

Top FTC Rules and Guides You Should Keep in Mind

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When we [posted](#) about a \$9.3 million FTC settlement involving the Mail Order Rule, many people commented that they had never heard of that Rule, and wondered what else they might be missing.

In fact, the FTC has more than 50 Rules and Guides. Don't let that number scare you - many of these rules are very narrow and wouldn't apply to most of our readers. For example, you probably don't have to worry about the rule that regulates power output claims for amplifiers used in home entertainment products or the rule that requires certain disclosures when selling funeral goods or services. But odds are that there are a number of Rules and Guides that do apply to you. Here's a high-level overview of a few of the key ones.

CAN SPAM Rule

If you're sending marketing emails, you want to be sure to comply with the CAN-SPAM Rule. The Rule sets forth various requirements for sending commercial emails and penalties for failure to follow those requirements. Commercial emails are those that advertise or promote a product or service, as opposed to "transactional" emails that facilitate an existing transaction, such as an order update or a receipt.

Generally, CAN-SPAM requires commercial emails to include:

- Truthful "From," "To," and "Reply to" fields, and routing information;
- Accurate subject lines;
- A disclosure that identifies the message as an ad;
- Your physical address; and
- A free and easy-to-use unsubscribe mechanism.

The unsubscribe mechanism must be active for at least 30 days after you send your message and you must honor the opt-out requests within ten days of the recipient asking to be removed from your mailing list.

Guides Concerning Use of Endorsements and Testimonials in Advertising

The FTC's Endorsement Guides address how companies can use endorsements (otherwise called "testimonials") from third parties. Although the Guides have been around since 1980 and cover a lot

of ground, the key issue driving the majority of FTC investigations over the past decade relates to the disclosure of material connections between endorsers and the companies whose products those people are endorsing.

As a general matter, if an influencer or regular consumer – we'll just use the term “endorser” to cover both – has a “material connection” to the company whose products he or she is endorsing, the endorser must clearly and conspicuously disclose that connection. Although that concept may seem relatively straightforward, it can be complicated to put into practice. Here are three key points:

- First, the term “endorsement” should be read broadly. Obviously, if a person says positive things about a company’s products, that constitutes an endorsement. But the FTC has read the term more broadly. For example, simply tagging a brand or posting pictures of the brand’s products, without anything more, can be an endorsement.
- Second, the term “material connection” should be read broadly, as well. If an endorser receives payments or free products, that’s obviously a relationship that should be disclosed. But the FTC has held that things like discounts, sweepstakes entries, or “other perks” can also constitute material connections that could also trigger a disclosure requirement.
- Third, disclosures should be made using clear language and presented in a way that’s hard to miss. If an endorser uses a hashtag, it should be something that consumers are likely to understand. For example, the FTC encourages influencers to avoid abbreviations and shorthand. Also, the disclosures should be readily visible to consumers without having to click on anything.

Many companies that work with endorsers do a fairly good job of communicating these requirements to endorsers, but many fail to ensure that the endorsers comply. As a result, many of the recent FTC settlements in this area require companies to develop robust monitoring programs.

For more information, see our [Advertising and Privacy Law Resource Center](#).

Mail or Telephone Order Merchandise Rule

The Mail Order Rule generally requires companies to have a reasonable basis for any representations they make about when they will ship an order or, if they do not make any representations, to have a reasonable basis for believing they can ship within 30 days.

If a company can’t ship an item within the time promised (or 30 days), the company must notify the customer. If the company has an expected shipping date, the notice must contain: (1) the revised shipping date; (2) a statement that the customer can cancel and get a full refund; and (3) a statement that a customer’s non-response is a consent to the delay. If the company does not know when it can ship the item, the initial delay notice must contain: (1) the reason for the delay; and (2) a statement that, if the customer agrees to the indefinite delay, the customer may cancel the order any time before shipment.

If a company can’t ship by the revised date, it must send a second notice. That notice must include information about: (1) a revised shipping date; (2) the customer’s ability to cancel for a full refund; and (3) a statement that, unless the customer agrees to wait beyond the revised shipment date and the company has not shipped by then, the company will automatically cancel the order and issue a refund. If the company doesn’t know when it can ship the item, the notice must include: (1) the reason for the delay; and (2) a statement that, if the customer agrees to the indefinite delay, the

customer may cancel the order any time until shipment.

Instead of sending a delay notice, the company can cancel the order and send a refund, as long as it notifies the customer and sends the refund within the time it would have sent the notice.

Although the Mail Order Rule hasn't been the subject of much enforcement in recent years, [a \\$9.3 million settlement in April](#) and a [recent FTC complaint](#) alleging violations serves as a good reminder that the Rule is still relevant today.

Guides for the Use of Environmental Marketing Claims

The FTC set forth the Guides for the Use of Environmental Marketing Claims (the "Green Guides") to help marketers avoid making environmental marketing claims that are unfair or deceptive under Section 5 of the FTC Act. The Guides offer general principles, guidance, and examples for a variety of environmental claims, including everything from a product being "recyclable," to the appropriate way to market that a company purchases carbon offsets. The Green Guides also provide some general parameters for making environmental claims:

- Avoid General Environmental Benefit Claims: The FTC generally advises against making broad environmental claims because they can be difficult to substantiate. Instead, marketers should clearly qualify any environmental claims to limit them to what the marketer can substantiate.
- Maintain Substantiation for Environmental Claims: As with any other claims a marketer makes, a marketer must have substantiation for any environmental claims made about a product, package, or service. The type of substantiation depends on the claim, and the Green Guides provide specifics, but the marketer must ensure the claims are closely tied to the substantiation the marketer has on hand.
- Be Specific: In aligning claims with the marketer's substantiation, a marketer must be specific as to the nature of the environmental claim, and whether the claim applies to a product, package, or service. Marketers should also avoid overstating environmental attributes.

While the Green Guides are not themselves legally binding on the federal level, but rather an interpretation of what constitutes a violation of the FTC Act, some states have incorporated the Green Guides by reference into state law.

Children's Online Privacy Protection Rule

Congress enacted the Children's Online Privacy Protection Act (or "COPPA") to give parents control over what information is collected from their children online. The FTC's COPPA Rule enumerates specific requirements for operators of websites and apps that are directed to children under the age of 13, or websites that have actual knowledge that they are collecting the personal information of children under the age of 13. The Act defines personal information broadly to include common identifiers, such as name and email address, as well as information collected about a child that the operator combines with an identifier.

Whether an operator's site or app is "directed to children" is a context-specific inquiry, based on the content of the site or app, for example, if a site features videos with animated characters. Further, if an operator has actual knowledge that it is collecting personal information from another site or app that is child-directed, then the operator's online service would also be considered to be child-directed. If an operator runs a site that is for a mixed audience of both children and adults, then one

option the operator may have is to age-screen visitors to determine whether COPPA requirements apply to that specific user.

The COPPA Rule dictates numerous requirements for operators, but one of the most important is that operators provide notice to parents and obtain a parent's verifiable parental consent prior to collecting or using the child's personal information. What an operator must include in the notice varies depending on the operator's intended use of the child's personal information, but this notice must be separate from the operator's privacy policy (which must also include specific information about the operator's children's privacy practices).

COPPA is one of the statutes that offers the FTC direct civil penalty authority, meaning that the FTC can seek fines from violators after the first offense. Recently, the FTC [settled](#) a case with Google LLC for \$170 million regarding allegations that its subsidiary YouTube violated COPPA by collecting children's information without parental consent. This was the agency's largest ever settlement for a COPPA violation. Because penalties can be so costly, operators should be extremely careful when collecting or using children's personal information, ensuring that they follow COPPA requirements.

For more information on this, and privacy issues in general, see our [Advertising and Privacy Law Resource Center](#).

Guides Against Deceptive Pricing

The Guides Against Deceptive Pricing address a variety of price comparisons, including comparisons to former prices and comparisons to suggested retail prices. As with all advertising, price comparisons must be truthful.

Advertisers can only compare current prices to former prices when the advertiser actually offered the product at the former price for a reasonable amount of time. This doesn't mean that the advertiser had to make any sales at the former price, but the advertiser must have actively offered the product for sale at that price to be able to make the comparison.

Advertisers often compare their prices to those of other retailers offering similar products. Similar to former price comparisons, retail price comparisons must be based on the actual, non-fictitious prices of a competing retailer.

One of the most common price comparisons is one where the retailer advertises a price as compared to the suggested retail price. As with all price comparisons, these comparisons must be truthful. If retailers offer the product at the list price in the advertiser's area, then the comparison is not deceptive. However, if the list price is not a common price for the product, then the comparison could be deceptive.

When offering a "buy one, get one free" promotion, or any other similar promotion, the advertiser must ensure that the offer is truthful. Specifically, the advertiser should not increase the price of the product or attach conditions to the purchase, other than requiring the consumer to make the purchase, prior to making the promotion. Otherwise, the promotion may be deceptive.

While the FTC has not enforced the Guides Against Deceptive Pricing recently, many private litigants have sued retailers under state false advertising laws specifically regarding price comparisons involving suggested retail prices. Click [here](#) for more information. To the extent marketers make any price comparisons, they should ensure that they are truthful and not misleading.

Summer associate Darby Hobbs contributed to this article. Ms. Hobbs is not a practicing attorney and

practiced under the supervision of principals of the firm who are members of the D.C. Bar.

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