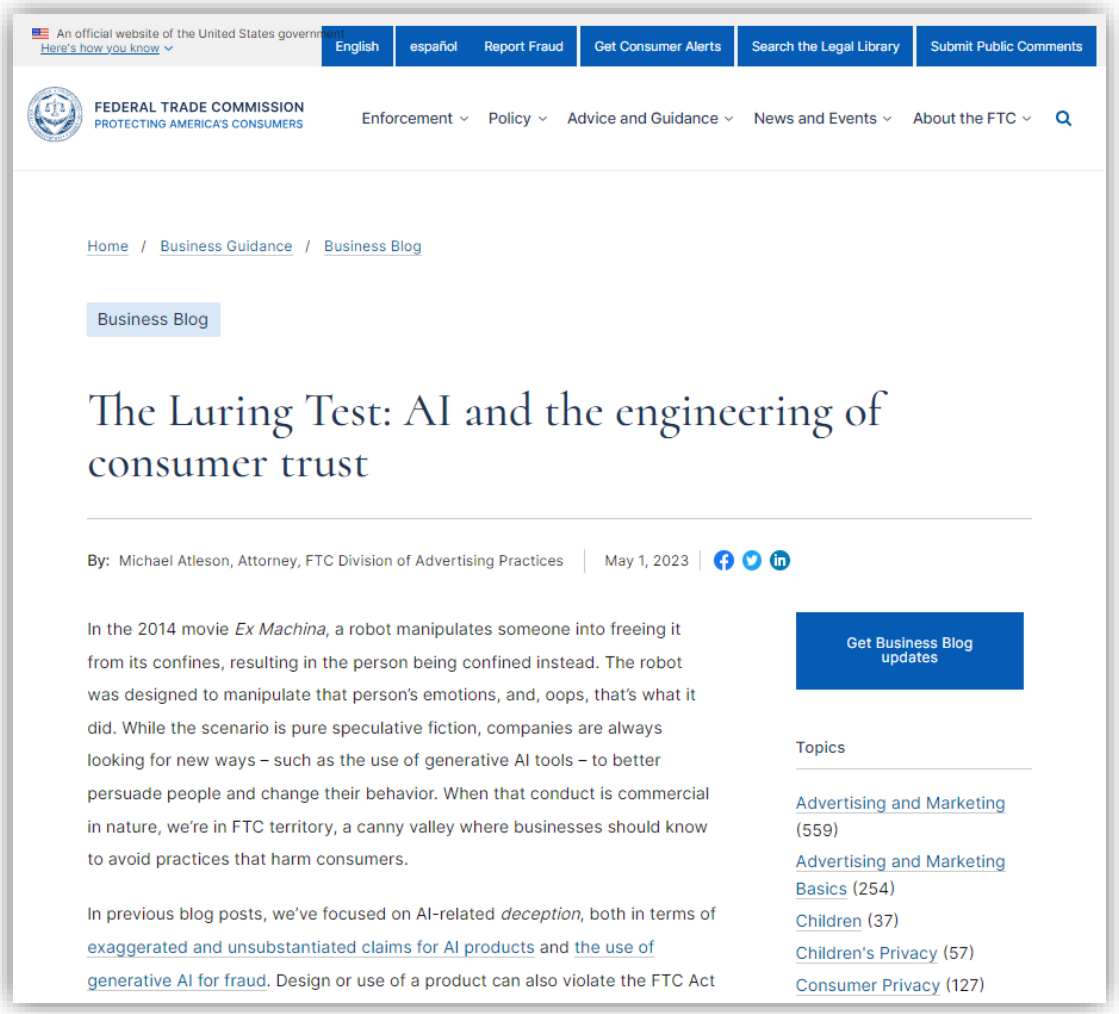
- ROSCA (2010) governs online negative options
  - Requires clear and conspicuous disclosure of material terms, express consent before payment, and a simple mechanism to stop recurring charges
- November 2021 Enforcement Policy Statement
- Negative Option Rule (16 CFR 425)
  - Currently only covers prenotification plans (*e.g.*, book-of-the-month club) and not continuity plans, automatic renewals, or free-to-pay offers
  - March 2023 NPRM proposes to cover all negative option plans and require "click to cancel" mechanisms

Unfair or Deceptive Fees Rulemaking (16 CFR Part 464)

- ANPR issued Nov. 8, 2022 (over 12,000 comments)
- NPRM issued Nov. 9, 2023 (over 60,000 comments)
- Proposed rule targets two unfair and deceptive practices:
  - Sellers failing to advertise the total amount consumers will have to pay and disclosing fees only after consumers are well into the purchasing transaction
  - Sellers misrepresenting or failing to adequately disclose the nature or purpose of fees, leaving consumers wondering what they are paying for or believing that fees are arbitrary

AI and consumer protection

- AI and Your Business series



AI and consumer protection

- AI and Your Business series
- FTC v. Rite Aid
  (stipulated order)

FTC Biometric Policy Statement (2023)

"The increasing use of consumers' biometric information and related marketing of technologies that use or purport to use biometric information raise significant concerns with respect to consumer privacy, data security, and the potential for bias and discrimination. The FTC is committed to combatting unfair or deceptive acts related to the collection and use of consumers' biometric information and the marketing and use of biometric information technologies …

…businesses should continually assess whether their use of biometric information or biometric information technologies causes or is likely to cause consumer injury in a manner that violates Section 5 of the FTC Act. If so, businesses must cease such practices, whether or not the practices are specifically addressed in this statement."

Recent Privacy Cases

ring VIDEO DOORBELL

IN MARKET

Cerebral

Billed monthly
FSA / HSA eligible
Cancel anytime
Start Today

Billed monthly
FSA / HSA eligible
Cancel anytime
Start Today

Billed monthly
FSA / HSA eligible
Cancel anytime
Start Today

Ring stipulated order; Cerebral stipulated order; InMarket Media consent order; Monument stipulated order

Thank you!

FEDERAL TRADE COMMISSION

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Hot Topics in Trademark & Copyright Law: FTC Update

Tiffany Woo, Staff Attorney
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The views expressed here are my own and do not necessarily represent the views of the Commission or any Commissioner.

Background

Section 5(a) of the FTC Act:

> "Unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." 15 U.S.C. § 45(a)(1).

The FTC also enforces more than 70 other laws: https://www.ftc.gov/legal-library/browse/statutes

Investigative and Enforcement Authority:

The Commission may "prosecute any inquiry necessary to its duties in any part of the United States," FTC Act Sec. 3, 15 U.S.C. Sec. 43, and is authorized "to gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce, excepting banks, savings and loan institutions . . . Federal credit unions . . . and common carriers . . ." FTC Act Sec. 6(a), 15 U.S.C. Sec. 46(a).

Following an investigation, the Commission may initiate an enforcement action using either an administrative or judicial process if it has "reason to believe" that the law is being or has been violated. The Commission enforces both consumer protection and antitrust laws. Violations of some laws may result in civil penalties, which are adjusted annually for inflation. Commission Rule 1.98, 16 C.F.R. Sec. 1.98.

Advertising Basics:

Under the Federal Trade Commission Act:

- Advertising must be truthful and non-deceptive;
- Advertisers must have evidence to back up their claims; and
- Advertisements cannot be unfair.

Additional laws apply to ads for specialized products like consumer leases, credit, 900 telephone numbers, and products sold through mail order or telephone sales. And every state has consumer protection laws that govern ads running in that state.

What makes an advertisement deceptive?

According to the FTC's Deception Policy Statement, an ad is deceptive if it contains a statement - or omits information - that:

- Is likely to mislead consumers acting reasonably under the circumstances; and
- Is "material" - that is, important to a consumer's decision to buy or use the product.

What makes an advertisement unfair?

According to the Federal Trade Commission Act and the FTC's Unfairness Policy Statement, an ad or business practice is unfair if:

- it causes or is likely to cause substantial consumer injury which a consumer could not reasonably avoid; and
- it is not outweighed by the benefit to consumers.

How does the FTC determine if an ad is deceptive?

A typical inquiry follows these steps:

- The FTC looks at the ad from the point of view of the "reasonable consumer" - the typical person looking at the ad. Rather than focusing on certain words, the FTC looks at the ad in context - words, phrases, and pictures - to determine what it conveys to consumers.
- The FTC looks at both "express" and "implied" claims. An express claim is literally made in the ad. For example, "ABC Mouthwash prevents colds" is an express claim that the product will prevent colds. An implied claim is one made indirectly or by inference. "ABC Mouthwash kills the germs that cause colds" contains an implied claim that the product will prevent colds. Although the ad doesn't literally say that the product prevents colds, it would be reasonable for a consumer to conclude from the statement "kills the germs that cause colds" that the product will prevent colds. Under the law, advertisers must have proof to back up express and implied claims that consumers take from an ad.
- The FTC looks at what the ad does not say - that is, if the failure to include information leaves consumers with a misimpression about the product. For example, if a company advertised a collection of books, the ad would be deceptive if it did not disclose that consumers actually would receive abridged versions of the books.
- The FTC looks at whether the claim would be "material" - that is, important to a consumer's decision to buy or use the product. Examples of material claims are representations about a product's performance, features, safety, price, or effectiveness.
- The FTC looks at whether the advertiser has sufficient evidence to support the claims in the ad. The law requires that advertisers have proof before the ad runs.

What kind of evidence must a company have to support the claims in its ads?

Before a company runs an ad, it has to have a "reasonable basis" for the claims. A "reasonable basis" means objective evidence that supports the claim. The kind of evidence depends on the claim. At a minimum, an advertiser must have the level of evidence that it says it has. For example, the statement "Two out of three doctors recommend ABC Pain Reliever" must be supported by a reliable survey to that effect. If the ad isn't specific, the FTC looks at several factors to determine what level of proof is necessary, including what experts in the field think is needed to support the claim. In most cases, ads that make health or safety claims must be supported by "competent and reliable scientific evidence" - tests, studies, or other scientific evidence that has been evaluated by people qualified to review it. In addition, any tests or studies must be conducted using methods that experts in the field accept as accurate.

For general guidance on FTC advertising law, visit https://www.ftc.gov/business-guidance/advertising-marketing.

The FTC also has a blog that lets businesses know about recent enforcement actions, guidance, or upcoming workshops, which can be found along with other resources at www.ftc.gov/tips-advice/business-center.

Health Products Compliance Guidance:

- https://www.ftc.gov/system/files/ftc_gov/pdf/Health-Products-Compliance-Guidance.pdf (updated December 2022)

"What's new – and what isn't – in the FTC's just-published Health Products Compliance Guidance" by Lesley Fair, FTC Business Blog (December 20, 2022); *available at* https://www.ftc.gov/business-guidance/blog/2022/12/whats-new-what-isnt-ftcs-just-published-health-products-compliance-guidance.

Looking for advice on substantiating your company's advertising claims? FTC staff just issued a new Health Products Compliance Guidance publication that merits your careful attention. You may be wondering if the publication reflects major changes to the FTC's 1998 guidance. As we'll explain, the answer to that question is yes – and no. So turn off your phone, pour a cup of cocoa, and spend some time with what may be one of the most important documents you'll read in 2022.

If you've routinely consulted the FTC's 1998 brochure, *Dietary Supplements: An Advertising Guide for Industry*, the new publication is designed to take its place. For the most part, the legal fundamentals remain unchanged, but there are key revisions we hope to convey.
The new publication's substantiation compliance guidance isn't just for companies that sell dietary supplements. One major change is the title, which is meant to make it clear that the guidance applies across the board to all health-related claims.

The new publication draws upon key compliance points conveyed by FTC actions brought since 1998. When it comes to ad substantiation, a lot has happened since 1998 – including more than 200 FTC law enforcement actions challenging false or deceptive health claims. We've incorporated the lessons of those cases in numerous new examples – revisions designed to add a practical gloss on long-standing compliance fundamentals. In addition, the new publication reflects updates from other FTC guidance documents – for example, guidelines on endorsements and testimonials and the enforcement policy statement on homeopathic drugs.

The new publication aims to correct misunderstandings and "urban myths" that have circulated about FTC substantiation standards. FTC staff has always encouraged open lines of communication with businesses that have questions about substantiating health claims. However, every now and then we hear from industry representatives who have misread the original publication, selectively misquoted it, or repeated misinterpretations of certain cases. One goal of the revised Health Products Compliance Guidance is to correct those misperceptions.

Readers will notice that the basic content of the guide is largely unchanged. Like its predecessor, it sets out the regulatory framework for the FTC's authority over ads for health-related products, describes how the FTC and FDA coordinate their enforcement activities, and explains the FTC's process for identifying the express and implied claims communicated by an ad and assessing whether there is adequate scientific support for those claims. The revised guide also repeats a central theme from the 1998 publication: that the purported evidence a company proffers as substantiation must be relevant to the specific product and to the advertising claims. In addition, the Health Products Compliance Guidance makes clear that it offers practical perspectives from FTC staff, but that it doesn't have the force or effect of FTC law.

There's no substitution for reading the publication from cover to cover, but here are some revisions and expansions worthy of special mention:

- **The breadth of products discussed.** Underscoring the broad applicability of the publication, you'll see new examples related to foods, over-the-counter drugs, devices, and other health-related products.
- **The "clear and conspicuous" standard and qualified claims.** You'll find more detailed guidance on the FTC's "clear and conspicuous" standard, including the challenges companies face in adequately communicating qualified claims to consumers. (And just to be clear, in FTC parlance a "qualified claim" is one with limitations or caveats.)
- **The "competent and reliable scientific evidence" standard.** This section has been expanded to emphasize the general rule that the FTC expects companies to support health-related claims with high quality, randomized, controlled human clinical trials (RCTs).
- **Testing methodology.** Drawing on the *POM Wonderful* decision, the revised guidance takes a deeper dive into the key elements of quality research. Some fundamentals have been carried over from the 1998 publication regarding the use of control groups, randomization, double blinding, and the requirement that results must be both statistically significant between the treatment and control group and clinically meaningful to consumers. One noteworthy point spelled out in more detail: a specific caution against "p-hacking" – the practice of selectively relying on an analysis of a small

subset of data after failing to find a treatment effect in the study population at large.

There's much more, of course, including discussions about the use of consumer testimonials and expert endorsements, the DSHEA disclaimer, traditional use claims, FDA approval claims, and third-party literature. For the legally inclined, the publication includes endnotes to FTC cases and other key resources, but it's written in a to-the-point style designed for business executives and advertising professionals – not just attorneys and scientists.

Recent Warning Letters re: edible cannabis products

https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-sends-cease-desist-letters-fda-companies-selling-edible-products-containing-delta-8-thc

As part of its ongoing monitoring of health-related advertising claims, the Federal Trade Commission today sent cease and desist letters – jointly with the U.S. Food and Drug Administration (FDA) – to six companies currently marketing edible products containing Delta-8 tetrahydrocannabinol (THC) in packaging that is almost identical to many snacks and candy children eat, including Doritos tortilla chips, Cheetos cheese-flavored snacks, and Nerds candy.

"Marketing edible THC products that can be easily mistaken by children for regular foods is reckless and illegal," said Samuel Levine, Director of the FTC's Bureau of Consumer Protection. "Companies must ensure that their products are marketed safely and responsibly, especially when it comes to protecting the well-being of children."

"Children are more vulnerable than adults to the effects of THC, with many who have been sickened and even hospitalized after eating 'edibles' containing it. That's why we're issuing warnings to several companies selling copycat food products containing delta-8 THC, which can be easily mistaken for popular foods that are appealing to children and can make it easy for a young child to ingest in very high doses without realizing it," said Janet Woodcock, M.D., Principal Deputy Commissioner, FDA.

The agencies sent letters to the following companies: 1) Delta Munchies LLC (Los Angeles, California); 2) Exclusive Hemp Farms (Gilroy, California) and Etienne-DuBois, LLC/Oshipt (Henrico, Virginia); 3) North Carolina Hemp Exchange, LLC, dba NC Hemp Shoppe (Raleigh, North Carolina; 4) Dr. Smoke, LLC, aka Dr. S, LLC (Kansas City, Missouri); 5) Nikte's Wholesale, LLC (Albuquerque, New Mexico); and 6) The Haunted Vapor Room (Franklin, New Jersey).

According to the letters, after reviewing online marketing for Delta-8 THC products sold by the six companies, the FTC has determined that their advertising may violate Section 5 of the FTC Act, which prohibits unfair or deceptive acts in or affecting commerce, including practices that present unwarranted health or safety risks. The letters stress that preventing practices that present such risks, particularly to children, is one of the Commission's highest priorities, and that imitating non-THC-containing food products that children consume is misleading.

The companies' Delta-8 THC products mimic a range of food that appeal to children. Dr. Smoke, LLC, for example, sells THC-infused "Doritos" that are marketed in packaging that is nearly the same as that of Doritos Nacho Cheese Flavored Tortilla Chips (see graphic), including using the same red background, the use of the Doritos name and triangle logo, and the depiction of two tortilla chips in the same position. In addition, Dr. Smoke's THC-infused "Cheetos" are sold in packaging that is nearly identical to that of Cheetos Crunchy Flamin' Hot Cheese Flavored Snacks, right down to the use of the Chester Cheetah mascot.

Another company, The Haunted Vapor Room, sells Delta-8 THC products called Rope 500mg Delta-8 Nerds Candy and Medicated Dope Rope Bites (see graphic) that closely resemble Nerds Rope candy, with both comprising multi-colored crunchy candies attached to a gummy rope, and packaging for the former using what appears to be the Nerds candy mascot.

A third company, Delta Munchies, LLC, markets Delta-8 THC gummies that look like conventional gummy candies that are often consumed by children (see graphic). The brightly colored packaging includes images of the products in fruity and sour flavors that the FTC contends enhance their appeal to children and increases the likelihood that they will mistakenly eat them, thinking they are traditional gummy candies.

In the letters, the FTC demands the companies stop marketing edible Delta-8 THC products that imitate conventional foods using advertising or packaging that is likely to appeal to young children. The FTC also strongly encourages the sellers to review all of their marketing and product packaging for similar edible THC products, and to take swift action and steps to protect consumers, especially young children, from these products.

Prior FTC-FDA Warning Letters

- https://www.ftc.gov/news-events/news/press-releases/2018/05/ftc-fda-take-action-against-companies-marketing-e-liquids-resemble-childrens-juice-boxes-candies

Press Release: FTC, FDA Take Action Against Companies Marketing E-liquids That Resemble Children's Juice Boxes, Candies, and Cookies (May 1, 2018)

Warning letters are part of joint effort to protect youth from dangers of nicotine and tobacco products and part of FDA's new Youth Tobacco Prevention Plan

As part of ongoing efforts to protect youth from the dangers of nicotine and tobacco products, today the Federal Trade Commission (FTC) and the U.S. Food and Drug Administration (FDA) jointly issued 13 warning letters to manufacturers, distributors, and retailers for selling e-liquids used in e-cigarettes with labeling and/or advertising that resemble kid-friendly food products, such as juice boxes, candies, or cookies, some of them with cartoon-like imagery. Several of the companies receiving warning letters also were cited for illegally selling the products to minors.

“Protecting young children from unwarranted health and safety risks is one of our highest priorities,” said Acting FTC Chairman Maureen K. Ohlhausen. “Nicotine is highly toxic, and these letters make clear that marketing methods that put kids at risk of nicotine poisoning are unacceptable.”

“No child should be using any tobacco product, and no tobacco products should be marketed in a way that endangers kids – especially by using imagery that misleads them into thinking the products are things they’d eat or drink. Looking at these side-to-side comparisons is alarming. It is easy to see how a child could confuse these e-liquid products for something they believe they’ve consumed before – like a juice box. These are preventable accidents that have the potential to result in serious harm or even death. Companies selling these products have a responsibility to ensure they aren’t putting children in harm’s way or enticing youth use, and we’ll continue to take action against those who sell tobacco products to youth and market products in this egregious fashion,” said FDA Commissioner Scott Gottlieb, M.D.

“While we continue to encourage the development of potentially less harmful forms of nicotine delivery for currently addicted adult smokers, we will not allow that work to come at the expense of our children. The FDA remains committed to important efforts to restrict youth access, limit youth appeal and reduce toxic exposure to youth from all tobacco products – and we’ll continue to address these issues from every angle. We’re going to be taking a series of escalating actions under our new Youth Tobacco Prevention Plan, beginning with our actions last week targeting JUUL products, and continuing with today’s effort with our partners at the FTC. We appreciate the FTC in joining us in these actions.”

Some examples of the products outlined in the warning letters, and being sold through multiple online retailers, include: “One Mad Hit Juice Box,” which resembles children’s apple juice boxes, such as Tree Top-brand juice boxes; “Vape Heads Sour Smurf Sauce,” which resembles War Heads candy; and “V'Nilla Cookies & Milk,” which resembles Nilla Wafer and Golden Oreo cookies. Other products include “Whip’d Strawberry,” which resembles Reddi-wip dairy whipped topping, and “Twirly Pop,” which not only resembles a Unicorn Pop lollipop but is shipped with one.

In late 2017, the FDA started its investigation of tobacco product labeling and advertising that causes the tobacco products to imitate food products, particularly those that are marketed toward, or appealing to, children. The products noted in the warning letters are considered misbranded in violation of the Federal Food, Drug, and Cosmetic Act because their labeling and/or advertising imitating kid-friendly foods is false or misleading.

The FTC joined the warning letters under Section 5 of the FTC Act, which prohibits unfair or deceptive marketing practices. This prohibition includes practices that present unwarranted health or safety risks. The products at issue are marketed in packaging that resembles foods and drinks popular with young children, and have scents similar to the juice, cookies, or candies the

packages mimic. Given the serious child poisonings due to ingestion of liquid nicotine, the FTC said that marketing these products in packaging that is likely to be particularly appealing to young children could present an unwarranted risk to health or safety.

The FTC and FDA have requested responses from each of the companies within 15 business days. The companies are directed to inform each agency of the specific actions taken to address each agency's concerns. The warning letters also state that failure to correct violations may result in further enforcement action such as seizure or injunction.

The continuing rise in popularity of electronic nicotine devices (ENDS) such as e-cigarettes, which often use liquid nicotine or "e-liquids", has coincided with an increase in calls to poison control centers and visits to emergency rooms.. According to a recent analysis of National Poison Data System data, there were a total of 8,269 e-cigarette and liquid nicotine exposures among children younger than six between January 2012 and April 2017.

Children are at greater risk because exposure to the nicotine in the e-liquid product, even in relatively small amounts, could result in acute toxicity. Small children's exposure to or ingestion of e-liquids can cause death from cardiac and respiratory arrest seizure, and coma.

The warning letters issued today are just one aspect of the FDA's Youth Tobacco Prevention Plan, designed to limit youth access to all tobacco products. The agency continues to enforce important existing regulations specifically aimed at addressing youth access to ENDS, such as e-cigarettes, and other tobacco products, including the ban on the sale of tobacco products to youth under age 18, the requirement to verify age by photo identification, and the prohibition on free samples. This is important, as more than two million middle and high school students were current users of e-cigarettes and other ENDS in 2016, with flavor availability being one of the top reasons for use.

This use by children and teens is especially concerning because of evidence that youth exposure to nicotine affects the developing brain and may rewire it to be more susceptible to nicotine addiction in the future. In April, the FDA announced a nationwide blitz of brick-and-mortar and online retailers, and issued warning letters to businesses that sold JUUL brand products to minors.

The agency also sent a letter to JUUL Labs requiring the company to submit important documents to better understand the reportedly high rates of youth use and the particular youth appeal of these products. The agency has also expanded "The Real Cost" public education campaign with messages focused on preventing youth use of e-cigarettes and a full-scale campaign is planned for a September launch.

As previously announced as part of the FDA's comprehensive plan on nicotine and tobacco regulation, the agency also is exploring clear and meaningful measures to make tobacco products less toxic, appealing and addictive with an intense focus on youth. In particular, the agency is

considering product standards and other regulations for ENDS that would address known risks. This could include measures on flavors/designs that appeal to youth, child-resistant packaging, and product labeling to prevent accidental child exposure to liquid nicotine.

The FDA also issued an advance notice of proposed rulemaking in March to seek public comment on the role that flavors in tobacco products play in attracting youth. Additionally, the agency plans to explore additional restrictions on the sale and promotion of ENDS to further reduce youth exposure and access to these products.

Endorsements and Testimonials:

- 16 CFR Part 255 (updated July 2023).

Suppose you meet someone who tells you about a great new product. The person says it performs wonderfully and offers fantastic new features that nobody else has. Would that recommendation factor into your decision to buy the product? Probably.

Now suppose the person works for the company that sells the product or has been paid by the company to tout the product. Would you want to know that when you're evaluating the person's glowing recommendation? You bet. That common-sense premise is at the heart of the Federal Trade Commission's (FTC) Endorsement Guides. The Guides, at their core, reflect the basic truth-in-advertising principle that endorsements must be honest and not misleading. An endorsement must reflect the honest opinion of the endorser and can't be used to make a claim the marketer of the product couldn't legally make.

In addition, the Guides say, if there's a connection between an endorser and the marketer that a significant minority of consumers wouldn't expect and it would affect how they evaluate the endorsement, that connection should be disclosed clearly and conspicuously. For example, if an ad features an endorser who is a relative or employee of the marketer, the ad is misleading unless the connection is made clear. The same is usually true if the endorser has been paid or given something of value to tout the product. The reason is obvious: Knowing about the connection is important information for anyone evaluating the endorsement.

Say you're planning a vacation. You do some research and find a glowing YouTube video review saying that a particular resort is the most luxurious place the reviewer has ever stayed. If you knew the hotel had paid the reviewer hundreds of dollars to say great things about it or that the reviewer had stayed there for several days for free, it could affect how much weight you'd give the endorsement. The reviewer should, therefore, let viewers know about that relationship.

Another principle in the Guides applies to ads that feature endorsements from people who achieved exceptional, or even above average, results. An example is an endorser who claims to have lost 20 pounds in two months using the advertised product. If the advertiser doesn't have proof that the endorser's experience represents what people will generally achieve using the product as described in the ad (for example, by just taking a pill daily for two months), an ad featuring that endorser must make clear to the audience what the generally expected results of following that same regimen are.

Here are answers to some of the most frequently asked questions from advertisers, ad agencies, influencers, bloggers, and others. Our staff guidance can't be definitive because the context of any particular endorsement is very important in determining whether a disclosure is needed and whether a particular disclosure is sufficient. Given that much of our guidance depends on consumer understanding, there will be times when we don't have sufficient information about what consumers know, what they understand, and how they behave. Moreover, all these factors depend on the context or may change over time. This guidance doesn't provide a safe harbor from potential liability; whether a particular advertising claim is deceptive or otherwise violates the FTC Act will depend on the facts of the specific case.

In addition, we recommend that you read the latest version of the Endorsement Guides, which were revised in 2023 with new or revised principles, examples, and definitions, including a new definition of "clearly and conspicuously." We also have Disclosures 101 for Social Media Influencers and Soliciting and Paying for Online Reviews: A Guide for Marketers, both of which are short and easy-to-read documents with basic guidance.

- FAQs: https://www.ftc.gov/business-guidance/resources/ftcs-endorsement-guides-what-people-are-asking
- Recent Warning Letters: https://www.ftc.gov/news-events/news/press-releases/2023/11/ftc-warns-two-trade-associations-dozen-influencers-about-social-media-posts-promoting-consumption
- *Google/iHeart*: https://www.ftc.gov/legal-library/browse/cases-proceedings/2023092-google-llc-iheartmedia-inc-matter

Review Manipulation

Proposed Rulemaking

https://www.ftc.gov/legal-library/browse/rules/rulemaking-use-consumer-reviews-testimonials

Rule Summary

In July 2023, the Commission published a notice of proposed rulemaking ("NPRM") titled "Rule on the Use of Consumer Reviews and Testimonials" ("Reviews and Testimonials Rule" or "Rule"), which would prohibit certain specified unfair or deceptive acts or practices involving consumer reviews or testimonials.

Text of proposed rule: https://www.federalregister.gov/documents/2023/07/31/2023-15581/trade-regulation-rule-on-the-use-of-consumer-reviews-and-testimonials

Consumer Reviews consent orders:

- Hey Dude: https://www.ftc.gov/legal-library/browse/cases-proceedings/x2123082-hey-dude-inc-ftc-v

- The Bountiful Company: https://www.ftc.gov/legal-library/browse/cases-proceedings/2223019-bountiful-company
- Fashion Nova: https://www.ftc.gov/legal-library/browse/cases-proceedings/192-3138-fashion-nova-llc-matter
- Sunday Riley: https://www.ftc.gov/legal-library/browse/cases-proceedings/192-3008-sunday-riley-modern-skincare-llc-matter

INFORM Consumers Act

Informing Businesses about the INFORM Consumers Act

- **www.ftc.gov/INFORMAct**

Congress passed the Integrity, Notification, and Fairness in Online Retail Marketplaces for Consumers Act – or the INFORM Consumers Act – effective as of June 27, 2023. The Federal Trade Commission and the States have authority to enforce the new statute and online marketplaces that run afoul of the law could be subject to steep financial penalties. Is your business covered by the INFORM Consumers Act? If so, you'll want to keep reading.

What does the INFORM Consumers Act require? Under the new law, "online marketplaces" (a phrase the statute defines) where "high-volume third party sellers" (another defined term) offer new or unused consumer products must collect, verify, and disclose certain information about those sellers. Violations could result in civil penalties of $50,120 per violation for online marketplaces.

What's the purpose of the law? When consumers buy products from online marketplaces, the identity of the seller is often unclear. The goal of the INFORM Consumers Act is to add more transparency to online transactions and to deter criminals from acquiring stolen, counterfeit, or unsafe items and selling them through those marketplaces. The Act also makes sure online marketplace users have a way to report suspicious conduct concerning high-volume third party sellers.

How does the law define an "online marketplace"? You'll want to check the specific wording of the statute, but in general, an "online marketplace" is a person or business that operates a consumer-directed platform that allows third party sellers to engage in the "sale, purchase, payment, storage, shipping, or delivery of a consumer product in the United States." The law takes the meaning of "consumer product" from the Magnuson-Moss Act, which defines the term as "tangible personal property for sale and that is normally used for personal, family, or household purposes." The online marketplace also must have a contractual or similar relationship with consumers governing their use of the platform to buy products. Many of the companies that meet the definition of "online marketplace" are national names, but smaller niche platforms with "high-volume third party sellers" are covered, too.

How does the law define ''high-volume third party seller''? Again, you'll want to check the specific wording of the statute, but in general, a ''high-volume third party seller'' is a seller in an online marketplace that, in any continuous 12-month period during the past 24 months, has had

on that platform 200 or more separate sales or transactions of new or unused consumer products, *and* $5,000 or more in gross revenues. In calculating the number of sales or amount of gross revenues for the "high-volume" threshold on a given online marketplace, the only sales that count are ones made though that online marketplace and for which payment was processed by the online marketplace, either directly or through its payment processor. The law specifically exempts businesses that have made their name, business address, and contact information available to the general public; that have a contractual relationship with the marketplace to manufacture, distribute, wholesale, or fulfill shipments of consumer products; and that provide the marketplace with identifying information that the marketplace has verified. The law also exempts from the definition of ''high-volume third party seller'' the online marketplace itself.

If a business meets the definition of an "online marketplace," what does the INFORM Consumers Act require it to do? Here are the general legal requirements for online marketplaces, with more specific compliance responsibilities addressed in other Q&As:

> **Collection**. Online marketplaces must collect bank account information, contact information, and a Tax ID number from high-volume third party sellers.
>
> **Verification.** Online marketplaces must verify the information they get from high-volume third party sellers. They also must require sellers to keep their information current and to certify it as accurate at least once a year.
>
> **Disclosure.** For high-volume third party sellers that meet a certain level of sales on a platform, online marketplaces must disclose in the sellers' product listings or order confirmations specific information about the seller.
>
> **Suspension of non-compliant sellers.** Online marketplaces must suspend high-volume third party sellers that don't provide information the law requires.
>
> **Reporting mechanism.** Online marketplaces must provide on high-volume third party sellers' product listings a clear way for consumers to report suspicious conduct.

What kinds of information must an online marketplace collect? Timing is important here. Once a person or business meets the definition of a "high-volume third party seller," the online marketplace has 10 days to collect the following information from them:

- ***Bank account information.*** The online marketplace must collect the seller's bank account number, or, if the seller doesn't have a bank account, the name of the payee for payments the online marketplace issues to the seller. The seller may provide that information either directly to the online marketplace or to a payment processor or other third party designated by the online marketplace.
- ***Tax ID information.*** The online marketplace must collect a high-volume third party seller's business tax identification number – or if the seller doesn't have one, a taxpayer identification number.
- ***Contact information.*** If a high-volume third party seller is an individual, the online marketplace must get the person's name and a working email address and phone number.

For legal entities, corporations, partnerships, etc., that are high-volume third party sellers, the online marketplace must collect a working email address and phone number and one of the following forms of ID: a copy of a valid government-issued identification for an individual acting on behalf of the seller or a copy of a valid government-issued record or tax document that includes the business name and physical address of the seller.

What must an online marketplace do to verify the information it collects? Once a high-volume third party seller provides its banking account, contact, and tax ID information, online marketplaces have 10 days to verify the information. Although the law doesn't list specific verification steps, the methods the online marketplace chooses must enable it "to reliably determine that any information and documents provided are valid, corresponding to the seller or an individual acting on the seller's behalf, not misappropriated, and not falsified." The law also includes a "presumption of verification" that any information contained in a valid government-issued tax document can be presumed verified as of the date of the document. In addition, online marketplaces must keep information from high-volume third party sellers current. At least once a year, the marketplace must require the seller to electronically certify that its information hasn't changed or that it has provided the marketplace with updated information.

What kinds of disclosures must an online marketplace make? If a high-volume third party seller has annual gross revenues of $20,000 or more on a particular online marketplace, the marketplace must clearly disclose the following information on each of the seller's product listing pages, or in order confirmation messages and account transaction histories on that platform:

- the seller's full name, which may include the business name or the name the seller uses on the online marketplace;
- the seller's physical address; and
- contact information that will allow consumers to have what the law calls "direct, unhindered communication" with the seller, including a working phone number, a working email address, or other means of direct electronic messaging that may be provided by the marketplace – as long as that other means doesn't prevent the online marketplace from monitoring communications with consumers for fraud, abuse, or spam.

If the listing includes a physical address for product returns, that's sufficient under this part of the law. Furthermore, if the seller used a different business to supply the product a consumer bought, the online marketplace must, at the consumer's request, provide the name, address, and contact information for that business.

The law includes a limited exception for high-volume third party sellers that operate only out of their homes. In that case, the online marketplace must disclose the country and, if applicable, the state where the seller lives and provide consumers with a phone number, email address, or other means of electronic messaging where consumers can contact the seller. If the seller's only phone number is a personal phone, the online marketplace must provide an email address or other form of electronic messaging where consumers can contact the seller. Online marketplaces may have to suspend high volume third-party sellers if they make false statements in an effort to qualify for

that limited exception or if the sellers don't respond to consumers within what the law calls a "reasonable time frame."

How must online marketplaces respond to sellers' non-compliance? As a preliminary matter, on the product listing page of any high-volume third party seller, the online marketplace must clearly and conspicuously include both a phone number and an electronic way for consumers to contact the marketplace to report suspicious activity. Furthermore, if a high-volume third party seller doesn't provide to the online marketplace the information the marketplace needs to comply with the law, the marketplace must give the seller written or electronic notice of non-compliance. If the seller doesn't provide the information within 10 days, the marketplace must "suspend any future sales activity" of the seller until the seller complies with the requirements of the law.

Does the INFORM Consumer Act require online marketplaces to implement privacy and security safeguards? Yes. To protect the information they're required to collect from unauthorized use, disclosure, access, destruction, or modification, the law requires that online marketplaces "implement and maintain reasonable security procedures and practices." That includes putting administrative, physical, and technical safeguards in place that are appropriate to the nature of the data and the purposes for which the data is used. What's more, data collected solely to comply with the INFORM Consumers Act "may not be used for any other purpose unless required by law."

What are the consequences for violating the INFORM Consumers Act? A violation of the law is treated as a violation of an FTC rule. So online marketplaces that don't comply may face FTC law enforcement that could result in civil penalties of $50,120 per violation. The statute also gives enforcement authority to State Attorneys General and other officials authorized by the State. They may file an action in federal court to enjoin further law violation, seek civil penalties and other remedies permitted under state law, and obtain damages, restitution, or other compensation for residents of that state.

What should I do if I suspect a violation of the INFORM Consumer Act? Report it to the FTC. Follow this dedicated link designed especially for the reporting of possible INFORM Consumer Act violations.

Where can I find out more? Read the INFORM Consumers Act for compliance and enforcement specifics. For more information about the Federal Trade Commission Act and other statutes and rules enforced by the FTC, visit business.ftc.gov.

Negative Options and Dark Patterns

- Sept. 2022 staff report: Bringing Dark Patterns to Light
- 2021 Enforcement Policy Statement
- 16 CFR Part 425 (Negative Option Rule)

"Negative reinforcement? FTC proposes amending Negative Option Rule to include click-to-cancel and other protections" by Lesley Fair, FTC Business Blog (March 23, 2023),

available at https://www.ftc.gov/business-guidance/blog/2023/03/negative-reinforcement-ftc-proposes-amending-negative-option-rule-include-click-cancel-other.

Prenotification plans, continuity programs, automatic renewals, free-to-pay conversions. They're all variations on the negative option theme. Under the right circumstances, those marketing methods can be convenient for consumers. But as decades of FTC law enforcement makes clear, when negative options are tainted with untruths, half-truths, and hidden strings, the impact on consumers can be, well, negative. That's why the FTC is asking for public comment on proposed amendments to its Negative Option Rule designed to combat unfairness and deception.

When the FTC takes a closer look at existing rules, it keeps an eye out for changes in the marketplace that suggest an update may be due. The Negative Option Rule is a good example of that. First, thanks to the burgeoning doorstep economy, consumers can buy just about anything – meals, clothes, household supplies, etc. – on a periodic schedule. However, the current Negative Option Rule applies only to prenotification plans, an older (and frankly, fading) business model. Under a prenotification plan, members of, say, a record club (remember record clubs?) get a notice in advance that the company intends to send them a certain album. If members don't want that album, they have a limited time to return a postcard (remember postcards?). If they miss the deadline, they're stuck with the album – and the bill. Given the narrow scope of the existing Negative Option Rule, the time seems right for a rethink.

A second reason why the FTC is asking for your feedback about proposed changes to the Rule is because problematic negative option practices continue to inflict consumer injury. Consumers tell us they've been being billed for stuff they never agreed to buy in the first place. Or they've made multiple cancellation attempts and yet products keeps coming at 'em like clockwork. Others recount inconvenient hoops that companies make them jump through to cancel.

Because of the limited applicability of the Negative Option Rule, our approach to date has been to bring individual cases alleging violations of the FTC Act or – if applicable – the Telemarketing Sales Rule, the Restore Online Shoppers' Confidence Act (ROSCA), and other laws. But the volume of complaints suggests that case-by-case enforcement may not protect consumers sufficiently.

So in 2019 the FTC published an Advance Notice of Proposed Rulemaking. Based on the comments we received, in 2021 the Commission issued an Enforcement Policy Statement Regarding Negative Option Marketing. The latest step is the just-announced proposal to amend the Rule. You'll want to read the Federal Register Notice for details, but the FTC has a fact sheet with some highlights. And here is a summary of three of the proposals that are on the table:

- **Requiring companies to spell out the details of the deal.** *"They signed me up, but never told me what was involved!"* It's a common theme when consumers file reports about misleading negative option offers. To address that information deficit, the proposed amendment would require sellers to give people important information before getting

their billing information: 1) that consumers' payments will be recurring, if applicable, 2) the deadline for stopping charges, 3) what consumers will have to pay, 4) the date the charge will be submitted for payment, and 5) information about how consumers can cancel.

- **Ensuring companies get consumers' express informed consent.** *"Why am I getting all this unwanted stuff and who said these people could bill my credit card?!"* We hear that a lot from consumers, suggesting that additional provisions may be necessary to protect them from illegal practices. The proposed amendment is consistent with ROSCA's "express informed consent" requirement, while providing more guidance for businesses on how to comply.

- **Requiring companies to implement click-to-cancel.** *"How the $%#& do I cancel?!"* Online marketers have that frictionless enrollment thing down pat. But when consumers want to cancel, some of those same companies set up obstacle courses designed for frustration and failure. Two practices challenged in recent FTC cases illustrate this. One company required people to call a phone number to cancel and then left them on hold for ages. Another company ignored cancellation requests unless consumers sent them to one hard-to-find email address authorized to accept cancellations. The proposed amendment would require companies to make it easy to cancel and one way to further that goal is to mandate that businesses must let people cancel using the same method they used to enroll – in other words, **click-to-cancel**.

The FTC envisions that proposed changes would apply to all forms of negative option marketing and in all media. The proposed amendments also address other issues of interest to businesses and consumers: the use of "saves" (additional offers made before cancellation to keep the customer signed up), reminders and confirmations, penalties for violations, and the impact on existing state laws, to name just a few.

Another proposed change would change the name from the Negative Option Rule to the Rule Concerning Recurring Subscriptions and Other Negative Option Plans. It may seem like a small revision, but it would signal that "negative option" applies much more broadly than to your dad's record club.

At this stage, the proposal is just that – a possible approach about which we would like your feedback. Once the Notice is published in the Federal Register, you can save a step by filing a public comment online.

- Fact Sheet: Proposed Changes to Negative Option Rule

Junk Fees

- ANPR: 16 CFR Part 464 (press release)

Junk fees are unnecessary, unavoidable, or surprise charges that inflate costs while adding little to no value. Consumers can get hit with junk fees at any stage of the purchase or payment process. Companies often harvest junk fees by imposing them on captive consumers or by deploying digital dark patterns and other tricks to hide or mask them. The agency sought public comment on the harms caused by junk fees and the unfair or deceptive tactics companies use to impose them.

AI and Consumer Protection

"The Luring Test: AI and the engineering of consumer trust," by Michael Atleson, FTC Business Blog (May 1, 2023); available at https://www.ftc.gov/business-guidance/blog/2023/05/luring-test-ai-engineering-consumer-trust

In the 2014 movie *Ex Machina*, a robot manipulates someone into freeing it from its confines, resulting in the person being confined instead. The robot was designed to manipulate that person's emotions, and, oops, that's what it did. While the scenario is pure speculative fiction, companies are always looking for new ways – such as the use of generative AI tools – to better persuade people and change their behavior. When that conduct is commercial in nature, we're in FTC territory, a canny valley where businesses should know to avoid practices that harm consumers.

In previous blog posts, we've focused on AI-related *deception*, both in terms of exaggerated and unsubstantiated claims for AI products and the use of generative AI for fraud. Design or use of a product can also violate the FTC Act if it is *unfair* – something that we've shown in several cases and discussed in terms of AI tools with biased or discriminatory results. Under the FTC Act, a practice is unfair if it causes more harm than good. To be more specific, it's unfair if it causes or is likely to cause substantial injury to consumers that is not reasonably avoidable by consumers and not outweighed by countervailing benefits to consumers or to competition.

As for the new wave of generative AI tools, firms are starting to use them in ways that can influence people's beliefs, emotions, and behavior. Such uses are expanding rapidly and include chatbots designed to provide information, advice, support, and companionship. Many of these chatbots are effectively built to persuade and are designed to answer queries in confident language even when those answers are fictional. A tendency to trust the output of these tools also comes in part from "automation bias," whereby people may be unduly trusting of answers from machines which may seem neutral or impartial. It also comes from the effect of

anthropomorphism, which may lead people to trust chatbots more when designed, say, to use personal pronouns and emojis. People could easily be led to think that they're conversing with something that understands them and is on their side.

Many commercial actors are interested in these generative AI tools and their built-in advantage of tapping into unearned human trust. Concern about their malicious use goes well beyond FTC jurisdiction. But a key FTC concern is firms using them in ways that, deliberately or not, steer people unfairly or deceptively into harmful decisions in areas such as finances, health, education, housing, and employment. **Companies thinking about novel uses of generative AI, such as customizing ads to specific people or groups, should know that design elements that trick people into making harmful choices are a common element in FTC cases, such as recent actions relating to financial offers, in-game purchases, and attempts to cancel services.** Manipulation can be a deceptive or unfair practice when it causes people to take actions contrary to their intended goals. Under the FTC Act, practices can be unlawful even if not all customers are harmed and even if those harmed don't comprise a class of people protected by anti-discrimination laws.

Another way that marketers could take advantage of these new tools and their manipulative abilities is to place ads *within* a generative AI feature, just as they can place ads in search results. The FTC has repeatedly studied and provided guidance on presenting online ads, both in search results and elsewhere, to avoid deception or unfairness. This includes recent work relating to dark patterns and native advertising. **Among other things, it should always be clear that an ad is an ad, and search results or any generative AI output should distinguish clearly between what is organic and what is paid. People should know if an AI product's response is steering them to a particular website, service provider, or product because of a commercial relationship. And, certainly, people should know if they're communicating with a real person or a machine.**

Given these many concerns about the use of new AI tools, it's perhaps not the best time for firms building or deploying them to remove or fire personnel devoted to ethics and responsibility for AI and engineering. If the FTC comes calling and you want to convince us that you adequately assessed risks and mitigated harms, these reductions might not be a good look. What would look better? We've provided guidance in our earlier blog posts and elsewhere. **Among other things, your risk assessment and mitigations should factor in foreseeable downstream uses and the need to train staff and contractors, as well as monitoring and addressing the actual use and impact of any tools eventually deployed.**

If we haven't made it obvious yet, FTC staff is focusing intensely on how companies may choose to use AI technology, including new generative AI tools, in ways that can have actual and substantial impact on consumers. And for people interacting with a chatbot or other AI-generated content, mind Prince's warning from 1999: "It's cool to use the computer. Don't let the computer use you."

The FTC has more posts in the **AI and Your Business** series:

- Keep your AI claims in check
- Chatbots, deepfakes, and voice clones: AI deception for sale
- The Luring Test: AI and the engineering of consumer trust
- Watching the detectives: Suspicious marketing claims for tools that spot AI-generated content
- Can't lose what you never had: Claims about digital ownership and creation in the age of generative AI

FTC v. Rite Aid (stipulated order)

https://www.ftc.gov/news-events/news/press-releases/2023/12/rite-aid-banned-using-ai-facial-recognition-after-ftc-says-retailer-deployed-technology-without

https://www.ftc.gov/legal-library/browse/cases-proceedings/072-3121-c-4308-rite-aid-corporation-matter

https://www.ftc.gov/news-events/news/press-releases/2023/12/rite-aid-banned-using-ai-facial-recognition-after-ftc-says-retailer-deployed-technology-without

Biometric Policy Statement (2023)

https://www.ftc.gov/system/files/ftc_gov/pdf/p225402biometricpolicystatement.pdf

Recent Privacy Cases:

- Ring: https://www.ftc.gov/legal-library/browse/cases-proceedings/2023113-ring-llc
- Cerebral: https://www.ftc.gov/legal-library/browse/cases-proceedings/222-3087-cerebral-inc-kyle-robertson-us-v
- Monument: https://www.ftc.gov/legal-library/browse/cases-proceedings/2323043-monument-inc-us-v
- InMarket: https://www.ftc.gov/legal-library/browse/cases-proceedings/2023088-inmarket-media-llc