



With the first quarter of 2024 in full swing, it is a good time for brands to revisit marketing compliance strategies to minimize the risk of potential class actions, regulatory enforcement actions, and competitor challenges. This Update highlights hot topics in advertising law for 2024.

### **Generative Artificial Intelligence (AI) and Advertising**

The emergence of consumer-friendly generative AI tools has alarmed content creators, lawmakers, and regulators wrestling with advertising transparency, intellectual property, data privacy, discrimination, ethics, and other issues. Various AI developers are currently defending against class action lawsuits alleging that they violated copyright, publicity, and privacy rights. The lawsuits often allege copyright violations and the misappropriation of personal data by companies that train generative AI models. Both the Federal Trade Commission (FTC) and Congress have hosted summits highlighting the risks and potential rewards of AI. In

2024, expect more investigations and lawsuits targeting suspected AI misuse as regulators, plaintiffs, and lawmakers evaluate the deployment and use of this technology and the related impact on consumers and rights holders.

Brands should draft an AI acceptable use policy if they have not done so yet. And if they already have one, it may be time to revisit that policy to determine whether it is consistent with current company goals and risk tolerance. Brands should also train their in-house teams, and potentially outside vendors, on their AI policies. Finally, brands should revisit vendor, agency, influencer, and other agreements to ensure that they include reasonably protective terms regarding generative AI use.

## **Advertising to Children and Teens**

The FTC, state regulatory authorities, and state legislatures are increasingly concerned about advertising targeted towards children. The FTC, for example, is focused on advertising and data collection practices that could affect children. The agency released a [staff paper](#) in September 2023 about "blurred advertising," in which advertising and nonadvertising content is blended in a way that is likely to confuse kids and teens about the advertising nature and purpose of the content. To address that potential confusion, the FTC recommended five steps that advertisers and platforms should take to reduce harm to kids: (1) use visual and/or audio cues to clearly distinguish between advertising and entertainment content; (2) provide clear, prominent, and timely disclosures about the advertising nature of the applicable content; (3) use recognizable icons to help kids identify advertising; (4) educate parents and kids about how digital advertising works; and (5) introduce platform tools and controls to help content creators and parents identify and monitor access by kids.

[The FTC also proposed changes](#) to regulations underlying the Children's Online Privacy Protection Act (COPPA) in December 2023. The proposed changes would increase data security obligations, strengthen requirements for parental consent, and place additional limits on the data and consents that websites can use to encourage use of a website or online service. The revision to the COPPA Rule will be open for public comment until March 11, 2024. This is distinct from ongoing legislative efforts to expand COPPA's scope.

State legislatures and regulators also showed interest in children's privacy legislation and enforcement. The California Age-Appropriate Design Code Act (ADCA), which requires businesses with online services that are "likely to be accessed by children" under age 18 to implement extensive privacy and safety features, was drafted to take effect in July 2024. The ADCA will be enforced by the California attorney general and carries penalties of up to \$7,500 per violation. In September of 2023, Judge Beth Freeman of the U.S. District Court for the Northern District of California issued a preliminary injunction staying enforcement of the ADCA, holding that the law likely violates the First Amendment. The California attorney general has appealed the issuance of the injunction to the U.S. Court of Appeals for the Ninth Circuit. Other state legislatures have explored banning access to various social media apps by kids under certain ages with similar legal challenges. Finally, attorneys general of numerous states brought enforcement actions against social media platforms alleging that they used design elements to unfairly manipulate kids and collect data from users under 13 without parental consent. Brands should continue to track legal developments in this area and review their advertising and digital content to manage risk.

## **Recurring Subscriptions**

Last year, the FTC issued a [Notice of Proposed Rulemaking](#) to expand its rule regarding recurring subscription programs. The FTC is reviewing public comments, and once finalized, the updated rule is expected to establish significant nationwide standards for recurring subscription programs. In particular, the rule would require—similar to some state laws—clear and conspicuous disclosure of material subscription terms, double

opt-ins for sign-ups, a simple cancellation method, and an annual renewal reminder. (See our previous [Update](#) for more detail.)

States also continue to add or amend their laws regulating recurring subscriptions. For example, new or updated laws were passed or took effect in 2023 in Connecticut, Florida, Georgia, Idaho, Illinois, Kentucky, North Dakota, and Virginia. Plaintiffs' lawyers also continue to bring lawsuits alleging violations of state recurring subscription laws.

To reduce the potential for consumer class actions and regulatory scrutiny, and to prepare for the finalized FTC rule, brands that offer recurring subscriptions should (1) clearly and conspicuously disclose material recurring subscription terms; (2) obtain consumers' express consent to the full subscription terms (and plan for the likely "double opt-in" consent as proposed in the FTC's rule); (3) provide simple and easy cancellation methods; (4) send a reminder notice before free trials convert to a paid subscription and before paid subscriptions automatically renew (as currently required by certain jurisdictions and proposed in the FTC's rule); and (5) stay current on changing laws and enforcement trends in this area.

### **Hidden Charges and Junk Fees**

As part of President Biden's new [federal consumer protection platform](#) and attack on "junk fees," the FTC [proposed a new rule](#) in October 2023 that would require sellers to clearly and conspicuously disclose the total price—meaning mandatory fees and charges, minus shipping and government fees—of products and services in offers and advertising. The proposed rule also addresses requirements for nonmandatory fees.

States are seeking to regulate added fees as well. For example, California [amended](#) the Consumer Legal Remedies Act (CLRA) (effective July 1, 2024) in an effort to eliminate hidden fees and provide fee transparency to consumers. Similarly, Massachusetts Attorney General Andrea Joy Campbell recently [announced](#) that her office has proposed new rules that would prohibit so-called "junk fees," including by advertising a price without clearly and conspicuously disclosing the total price of the product upfront (i.e., before checkout). In New York, a [similar bill](#) was signed into law in December 2023 requiring sellers that impose credit card surcharges to post the total price, inclusive of the surcharge. Other states—such as Arizona, New Jersey, New York, North Carolina, Rhode Island, Texas, and Virginia—have also proposed laws targeting junk fees.

Given these evolving regulations, brands should review their price disclosures for compliance with applicable laws and continue to monitor for developing junk fee-related standards at the federal and state levels.

### **Dark Patterns**

The FTC has aggressively enforced against digital design practices that allegedly trick or manipulate consumers into making choices they would not have otherwise made (labeled "dark patterns" by the FTC and other regulators). Examples of dark patterns include false countdown timers, "confirmshaming," hidden fees, confusing and misleading text, buried disclosures, and making it hard to cancel a subscription. As discussed above, the FTC is also considering rulemaking to curb junk fees, which it views as a type of dark pattern. Consumer litigation and regulator enforcement actions regarding hidden and misleading fees are not new, but we expect to see an increase in these actions in 2024. To mitigate risk related to dark patterns and hidden fees, brands should (1) avoid using visual misdirection or deception to create pressure to complete the transaction; (2) make consumer choices easy to access and understand; (3) disclose unavoidable and mandatory fees upfront; (4) itemize different types of applicable fees at checkout for clarity; and (5) otherwise work with counsel early and often in the website, app, and digital experience design process.

## **Influencers, Endorsements, and Consumer Reviews**

The FTC introduced two important developments on influencers, endorsements, and consumer reviews in 2023: (1) the revised [\*Guides Concerning the Use of Endorsements and Testimonials in Advertising\* \(Endorsement Guides\)](#) summarized in our [August 2023 Update](#), and (2) a notice of proposed rulemaking for a new [Rule on the Use of Consumer Reviews and Testimonials](#).

The updates to the *Endorsement Guides* expanded guidance on: (1) what qualifies as an "endorser" and "endorsement," (2) who can be liable for noncompliance, and (3) how to clearly and conspicuously disclose material connections between brands and influencers. Disclosures must be "difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers" and "unavoidable" when made on social media or in other interactive digital content. The FTC also sent [staff warning letters](#) to trade associations and influencers in the beverage and sugar industries alleging failures to disclose material connections (e.g., payment and free products). Brands should review their influencer and endorsement policies, training programs, and monitoring programs for compliance with the updated *Endorsement Guides*.

While the *Endorsement Guides* include guidance on customer reviews, the proposed Rule on the Use of Consumer Reviews and Testimonials would enhance the FTC's enforcement ability in the area. The Rule would give the FTC the ability to seek civil penalties for creating fake reviews, buying positive reviews, and suppressing negative reviews. The comment period ended in September 2023, and the FTC is likely to finalize the rule in 2024. Brands should proactively run a compliance "checkup" on their customer review programs and watch for the final FTC rule on this issue.

## **Sustainability Advertising**

Brands continue to face potential litigation, regulatory, and reputational risks from making misleading environmental and sustainability (green) marketing claims, especially as the FTC is actively working to update its *Green Guides*. The *Green Guides*, first published in 1992, provide guidance about making and substantiating green marketing claims. While they are nonbinding and describe the FTC's views on whether a particular green claim constitutes an unfair or deceptive practice under the FTC Act, states can incorporate the *Green Guides* into state law, as California does.

Regulators are particularly concerned about green messaging that may convey multiple meanings, such as "sustainable," "compostable," and "recycled content," emphasizing that brands must have credible substantiation for their claims. Staying current with regulatory guidance is helpful, but brands should be mindful that green claims can trigger challenges from class action lawyers, competitors, and the National Advertising Division (NAD). Even "aspirational" claims about efforts to be more environmentally friendly in the future have been challenged. Given the evolving legal and regulatory landscape, brands should carefully evaluate their claims to ensure they are supported by competent, science-based evidence.

Check with experienced marketing and consumer protection law counsel to help manage legal and practical risks when advertising products and services in 2024, and follow *Consumer Protection Review* to stay current on ad law developments and trends throughout the year.

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