MLRC Media Law Conference
Oct. 4-6, 2023
Lansdowne Resort Hotel, Leesburg, VA

Advertising & Commercial Speech

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I. Continuity, "Negative Option" Plans, and Auto-Renewals

A negative option plan is a contractual arrangement between a seller and a subscriber in which the seller periodically sends the subscriber an announcement that identifies merchandise selections that the seller offers to sell, and the subscriber is deemed to agree to buy such merchandise unless the subscriber exercises an option not to purchase by notifying the seller by a specified date. Such plans are used to sell merchandise such as books and magazines, and also services, such as optional services of public utility companies, e.g., telephone-line maintenance services. These plans are subject to very specific rules and regulations, including from the FTC (*see* 16 C.F.R. § 425 ("Use of Prenotification Negative Option Plans"), the Restore Online Shoppers Confidence Act ("ROSCA"), 15 U.S.C. §§ 8401-05, and on the state level, as further discussed below. In practice, negative option plans are often seen in connection with "free trial" offers: the free trial automatically converts into an ongoing subscription subject to automatic periodic credit card charges unless and until the consumer cancels.

Under ROSCA, automatic renewal plans are prohibited for transactions conducted on the Internet unless the seller (1) clearly and conspicuously discloses all material terms of the transaction prior to obtaining the customer's billing information, (2) obtains the customer's informed consent before charging the consumer, and (3) provides simple mechanisms for a consumer to stop the recurring charges. 15 U.S.C. § 8403.

Many states have also enacted (or amended) laws related to auto-renewal programs. California has long been the leader in automatic renewal laws ("ARLs"). In June 2018, California amended its "Automatic Repurchase Renewals Law" to require marketers to provide consumers of automatic renewal or continuous service offers with more information and additional ways to terminate. Cal. Bus. & Prof. Code § 17602. In addition to requiring clear and conspicuous disclosures and affirmative consent, the law requires providing the consumer with an acknowledgement of the terms, cancellation policy, and instructions that can be retained by the consumer, as well as a cost-effective, timely and easy-to-use mechanism for termination such as a toll-free number (and more). Additional amendments to the California law took effect on July 1, 2022. Under the recent amendments, online sellers must offer purchasers the opportunity to cancel online immediately, and sellers must send renewal notices 15 to 45 days prior to the end of the initial term if the initial term is a year or longer. Cal. Bus. & Prof. Code § 17602. Other jurisdictions, including Colorado, Delaware, the District of Columbia, Illinois, New York, North Dakota, and Vermont have also enacted strict ARLs. *See* C.R.S. § 6-1-732; 6 Del. Code §§ 2731-37; D.C. Code § 28A-201 through § 28A-204; 815 ILCS 601/1-20; N.Y. Gen. Bus. Law §§ 527

through 527-a; N.D. Cent. Code, § 57-37-01 through § 57-37-06; 9 V.S.A. § 2454a. In 2022 alone, new laws regulating certain automatically renewing subscriptions were passed in Idaho, New Jersey, Tennessee and Virginia. *See* Tenn. Code § 47-18-104, Idaho Code 48-603G, NJ Stat. § 56:12, Va. Code Ann. §§59.1-207.45 through 59.1-207.49.

Enforcement in this area has been abundant. For example, in June 2019, the FTC announced settlements against two sets of defendants for marketing and selling a variety of products online and offering "risk free" trials that ultimately resulted in much higher charges to consumers and enrollment in negative option plans without their consent. The FTC (with the help of the United States Postal Inspection Service, the Nevada Attorney General's Office, the San Diego County District Attorney's Office, and several Better Business Bureaus) charged the defendants with violating the FTC Act, ROSCA, and the Electronic Fund Transfer Act (EFTA). The orders settling the cases against the two sets of defendants impose judgments of $48.1 million and more than $123.1 million. *See* Online Marketers Barred from Deceptive "Free Trial" Offers, Unauthorized Billing available at https://www.ftc.gov/news-events/news/press-releases/2019/05/online-marketers-barred-deceptive-free-trial-offers-unauthorized-billing. More recently, the FTC has been focusing its efforts on companies' use of "dark patterns," including confusing cancellation policies, that trick or manipulate consumers into difficult to cancel subscriptions. *See* the FTC's Enforcement Policy Statement Regarding Negative Option Marketing (October 22, 2021). On November 3, 2022, the FTC announced an agreement by Vonage to a proposed court order requiring Vonage to pay $100 million in refunds to consumers as a result of the FTC's allegations that Vonage violated the FTC Act and ROSCA by making cancellation of its service difficult, charging unexpected termination fees, and continuing to charge customers after cancellation was requested. *See FTC v. Vonage Holdings Corp et al*, No. 3:22-cv-6435 (D.N.J.).

In 2023, the Consumer Financial Protection Bureau published Circular 2023-01 on "Unlawful negative option practices." https://www.consumerfinance.gov/compliance/circulars/consumer-financial-protection-circular-2023-01-unlawful-negative-option-marketing-practices/. The CFPB stated that persons engaged in negative option practices can violate the prohibition on unfair, deceptive, or abusive acts or practices set forth in the Consumer Financial Protection Act. The CFPB historically had pursued enforcement actions to halt "harmful negative option practices," and the CFPB stated that its "approach to negative option marketing is generally in alignment with the FTC's approach to section 5 of the FTC Act as set forth in its recent policy statement." The CFBP emphasized clear and conspicuous disclosure of material terms, informed consent, and a prohibition on misleading consumers who want to cancel or erecting unreasonable barriers to cancellation.

Putative class actions under state ARLs allowing for a private right of action are on the uptick with expansion of the subscription economy. In January 2022, fitness app developer Noom settled for $62 million a nationwide class action alleging that Noom tricked consumers into signing up for "risk free" trail offers that converted into paying subscriptions that were difficult to cancel "by design." *See Mojo Nichols et al v. Noom, Inc. et al*, Case No. 1:20-cv-03677-KHP (S.D.N.Y). The *Washington Post* settled a class action for alleged violation of California's ARL for $6.7 million, *Jordan v. WP Company LLC*, Case No. 3:20-cv-05218 (N.D. Ca.), but Time, Inc. prevailed on a motion to dismiss in a California ARL case. Hall v. Time, Inc., 857 Fed. Appx. 385 (9th Cir. 2021). Amazon defended two recently filed consumer class actions alleging, in part, that

it used dark patterns to thwart the cancellation of Amazon Prime subscriptions in violation of the California and Washington ARLs, respectively. *See Nacarino et al. v. Amazon.com, Inc,,* Case No. 3.22-cv-02713 (N.D. Ca.) (dismissed without prejudice), and *Dorobiala v. Amazon.com, Inc.,* Case No. 2:22-cv-01600 (W.D. Wa.). Consumers also have filed claims against Google alleging that YouTube's various services, including YouTube Music and YouTube Premium, failed to provide the requisite disclosures and obtain the necessary authorizations under Oregon's ARL and unlawful trade practices act. *See Walkingeagle, et al. v. Google LLC, et al.*, Case No. 3:22-cv-763 (D. Or.) (finding that challenged disclosures met legal requirements and dismissing case). In August, 2022, plaintiffs filed a putative class action against Gannett Media, alleging it violated New Jersey's Consumer Fraud Act and Electronic Fund Transfer Act by charging customer accounts after subscription cancellation. *See Anderson v. Gannett Co. Inc.*, 3:22-cv-05088 (D.N.J).

II. Advertising to Children – Recent Developments

A. Overview

Advertising targeted at children must often meet higher standards of non-deception because children are more vulnerable to misleading advertisements. *See In the Matter of Ideal Toy Corp.*, 64 F.T.C. 297 (taking into account children's limited ability to detect exaggerations when examining advertising targeted toward them). Because claims are interpreted from the perspective of the reasonable consumer to whom the advertising is directed, children's advertisers must ensure that ads directed toward children do not convey messages that will mislead the youngest members of the target audience.

For general advertising purposes, the most vulnerable and protected age group of children is those under 13 years of age. *See* the Self-Regulatory Guidelines for Children's Advertising of the Children's Advertising Review Unit ("CARU") of the BBB National Programs, revised effective January 1, 2022 ("Advertising Guidelines"), https://bbbprograms.org/programs/all-programs/children's-advertising-review-unit/Ad-Guidelines (extending scope of regulatory program to "national advertising primarily directed to children under age 13 in any medium").

B. Online Data Collection

1. Overview

COPPA is federal legislation that regulates the personal data collection practices of advertisers and online content platforms directing marketing and other content to children under 13 or having actual knowledge that it is collecting personal information from children under 13. *See* 15 U.S.C. §§ 6501–6506; 16 C.F.R. § 312. Among other provisions, a website operator must seek verifiable consent from a parent or guardian before collecting or using the child's information in certain ways and must post a proper notice of its practices and parents' rights under COPPA in its privacy policy. CARU was the first industry organization to establish an FTC-approved Safe Harbor Program under COPPA for those who comply with its guidelines and review programs, s*ee* https://bbbprograms.org/media-center/press-releases/caru-safe-harbor-program-and-requirements, followed by five others, including the Entertainment Software Rating Board (ESRB), kidSAFE and TRUSTe.

Although the FTC has provided direction for obtaining verifiable parental consent,

including five examples of what it deems to be acceptable methods, online providers have grappled with establishing frictionless complaint mechanisms for obtaining parental consent. The FTC has approved to other consent mechanisms, including a "knowledge-based authentication" that uses a number of challenge questions as a last resort authentical and a "face match to verified photo identification" method by the use of imaging and face recognition technology. In July 2023, the FTC announced that it is seeking public comments on an application by ESRB and others for approval of "facial age estimation" technology to confirm that the person providing consent is an adult.

An alternative to seeking parental consent is for an online platform or mobile app that collects personal information from its users to prevent access by children under 13. CARU determined that using technology in tandem with age-screening mechanisms for websites and online services is not limited to use of cookies when preventing children from trying to gain access to adult apps. Facebook argued that because cookies are limited to the website environment, it was not required to use a different mechanism in the mobile environment because one did not exist. CARU was not satisfied with this interpretation given that there are other ways, such as device ID, to track someone underage and prevent them from trying to change their age to gain access to the Facebook app. *Facebook, Inc., (Facebook App)*, Report # 6274, NAD/CARU *Case Reports* (April 2019).

2. FTC Enforcement Actions

In 2018, the FTC received a settlement award of $5.7 million as a result of violations by TikTok (formerly Musical.ly), a video sharing app. Among the findings, most important was that an online service will be considered "directed to children" even if its primary audience is not children after the Commission considers: subject matter, visual content, music, age of models, use of animated characters, presence of child celebrities, celebrities who appeal to children, or any competent empirical evidence regarding audience composition. *See Musical.ly Inc. (Musical.ly App)*, Report # 6171, *CARU Case Reports* (November 2018). The following year, Google and its subsidiary YouTube agree to "pay a record $170 million ($136 million to the FTC and $34 million to New York) to settle allegations by the FTC and the New York Attorney General that the YouTube video sharing service illegally collected personal information from children without their parents' consent." *See* https://www.ftc.gov/news-events/news/press-releases/2019/09/google-youtube-will-pay-record-170-million-alleged-violations-childrens-privacy-law.

The FTC broke records yet again in 2023 with two separate settlements with Epic Games, Inc., the maker of the video game Fortnite, a child-directed online service, for a total of $520 million in relief for violations of COPPA and for the use of dark patterns to trick millions of players, including children and teens, into making unintentional purchases. The $275 million penalty by federal court order for the alleged COPPA Rule violation is the largest to date ever obtained for violating an FTC rule, and $245 million refund amount for Epic's dark patterns and billing practices is the largest refund amount in a gaming case and the FTC's largest administrative order in history. In its COPPA complaint, the FTC alleged that Epic collected personal information from children over 13 without obtaining parents' verifiable consent and caused parents to jump through unreasonable hoops when requesting that their children's personal information be deleted.

C. Social media and technology usage

In response to the growing use by children of social media platforms for communication, information and entertainment, CARU's 2022 revisions to the Advertising Guidelines incorporate the FTC's general guidance regarding influencers and other endorsers. CARU also added a new section to the Advertising Guidelines to warn against the use of "unfair, deceptive or other manipulative tactics, including but not limited to deceptive door openers or social pressure or validation," to encourage in-app or in-game ad viewing or purchasing. *See* Advertising Guidelines Sections 4(d) and (i).

H. Stealth advertising

The FTC also has been concerned about the impact of blurring of advertising and content on children, particularly in immersive environments such as gaming platforms, virtual reality and social media, and assessing steps that creators, advertisers and platforms should be taking to mitigate deceptive influence on children's purchasing decisions. It conducted a workshop in October 2022, *Protecting Kids from Stealth Advertising in Digital Media*, to explore techniques being used to advertiser to children through digital media and potential harm arising from obfuscation of such advertising. In September, 2023, FTC staff issued a report of the same name detailing its findings and issuing the following recommendations to stakeholders: (i) advertising should be clearly distinguished from kids' entertainment/educational content through formatting techniques and visual cues; (ii) prominent just-in-time multi-nodal disclosures should be made at the time the advertised product is introduced with an explanation of the sponsor's intent; (iii) industry players should consider developing a single easily recognizable icon to identify ads; (iv) stakeholders should educate kids, parents and educators about how digital advertising works; and (v) platforms should consider requiring content creators to self-identify content that includes advertising and offering parental controls to restrict children from seeing such content.

III. Vice Advertising

A. Marijuana/CBD/Hemp

Marijuana, CBD oil, and hemp advertising and promotion is a complex area of the law. There are a number of permutations to the rules depending on whether the program is for medical marijuana, recreational marijuana, CBD oil, or hemp and where the program takes place. Not surprisingly, laws and rules vary from state to state.

1. General sales restrictions

It is illegal under federal law to manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense, marijuana. Simple possession of marijuana is also illegal. It is also illegal under federal law to import marijuana from any other country.

In 2018, the Federal Agriculture Improvement Act of 2018 ("2018 Farm Bill") legalized the possession of CBD products that contain less than 0.3% THC (tetrahydrocannabinol, which is the main psychoactive ingredient in marijuana). However, the FDA has prohibited the sale of CBD in any unapproved health products, dietary supplements, or food. With the exception of one prescription drug used to treat epilepsy, the FDA has not approved any CBD products. The production of hemp is legal under the 2018 Farm Bill, as long as it contains less than 0.3% THC.

In addition, a publication containing an advertisement for marijuana can be deemed non-mailable matter under federal law. In a written notice dated November 27, 2015, issued by the Portland, Oregon, District Mailing Requirements Office, the U.S. Postal Service explained that "[i]f a mailpiece contains an advertisement for marijuana, that mailpiece is non-mailable." Although a lawyer for the postal service has stated that the postal service will accept materials with marijuana ads but may refer them to law enforcement, there has not been much enforcement in this regard.

Many states, along with Washington DC and Guam, have legalized marijuana entirely as of 2023. These states are: Alaska, Arizona, California, Colorado, Connecticut, Delaware Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, and Washington. The following states have legalized medical marijuana only: Alabama, Arkansas, Delaware, Florida, Georgia, Hawaii, Louisiana, Minnesota, Mississippi, New Hampshire, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Utah, and West Virginia. In the following states, marijuana remains fully illegal as of 2023: Idaho, Indiana (except for CBD oil), Iowa (except for CBD oil), Kansas, Kentucky (except for CBD oil), Nebraska, North Carolina, South Carolina, Tennessee (except for CBD oil), Texas (except for CBD oil), Wisconsin (except for CBD oil), and Wyoming.

In Michigan, for example, marijuana may be sold to adults over the age of 21. People are able to travel with up to 2.5 ounces of marijuana anywhere except schools and prisons. At home, people are allowed to possess up to 10 ounces, as long as at least 7.5 of those ounces are locked up. People are also allowed to grow up to 12 marijuana plants per household, and for people who grow their own, there is no possession limit. This is in addition to Michigan's medical marijuana laws, which already allowed people with certain medical conditions to possess and consume marijuana.

As of 2018, hemp-derived CBD (cannabidiol) is legal in all 50 states. However, the legality of marijuana-derived CBD varies by state. In a number of states, CBD is legal for certain purposes, mainly medical. Those states include Alabama, Georgia, Indiana, Iowa, Kansas, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee, Texas, Virginia, Wisconsin, and Wyoming. Some states have explicit laws allowing retailers to sell industrial hemp-derived products, including CBD products. These states include Alaska, Colorado, Illinois, Indiana, Oklahoma, Kentucky, Maryland, Missouri, New York, North Carolina, Oregon, Rhone Island, South Carolina, Tennessee, Utah, Texas, Vermont, and Wisconsin. Some states fall into a gray area. They don't have explicit prohibitions against the retail sale of industrial hemp-derived CBD products, but they have exemptions in the law for the argument that hemp-derived CBD products are legal. These states include Arkansas, Delaware, Florida, Connecticut, Georgia, Idaho, Iowa, Louisiana, Maine, Massachusetts, Nebraska, Minnesota, Mississippi, New Hampshire, New Jersey, Pennsylvania, Virginia, and Washington. In some states there is no explicit prohibition on the sale of industrial hemp-derived CBD products, but recent law enforcement actions raise the risk of sale. These states include Alabama, Arizona, California, Michigan, Nevada, Ohio, South Dakota, West Virginia, and Wyoming. Some states, such as Michigan, allow the sale of CBD oil as long as it has less than 0.3% THC.

Most states, with the exception of West Virginia, define industrial hemp as a variety of cannabis with a THC concentration of not more than 0.3%. Most states allow the cultivation of hemp for commercial, research, or pilot programs. The only states that do not are Idaho and Mississippi. For example, Kentucky has a research program which studies the environmental benefit or impact of hemp, the potential use of hemp as an energy source or biofuel, and the agronomy research being conducted worldwide related to hemp. Some states have explicit laws allowing retailers to sell industrial hemp-derived products. These states include Alaska, Colorado, Illinois, Indiana, Oklahoma, Kentucky, Maryland, Missouri, New York, North Carolina, Oregon, Rhone Island, South Carolina, Tennessee, Utah, Texas, Vermont, and Wisconsin.

2. Advertising and promotions restrictions

Federal law does not allow any advertisement of marijuana because it is classified as a controlled substance. It is unlawful for any person to place in a newspaper, magazine, handbill, or other publication any written advertisement knowing that it has the purpose of seeking or offering illegally to receive, buy, or distribute a Schedule 1 controlled substance. The Rohrabacher-Blumenauer amendment, which must be renewed each fiscal year, does provide a workaround. The amendment prohibits the US Department of Justice from using federal funds to interfere with state-legal medical marijuana programs only. The amendment provides no protection for recreational programs, so advertisers and publishers should still use caution with advertisements in recreational states.

Each state regulates marketing of recreational or medical marijuana:

- In Alaska, advertising of marijuana and marijuana products cannot be false, misleading, promote excessive consumption, represent therapeutic effects; and like California cannot depict anyone under the age of 21 years old using marijuana or any likeness to appeal to anyone under 21 years of age

- Arizona does not have any rules or regulations for advertising medical marijuana dispensaries.

- California's advertising is regulated by the Bureau of Cannabis Control. The regulations provide that in broadcast, print, radio, cable and digital communications may be displayed only when people at least 21 years old are at least 71.6% of the audience; no images of minors or anyone less than 21 years old; no image that would appeal to minors or anyone less than 21 years old and no free products in raffles, sweepstakes or contests; no labeling that would confuse the product with alcohol; and no billboards can be located within a 15-mile radius on an interstate highway of a California border or a state highway that crosses a California border. California's Department of Public Health prohibits packaging that would be designed to appeal to minors or anyone less than 21 years of age.

- Colorado allows no deceptive, false, or misleading statements; television, print, Internet, and radio advertising is allowed only if the retail marijuana establishment has reliable evidence that no more than 30% of the audience is under the age of 21 years old.

- Connecticut prohibits advertising between or among two or more of the following: a producer, dispensary facility personnel, or physician where such advertising has the purpose or effect of steering or influencing patient or caregiver choice with regard to their selection of a physician, dispensary, or marijuana product. Advertising may not include: false or misleading statements; statements disparaging a competitor's product; any statement or illustration that is obscene or indecent; any statement that encourages or represents the recreational use of marijuana; any statement or illustration related to the safety or efficacy of marijuana unless supported by substantial evidence or clinical data; any statement or illustration depicting anyone under the age of 18 years old or containing the likeliness of anyone under 18 years old; any offer of a prize or award related to the purchase or use of the marijuana; or any suggestion that product is endorsed by the state of Connecticut. Connecticut also requires that an advertiser must provide a cover letter with an advertisement that includes a brief description of the format and expected distribution of the advertisement and states in the subject line: Medical Marijuana advertisement review package for a proposed advertisement (Brand). The package must include a summary of the proposed advertisement showing the claim being made and support of said claim; verification that the person in the advertisement is an actual patient or health care provider (not a model or actor); verification that a spokesperson who is represented as a real patient is really a patient; verification that the official translation of a foreign language is accurate; annotated references to support disease or epidemiology information, cross-referenced to the advertisement summary; and a final copy of the advertisement, including any video in an acceptable format.

- Delaware requires that no person may advertise medical marijuana in print, broadcast, or by paid in-person solicitation of customers. Listing in phone books, trade, or medical publications or sponsorship of health or not-for-profit charity or advocacy events is allowed.

- The District of Columbia is silent on advertising other than signage.

- Florida allows treatment centers to advertise on the internet if they are approved by the department. In Florida, ads may not target anyone under the age of 18 years old, which includes a ban on the use of cartoon characters, and digital ads may not include an unsolicited pop-up advertisement. Any opt-in marketing must include an easy and permanent opt-out feature. Medical marijuana treatment centers can use their websites to advertise product to purchase, price for the product, and delivery price and any discount policies and eligibility criteria for discounts.

- Georgia does not allow any advertising.

- Hawaii does not have any advertisement restrictions other than signage and window displays.

- Illinois dispensary advertisements have signage restrictions.

- Maine prohibits the use of misleading, deceptive, or false advertising, marketing, and signage and the use of mass-marketing advertisements or marketing campaigns that target anyone under 21 years old or are designed to appeal to anyone under 21 years old. Maine prohibits the following: health or physical benefit claims in advertising, marketing or packaging; unsolicited advertising or marketing on the Internet, including but not limited to banner advertisements on mass-market websites; opt-in advertising or marketing that does not permit an easy and permanent opt-out feature; advertising or marketing directed toward location-based devices including but not limited to cellular phones, unless the marketing is a mobile device application installed on the device by the owner of the device who is over the age of 21 years old and includes an easy and permanent opt-out feature; and signage that is inconsistent with local ordinances, laws, and regulations.

- Maryland has no advertising regulations for its registered dispensaries, processors, or producers.

- Massachusetts restricts logos, signage, and displays for Registered Marijuana Dispensaries. Massachusetts prohibits the following types of statements, designs, representations, pictures, or illustrations in advertising materials: those that encourage or represent the use of marijuana for any purpose other than to treat a debilitating medical condition or related symptoms; those that encourage or represent the recreational use of marijuana; those that are related to the safety or efficacy of marijuana unless supported by substantial evidence or substantial clinical data with reasonable scientific rigor, which must be made available upon the request of a registrant or the Department; or those that portray anyone under the age of 18 years old.

- Michigan has signage restrictions and is silent on other advertising restrictions.

- Minnesota has no restrictions on advertising for medical marijuana manufactures and distribution centers.

- Montana prohibits anyone who has a license or valid registry patient identification card from advertising marijuana or marijuana-related products in any medium, including electronic means.

- Nevada requires approval by the Administrator of the Division of Public and Behavioral Health of any medical marijuana establishment ("MME") name, logo, sign or advertisement before it can be used by the MME.

- New Hampshire states that advertising restrictions prohibiting misrepresentation and unfair practices will be adopted.

- New Jersey has not adopted any advertising restrictions.

- New Mexico does not have advertising regulations for medical marijuana dispensaries.

- In March of 2023, New York's Cannabis Control Board's advertising regulations took effect. The regulations are extensive and provide, for example, that licensee's must age-gate websites and users must consent to receiving cannabis-related advertising before being served pop-up ads.

- Oregon has restrictions on signage.

- Rhode Island has no advertising regulations for medical marijuana dispensaries.

- Texas does not have regulations for marijuana, and regulations for its CBD distribution centers are to be determined.

- Vermont has no advertising regulations for dispensaries.

- Washington has signage requirements including billboards and transit advertising. All print advertising must contain text that marijuana products may be purchased or possessed only by persons 21 years of age or older, no target for advertising anyone outside the state of Washington. Washington bans giveaways and coupons.

3. Miscellaneous

Google strictly prohibits the advertising of recreational drugs, which includes marijuana or CBD. Facebook allows CBD advertising.

IV. Testimonials/Endorsements

A. Overview

First released in 1980, the FTC's "Guides Concerning the Use of Endorsement and Testimonials in Advertising," 16 C.F.R. Part 255 ("Endorsement Guides"), address the use of consumer, celebrity, expert, organization and influencer endorsements in advertising. The FTC issued a revised version the Endorsement Guides effective July 26, 2023, to take into account the transformation of the social media and digital technology landscape since the Endorsement Guides' 2009 update. The FTC simultaneously released an updated version of its FAQs, previously revised in 2017, to provide additional guidance and interpretation to marketers and other stakeholders. *See* "The FTCs Endorsement Guides: What People Are Asking," *available at* https://www.ftc.gov/business-guidance/resources/ftcs-endorsement-guides-what-people-are-asking.

The FTC defines an endorsement as any "advertising, marketing or promotional message for a product that consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser." 16 C.F.R. § 255.0(b). In addition to recognizing verbal statements, demonstrations, and identifying indicia of individuals and organizations as endorsements, the 2023 Endorsement Guides clarify that tags in social media posts, posts by virtual influencers and consumer reviews also may constitute endorsements. *See* 16 C.F.R. §255.0(b). A consumer review becomes an endorsement if the consumer is incentivized to post the review, 16

C.F.R. §255.0 (g)(6), or the advertiser highlights the review on its own website, 16 C.F.R. §255.0(g)(7).

Endorsements must be truthful, non-deceptive, and substantiated by the advertiser. Advertisers cannot use testimonials to support product claims in lieu of actual testing/studies/other recognized support; they may not make product claims through testimonials that cannot otherwise be supported by the advertiser themselves. *See* 16 C.F.R. § 255.1(a); *see also, e.g., FTC v. Central Coast Nutraceuticals*, No. 1:10-cv-4931 (N.D. Ill. Aug. 6, 2010) (temporary restraining order). The FTC holds accountable not only advertisers and endorsers for false or misleading endorsements, but also advertising agencies, public relations firms, review brokers, reputation management companies and other intermediaries for their role in creating or distributing such endorsements. *See* 16 C.F.R. §255.1(f). With respect to the advertiser's potential liability for a deceptive endorsement, the 2023 Endorsement Guides elaborate on the FTC's expectations with respect to the advertiser's guidance to and monitoring of its endorsers, although the Guides note that such recommended practices are not a safe harbor. *See* 16 C.F.R. §255.1(d)(3).

B. Typicality

Consumer endorsements "will likely be interpreted as representing that the endorser's experience is representative of what consumers will generally achieve with the advertised product in actual, albeit variable, conditions of use." 16 C.F.R. § 255.2(b). Therefore, results must mirror what the consumer can expect; if the advertiser does not have substantiation that the consumer can expect the described experience, or if the endorsement is truthful, but an "outlier", then the advertising must clearly and conspicuously disclose what the "typical" results may be. The idea is that consumers must be told what to expect in the circumstances shown in the advertisement. There is no longer a pre-existing "safe harbor" for use of the ubiquitous "results not typical" disclaimer, and the FTC has expressed the view that such disclosures are unlikely to be effective.

C. Material Connection

Endorsements must fully disclose any unexpected material connections between the endorser and the advertiser. The Endorsement Guides define a material connection as any connection between the endorser and the advertiser "that might materially affect the weight or credibility of the endorsement," which connection is not "reasonably expected by the audience." New in the 2023 Endorsement Guides, a material connection must be disclosed "when a significant minority of the audience for an endorsement does not understand or expect the connection." 16 C.F.R. § 255.5(a). Material connections exist in the case of business (including employee), family or personal relationships, individuals who have received monetary compensation and/or free products for the endorsement, whether or not such products are those being endorsed), advertiser-funded research findings, and more. The provision of an entry in a sweepstakes or contest in return for the making of a post is also a material connection that must be disclosed if unexpected. The FTC does acknowledge that disclosure of the connection does not require the complete details of the connection as long as it "clearly communicate[s] the nature of the connection sufficient for consumers to evaluate its significance." *Id.*

D. Clear and Conspicuous

The FTC requires that disclosures in endorsements of unexpected material connections be "clear and conspicuous," which standard the 2023 Endorsement Guides define for the first time in in the context of endorsements. Specifically, disclosures must be "difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers." 16 C.F.R. § 255.0(f). Borrowing from the FTC's Native Advertising Guide and Dot Com Disclosures (both further discussed below), the 2023 Endorsement Guides recommend that the disclosure of unexpected material connection be made in the same medium as the endorsement, including both visual and audio if the representation is made through both visual and audible means. With respect to communications "using an interactive electronic medium, such as social media or the internet," the disclosure should be "unavoidable." *Id*.

E. FTC Actions

The FTC has pursued a number of actions in connection with the Endorsement Guides, including the following.

1. Warning Letters and Notices of Penalty Offenses

Notices of Penalty Offenses have taken on a new life and a new significance in light the Supreme Court's decision in *AMG Capital Management LLC v. FTC*, 141 S. Ct. 1341 (2021), that the FTC does not have authority to obtain restitution or other equitable monetary relief under Section 13(b) of the FTC Act, 15 U.S.C. 57b. Given the strong deterrent effect of monetary damages, the FTC has taken the position that a Notice of Penalty Offence identifying specific conduct that it previously has found by administrative order (other than a consent order) to be unfair or deceptive would position the FTC to pursue civil penalties against recipients of such Notice under Section 5(m)(1)(B) of the FTC Act in the event they subsequently engaged in similar practices.

- In October, 2021 the FTC sent warning letters and Notice of Penalty Offenses to more than 700 companies, followed by subsequent letters to an additional 1,100 companies, regarding the use of endorsements and testimonials. *See* https://www.ftc.gov/system/files/attachments/penalty-offenses-concerning-endorsements/npo_endorsement_template_letter.pdf. The FTC warned the recipients that "some companies use these advertising tools in a manner that deceives consumers" and recommended that recipients "carefully review the notice and take any steps necessary to ensure that your company's practices do not violate the law." Although the FTC noted that "FTC staff is not singling out your company or suggesting that you have engaged in deceptive or unfair conduct," it also reminded recipients that companies could be subject to civil penalties of up to $43,792 per violation.

- The FTC sent warning letters in March 2020, to 10 paid celebrities and influencers, including Cardi B and Adriene Bailon, for their failure to adequately disclose that Teami LLC had paid them to endorse Teami-branded teas and skincare products. In addition, the FTC brought charges against Teami for using deceptive health claims in its advertising, as well as for the inadequate disclosures by its paid influencers. The FTC agreed to settle its claims against Teami under a proposed

order imposing a $15.2 million judgment based on the total sales of the challenged products, which it suspended upon payment of $1 million. *See In the Matter of Teami, LLC et al*., FTC File No. 182-3174 (consent order, M.D. Fla.).

- The FTC and the FDA announced in June 2019 that they jointly sent warning letters to four companies that market flavored e-liquid products. The letters cite postings by influencers on social media sites endorsing the companies' products and state that the influencers' posts failed to include required product warnings and failed to include a disclosure about the influencers' "material connection" with the companies.

2. FTC Proceedings

- The FTC settled its first complaint against individual social media influencers in 2018. The complaint was against two social media influencers who co-owned CSGO Lotto, an online service enabling customers to gamble using custom "skins" from the online, multi-player game Counter-Strike as virtual currency. The settlement relates to charges that the influencers, Trevor "TmarTn" Martin and Thomas "Syndicate" Cassell, deceptively endorsed CSGO Lotto without disclosing their ownership interests in the company and paid other influencers to promote CSGO Lotto on social media without requiring any sponsorship disclosures. The proposed order settling the FTC's charges prohibits Martin and Cassell from misrepresenting that any endorser is an independent user or ordinary consumer and requires clear and conspicuous disclosures of any unexpected material connections with endorsers.

- The FTC announced a settlement in 2018 with public relations firm Creaxion Corporation, Inc. and gymnastics publication Inside Gymnastics for allegedly engaging Olympic athletes to promote an insect repellant without disclosing their connections to the brand, and for reimbursing employees for purchasing the product and posting reviews without disclosing their material connections. *See In the Matter of Creaxion Corporation et al*, FTC File Nos. 172-3066, 172-3067 (consent order).

- The FTC brought a suit against Machinima in 2015, the operator of a popular YouTube channel, alleging that bloggers engaged as part of a campaign for a new Microsoft Xbox One failed to disclose material connections related to their affiliation with the product. *See* FTC Approves Final Order Prohibiting Machinima, Inc. from Misrepresenting that Paid Endorsers in Influencer Campaigns are Independent Reviewers, available at https://www.ftc.gov/news-events/press-releases/2016/03/ftc-approves-final-order-prohibiting-machinima-inc.

- The FTC brought a case in 2014 against Sony Computer Entertainment America and Deutsch LA, the company's advertising agency, alleging that the agency sent a company-wide email asking employees to help with an ongoing campaign by posting positive commentary to their own pages about the product. *See* FTC Approves Final Orders Related to False Advertising by Sony Computer Entertainment America and Its Ad Agency Deutsch LA for PS Vita Game Console,

available at https://www.ftc.gov/news-events/news/press-releases/2015/03/ftc-approves-final-orders-related-false-advertising-sony-computer-entertainment-america-its-ad.

- The FTC announced in 2012 that it had investigated Hewlett Packard and its public relations firm Porter Novelli, alleging that Porter Novelli provided gifts to bloggers in exchange for posting content about an HP marketing campaign, and that the bloggers did not disclose the material connection. *See* HP Inkology, FTC File No. 122 3087, available at https://www.ftc.gov/sites/default/files/documents/closing_letters/hp-inkology/120927hpinkologycltr.pdf.

- The FTC announced a $40 million settlement with Skechers in 2012, to settle charges that an "independent" clinical study touting a product's benefit was done in part by a chiropractor married to a Skechers marketing executive. *See* Skechers Will Pay $40 Million to Settle FTC Charges That It Deceived Consumers with Ads for "Toning Shoes," available at https://www.ftc.gov/news-events/news/press-releases/2012/05/skechers-will-pay-40-million-settle-ftc-charges-it-deceived-consumers-ads-toning-shoes.

F. Proposed Rule Banning Fake Reviews and Testimonials

One day after issuing the 2023 Endorsement Guides, the FTC published a proposed rule intended to stop marketers from using fake reviews, suppressing honest negative reviews and paying for positive reviews, review "hijacking" (using reviews of one product for a different product) and other practices that the FTC considers to be clearly deceptive or unfair practices. *See* 88 FR 49,364, 16 CFR Part 465. As with the FTC's recent use of Notices of Penalty Offences, the proposed rule is intended to bolster deterrence of such deceptive practices by enabling civil remedies under Section 19 of the FTC Act, 15 U.S.C. 57b, in light of *AMG Capital Management*'s foreclosure of monetary relief under Section 13(b) of the FTC Act. See 88 FR 49,364, 49,377-378.

The proposed rule follows recent cases brought by the FTC regarding deceptive customer reviews. In January 2022, Fashion Nova, an online "fast fashion" retailer, agreed to pay $4.2 million for suppressing negative customer reviews (ratings less than four stars) from its website, contrary to its representation that product reviews on the website accurately reflected the views of all product reviewers. *See* 87 FR 4596 (proposed consent agreement and request for comment). The FTC's case against Fashion Nova was its first challenging a company's failure to post negative reviews.

The FTC joined six state attorneys general in a complaint against Roomster Corp, and its owners for buying and posting tens of thousands of four and five-star fake reviews and posting phony listings on other websites to drive consumers to Roomster's rental listing platform. The fake reviews diluted real consumer reviews, including those warning consumers that Roomster's listings were fake. Once on Roomster's platform, Roomster charged consumers to access the phony listings. In August 2023, the FTC announced a stipulated consent order, awarding a monetary judgment of $36 million and civil penalties of $10 million payable to the states,

although all but $1.6 million of the penalties was suspended based on the defendants' inability to pay. *See* https://www.ftc.gov/news-events/news/press-releases/2023/08/ftc-state-partners-secure-proposed-order-banning-roomster-owners-using-deceptive-reviews .

In February, 2023, the FTC brought its first enforcement action for "review hijacking" against The Bountiful Company, the maker of Nature's Bounty vitamins, with respect to consumer reviews of its products selling on the Amazon marketplace. Specifically, the FTC alleged that The Bountiful Company used Amazon's tool that enables a combination of like products for the purpose of facilitating consumer selection to merge the consumer reviews of products with different formulations, thereby artificially boosting the ratings of newer products. The Bountiful Company was ordered to pay the FTC $600,000 for consumer redress. *See* https://www.ftc.gov/news-events/news/press-releases/2023/04/ftc-approves-final-order-against-bountiful-company-first-case-alleging-hijacking-online-product .

Other steps taken by the FTC to discourage deceptive reviews include its January 2022 release of guidance for online retailers and review platforms: Soliciting and Paying for Online Reviews: A Guide for Marketers, https://www.ftc.gov/system/files/documents/plain-language/1007a_soliciting-and-paying-for-online-reviews-508_0.pdf; and Featuring Online Customer Reviews: A Guide for Platforms https://www.ftc.gov/system/files/documents/plain-language/1006a_featuring-online-customer-reviews-508_0.pdf. The FTC also announced that same month that it was sending warning letters to ten review platforms offering review management services placing them on notice that suppression of negative reviews violates Section 5 of the FTC Act.

G. Practical Issues for Use of Endorsements and Testimonials

3. Considerations for consumer testimonials:

- Representative of class or group of consumers shown.
- Unbiased.
- Truthful as to the product/service claim.
- Truthful as to the consumer's view of product/service.
- Actual consumer shown in ad or disclose use of actor/model.
- Obligation to update continued use/endorsement over time of product or service by the endorser.
- Need to disclose payment or other consideration provided in connection with testimonial.

4. Considerations for expert testimonials:

- Bona fide expert with proper qualifications.

- Qualifications must relate to the product/service.
- Claims independently verified by the expert.
- No need to disclose payment unless payment would not be expected by the consumer given the medium used or the context of the material.

5. Considerations for Celebrity Testimonials:

- Must use product.
- Independent liability for celebrities making inherently incredible claims or those they "know" are not truthful.
- Even for scripted advertising, celebrity has some independent obligation to confirm product/service efficacy and other claims.
- Must disclose paid endorsement relationship or other "material connection" to advertiser if context is unexpected, e.g., endorsement is given in a non-traditional context, such as during a talk show interview.

6. Considerations for Blogger/Influencer Testimonials:

- Must use product and provide truthful, unbiased review.
- Independent liability for advertisers who "engage" or provide free product to bloggers and theoretically for bloggers who "review" products they have received for free without disclosing this "material connection."
- The key inquiry is whether the audience understands the reviewer's relationship to the company whose products are being reviewed.

V. Affiliate Marketing

Affiliate marketing is the practice by a marketer of engaging third party "affiliates" to help target audiences, which affiliates earn a benefit (usually in the form of a commission) from either clicks to the marketer's website (cost per click) or purchases of the marketed product attributable to them (cost per acquisition, usually traced through a personalized link or code unique to that party). Most often, affiliates are individuals (such as social media influencers or bloggers), or publishers (including media companies, review sites, and more), who integrate the affiliated brands into their content. This performance-oriented marketing tool has become increasingly popular in an era of burgeoning social media.

Affiliate marketing is largely regulated by the same principles that apply to testimonials and endorsements, including the Endorsement Guides. In this case, the fact that the affiliates may receive a portion of the proceeds, or a commission, from clicks to a marketer's website or the purchase of the product is considered a "material connection" (as discussed above) that must be disclosed. The disclosure must be clear and conspicuous such that a reader can see the disclosure

in close proximity to the affiliate link. The reader should not need to click away from the page to do view the disclosure.

Recently, much of the FTC's "material connection"-related enforcement has targeted affiliate marketing practices. Some notable examples include *FTC v. LeadClickMedia, LLC*, 838 F.3d 158 (2d Cir. 2016) (affirming a ruling requiring Lead Click to pay $11.9 million for helping to promote weight-loss supplement Lean Spa through deceptive affiliate marketing tactics, including recruitment of affiliate marketers that used fake news sites to drive traffic to the Lean Spa website without proper disclosures) and *In the Matter of Legacy Learning Systems, Inc. et al*, FTC File No. 102-3055 (June 1, 2011) (Decision and Order) (settling FTC claims against Legacy Learning Systems that the company deceptively advertised services through online affiliate marketers who posed as independent consumers or reviewers without properly disclosing their material connections). According to these decisions, marketers using affiliates to market their goods and services must: 1) explain to their affiliates what can and cannot be said about their products and services; 2) establish reasonable monitoring programs to watch what their affiliates are saying and how and where they're saying it; and 3) follow up if they find questionable practices.

In *GOLO, LLC, v. Higher Health Network, LLC*, the U.S. District Court for the Southern District of California opined on whether affiliate marketing in the context of an online review website may give rise to a claim under the Lanham Act. *See GOLO, LLC v Higher Health Network, LLC,* 2019 U.S. Dist. LEXIS 18506 (S.D. Cal. Feb. 5, 2019) (alleging that defendant's online review site provided false information about plaintiff's products and falsely held itself out as an independent site even though the defendant maintained affiliate relationships with plaintiff's competitor). The court stated that "liability can arise under the Lanham Act if websites purporting to offer reviews are in reality stealth operations intended to disparage a competitor's product while posing as a neutral third party." *Id*. at *26 (internal quotation marks omitted). As such, the court allowed the plaintiff's claims to survive a motion to dismiss. *Id*. at *27.