

LIVING UNDER FTC OVERSIGHT

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A. An FTC Advertising Investigation: Origin and Early Stages

- 1. How does an investigation start?**
 - a. Referrals (NAD, BBB, CFPB, Congressional Offices and other agencies)
 - b. Monitoring by FTC staff
 - c. Consumer Complaints (Sentinel)

A. An FTC Advertising Investigation: Origin and Early Stages

2. Investigational Priorities: Types of Claims and Issues in National Advertising Campaigns

- a. Health claims, especially claims involving the treatment or prevention of serious health conditions, children's immune systems, claims relating to boosting memory or cognitive abilities in young children and seniors, other products claiming to treat or prevent serious medical conditions.
- b. Work at home or investment claims (investing in real estate, etc.)
- c. Products targeted at the economically vulnerable (stop foreclosure and the like).

A. An FTC Advertising Investigation: Origin and Early Stages

- 3. To whom is the investigation assigned? BCP (and, if so, what section?) or a regional office? What can that information tell the target?**
 - a. Check similar investigations or litigation
 - b. Level of staff resources committed

A. An FTC Advertising Investigation: Origin and Early Stages

4. Initial procedural choices available to FTC staff

- a. Does this involve real “bad guys” with the potential of asset seizures and TRO application?
- b. A civil investigative demand establishes deadlines but notice to the company.
- c. An access letter, the most informal initial request for information, must nonetheless be taken seriously:
 - o Could easily be converted to a CID
 - o Can sometimes invite an informal disposition of the matter
- d. Investigational hearings with witnesses likely not signaled immediately but frequently can follow the submission of required documents.

B. The Company receives the document request: What now?

1. Preliminary steps: take the matter very seriously and communicate with senior executives at the Company.
2. Get out a document preservation order to prevent destruction of covered documents in the ordinary course.
3. Inside counsel should consider getting help from outside counsel with more experience in production of documents to this agency.
4. Discuss minimizing costs with outside counsel and senior executives by streamlining the processes within the organization and managing the process sufficiently and effectively. Need to minimize not just hard costs, but time of senior executives.
5. Do a White Paper to pull studies and academic thinking together?
6. Think about presenting expeditious informal ways to resolve the issue.
7. Look at competitors ads and ads in similar industries to determine “generally accepted” practices in that media.

C. Initial Discussions with Commission Staff

1. Take advantage of the Meet And Confer provisions in the standard CID or access letter. As counsel for the Company, make sure you have a good sense of document volume, difficulty of identification of particular documents, how the IT system works, and related issues. Try to identify an experienced professional to be closely involved in document compliance. Tap into previously established litigation discovery response procedures.

C. Initial Discussions with Commission Staff

2. FTC staff will be looking for a way to get what they need and not get snowed with information.
 - a. Approaches that work
 - b. Approaches that don't
 - c. Does a relationship formed in document production carry over to discussions on the merits?
3. Planning for investigational hearings (*i.e.*, depositions) following completion of document production.
4. Begin planning for worst case scenario – litigation with the Commission. Begin planning for consumer surveys and testifying experts. Remember to protect these, where appropriate, under the Work Product Privilege.

D. Time to Draw Conclusions: FTC Staff

1. The Staff determines what claims were being made in the advertising, including whether the ad made objective claims that need substantiation (or mere puffery) and whether the ad made establishment claims. What group did the ad campaign target, a general audience or a specific audience such as children or the elderly or the like? Are the implications of the ad clear enough to determine claims without extrinsic evidence and are any disclaimers “clear and conspicuous”?

D. Time to Draw Conclusions: FTC Staff

2. Are the claims substantiated?
 - a. Does the Company have a reasonable basis for objective product claims?
 - b. If objective health benefit claims are made, are they substantiated by competent and reliable scientific evidence?
 - c. What about studies the Company relies on? How good are they and are they consistent or inconsistent other studies in the field of this kind of product?

D. Time to Draw Conclusions: FTC Staff

- d. What potential actions and remedies seem to suit the problems found by the staff?
 - A complaint in Federal District Court or a Part 3 Administrative Action?
 - In addition to the advertiser, should the ad agency, endorsers, affiliate networks or other entities be named?
 - Should regress or disgorgement be sought from the advertiser and others for the advertising at issue?
- e. The staff forwards the recommendation to the Bureau and engages in discussions with the Head Office prior to contacting the Company.

E. The Company's Negotiating Choices

1. The Company hears from the Commission, perhaps after several months of silence, that the Commission Staff has a problem with the Company's advertising and Bureau has authorized the staff to discuss a settlement. The first question: Is the relief requested by FTC such a fundamental attack on the Company's business model that it has no choice but to litigate?
2. Are there other potential business models, claims and advertising approaches which would comply with the FTC concerns but still allow you to be competitive in the marketplace?

E. The Company's Negotiating Choices

3. Look at your competitors – what are they doing? How are they dealing with the issues presented by the FTC? Is this going to be an industry-wide action by the Commission or is it only for claims that are problematic?
 - a. Look at all claims, including digital media. How are comparable companies engaging in digital medial advertising?
 - b. Visits with the Commissioners?
 - c. What about class actions or follow on litigation?

Conclusion/Q&A