

# Top Advertising Law Developments in 2023

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If you follow our blog, you already know that there have been a number of significant developments in the world of advertising law over the past 12 months. In this post, we highlight ten of those developments and consider what they might mean for the future.

- **Regulators' Favorite Shade - Dark Patterns:** Following the FTC's [2022 Dark Patterns Report](#) and [high profile enforcement action against Epic Games](#), regulators including the FTC, CFPB, and state AGs continued to bring enforcement and provide guidance on perceived "dark patterns" – primarily related to automatic renewal and continuous service options, but also as to [chat bots](#), disclosures, and marketing practices more broadly. In January, the [CFPB released guidance](#) focused on dark patterns in negative option marketing. In March, the NAD joined the discussion in a [decision](#) highlighting potential issues with Pier 1's advertising of discounted pricing only available with a paid subscription and its use of a pre-checked box for enrollment with that same subscription. The FTC continued to lead the charge – with dark patterns allegations playing a key role in a number of enforcement actions, including against [Publishers Clearing House](#), [Amazon](#), and [fintech provider Brigit](#).
- **Beyoncé and Taylor Swift Concerts Lead to War on Junk Fees:** Okay, the war against junk fees may have predated the fees associated with the pop stars' mega tours, but it continued in earnest throughout the year. As with dark patterns, the FTC, CFPB and state AGs all took on junk fees at various times. Most notably, the FTC proposed a [far-reaching rule](#) that could fundamentally alter how prices and fees are disclosed in businesses across the country. The comment period was just [extended](#) until February 7, 2024 for the proposed rule. Not to be outdone, California [passed](#) new legislation banning hidden fees and the Massachusetts AG [issued draft regulations](#) that would prohibit hidden "junk fees," enhance transparency in various transactions, and make it easy for consumers to cancel subscriptions.
- **Endorsement Guides:** In June, the FTC released its long-awaited update to the Endorsement Guides. We [noted](#) that the Guides include some significant changes, including new examples of what constitutes an "endorsement," details about what constitutes a "clear and conspicuous" disclosure, and an increased focus on consumer ratings and reviews. We also [examined](#) how the revisions could affect influencer campaigns. In November, we [reported](#) that the FTC had sent warning letters to two trade associations and 12 influencers over their posts, giving us a glimpse of enforcement to come. Meanwhile, NAD has also been active in this space and even [referred](#) a case to FTC for enforcement. Expect this to be a priority for both FTC and NAD in 2024.
- **Green Guides:** The FTC's Green Guides review progressed this year with an initial comment

period closing in April, followed by an FTC workshop on “recyclable claims,” which we attended and highlighted [here](#). With its history of hosting several workshops on hot green topics, we expect to hear of more workshops in the new year. California has been active as well with the governor signing a new law in October that aims to regulate carbon claims and make businesses more transparent about their carbon reduction efforts by requiring certain website disclosures (see our summary of the law [here](#)). The effective date is the first of the new year, but according to a recent letter from the bill’s sponsor, we expect that California will defer enforcement until January 1, 2025 to give companies time to comply (see [here](#)). With ESG efforts continuing to be front and center for most companies, consumers and regulators are holding companies accountable for those claims by questioning messaging about their efforts, aspirations for the future, and basis for the claims (see, for example, [here](#), [here](#), and [here](#)).

- **State Privacy Laws:** It’s getting increasingly hard to remember a time before state privacy laws regulated [data sales](#), [targeted advertising](#), [sensitive data](#), and [privacy disclosures](#). At the start of the year, [five states had enacted privacy laws](#), and now there are 13 comprehensive consumer privacy laws ([CA](#), [CO](#), [CT](#), [DE](#), [FL](#), [IN](#), [IA](#), [MT](#), [OR](#), [TN](#), [TX](#), [UT](#) & [VA](#)) and an additional two health-focused laws ([WA](#), [NV](#)). What does this mean for advertisers? (1) Know who your [vendors are and their data practices](#). (2) Obtain consent before building inferences based on [sensitive data, like race/ethnicity, religion, or health](#). (3) Disclose up-front the [collection, use, and disclosure of personal information](#). (4) Finally, recognize the limitations of third-party data as [new regulations and laws](#) take effect.
- **Children’s Privacy:** Congress, regulators, and advocates focused time and energy on children’s privacy issues in 2023. The House and Senate held [hearings focused](#) on children’s safety and privacy. Although the Senate Commerce Committee advanced the Kids Online Safety Act, it never received a floor vote; Senators Markey and Cassidy continued to advocate for approval of the Children and Teens’ Online Privacy Protection Act (COPPA 2.0). The FTC reached settlements with companies about practices it alleged violated the Children’s Online Privacy Protection Act (COPPA) on the [Xbox](#) and [Alexa](#) platforms and with edtech provider, [Edmodo](#). In September, the FTC [released](#) a “Staff Perspective” on digital advertising to children, which included recommendations on how to protect kids from the harms of “stealth advertising.” Also in September, a federal court [agreed](#) with industry advocates that California’s Age Appropriate Design Act, which imposes a variety of obligations on businesses that provide online services “likely to be accessed by children,” violated the First Amendment. California is appealing the decision, and regulators, including a number of Attorneys General and FTC Commissioner Alvaro Bedoya, have joined the state as amici. One of the most anticipated developments occurred with just 11 days left in the year, when [the FTC proposed revisions to the COPPA Rule](#)—more than four years after initiating its review process. Among other things, the proposed Rule would require new, additional consents for third-party disclosures and could affect operators’ approach to “internal operations.” Online services with children’s audiences have lots to consider in 2024 and beyond. Stay tuned for further updates.
- **State AG:** State Attorneys General continued to make their presence felt in 2023. State AGs continued to go after companies for using [fake reviews](#) and false [endorsements](#), enforced and [proposed new](#) price gouging rules, pursued [telehealth companies](#) for deceptive practices, [supported](#) the FTC’s Negative Option Rulemaking while bringing their own [auto-renewal actions](#), continued to impose significant penalties against companies for [data breaches](#), pursued companies for misleading [consumer financial practices](#), and focused efforts on so-called “[junk fees](#).” But two topics continue to be the highest priority of AGs – the impact of developments in

AI (which we've written about [here](#), [here](#), and [here](#) – just to name a few) and protecting the most vulnerable consumers – especially our nation's youth. The incoming president of the National Association of Attorneys General president, Oregon Attorney General Ellen Rosenblum, has already made protecting youth, especially teens, this year's presidential initiative. Look for AGs to continue to this focus well into 2024.

- **Automatic Renewal:** While auto-renewal service sign-up flows remain important, this year, we have seen a transition to cancellation processes being the hottest topic as states enforce their specific requirements and the FTC has drawn attention to “click to cancel” through its proposed rule. But we shouldn't forget all of the FTC's other proposals under the [negative option rule NPRM](#), including expanding the scope, requiring more specific disclosures, separate consent for negative option, consent for save offers, and expanded notice requirements. Regardless of whether a federal rule formally comes into play in 2024, as referenced above certainly [states have agreed](#) are on board with FTC's proposals, and they also resolved a [multistate investigation](#) this year requiring checkbox consent, online cancellation, and limiting save attempts. And don't forget Massachusetts is working on [its own rulemaking](#) involving online cancellation.
- **NAD:** This year, NAD issued number of decisions that caught our attention. For example, a [decision](#) in February narrows the scope of what claims may be considered puffery. NAD later elaborated on what it thinks advertisers must do in order to [substantiate aspirational claims](#) about future goals. NAD also issued a number of decisions involving endorsements – including [employee endorsements](#) and [disclosure requirements](#) – and even [referred](#) a case to FTC for enforcement. In August, NAD held that [emojis could convey claims](#), though NARB later [disagreed](#) with how NAD had applied that principle. As always, NAD plays a big role in the advertising law landscape, so companies will want to continue to watch what NAD does in 2024.
- **Same Product/Different Label Litigation:** We [chronicled](#) a Connecticut district court's denial of a motion to dismiss in a case in which the plaintiff alleged that Beiersdorf, maker of Coppertone sunscreens, engaged in false advertising by selling the same sunscreen formula in two different packages, one of which was labeled as “FACE” and sold in a smaller tube at twice the price of the regular Coppertone Sport Mineral sunscreen. That case is one to watch but it is not the only one of its kind. In fact, 2023 saw several similar cases involving allegedly the same formula marketed as different products with varying price points, such that the plaintiffs alleged that they were misled into purchasing the more expensive item because they believed it was uniquely suited to their needs when, in fact, it was the same as the lower-priced item. These cases involved a range of products, such as baby/adult lotions, infant/children's acetaminophen, children's/adult cold remedies, to name a few. So far, decisions are mixed, with some courts being more willing than others to find that the differing prices were justified. Marketers of food and personal care brands that merchandise the same formula in varying iterations will want to remain mindful of these cases as they update packaging and claims.

Keep following us in 2024, and we'll keep you posted on how these trends develop. In the meantime, have a great holiday!