



Summertime, and the Marketing Compliance Is Easy

June 30th, 2022

If you're like me, the first weeks of summer mean yardwork, the first of many cannonballs into the pool, and drinks on the patio. This year, summertime should also inspire a cleanup of your marketing.

Marketing practices always provide ample opportunity for regulator scrutiny, but with the Consumer Financial Protection Bureau recently announcing its plan to assert supervisory authority over nonbank businesses that it previously ignored, now is the time to tidy up your marketing practices. I usually don't like to speak in absolutes, but the CFPB *always* analyzes consumer-facing marketing materials during an exam.

Marketing oftentimes provides a regulator the first glimpse of your compliance attitude and practices. If your consumer-facing advertisements and marketing tactics (for example, your website and your paid search ads) show your commitment to compliance, perhaps the regulator will decide to move on to the next target that perhaps doesn't have its ducks as neatly in a row as you do.

You've worked hard to get your marketing policies and procedures in place, so think about taking the time to ensure that they are up to date and are being followed. If you don't have a formal marketing policy and accompanying procedures in place, no time like the present!

Since we all know that it's best to tackle the most important tasks first, let me remind you of the most important pieces of marketing compliance that the CFPB usually considers.

Formal Policy and Implementing Procedures. These documents are crucial. They are your marketing compliance roadmap. Without them, you'll be hard pressed to prove to a regulator that you are aware of marketing compliance issues and take steps to ensure your marketing complies with applicable law. Having an informal process where the marketing person relays the marketing campaign via email to the compliance person for a quick review before blasting it over the radio or social media doesn't cut it when it comes to an examination.

Review of Marketing Materials Prior to Use. All marketing materials, with very few exceptions, should be reviewed and approved by your legal/compliance department prior to use. Your formal policy should include this requirement. Your procedures should lay out exactly how you will accomplish this task and how you will document the review and approval within your organization. They should also include steps that ensure that fulfillment matches the marketing. If you don't have a policy or procedures, see above.

You should be able to prove that you reviewed and approved the marketing materials before they

were used. Searching through emails to find all of the back and forth “yeah this looks fine” marketing approvals takes an obscene amount of time and risks accidentally turning over privileged information. The review/approval procedures do not have to be fancy, but you should be able to quickly pull the proof that a specific advertisement was reviewed and approved, by whom, and on what date.

Clear and Conspicuous Disclosures. Both the Consumer Financial Protection Act and the Federal Trade Commission Act regulate marketing materials and prohibit deceptive acts or practices. An act or practice is deceptive if: (1) there is a representation, practice, or omission likely to mislead consumers; (2) consumers interpret the message reasonably under the circumstances; and (3) the misleading effect is “material,” i.e., it affects the consumers’ conduct or decisions regarding the product. The deceptive standard includes stating something misleading, implying something misleading, or creating a misleading impression by failing to state something.

Regulators generally consider an advertisement in its entirety to determine how reasonable consumers are likely to respond to it. Typically, the regulator considers whether a qualifying disclosure is clear and conspicuous. According to regulator guidance, a disclosure is clear and conspicuous if consumers notice it, read it, and understand it. Accordingly, regulators assess whether an advertisement’s use of footnotes or fine print disclosures modifying prominent claims made in the ad adequately avoid an argument that the prominent claim is deceptive. In certain circumstances, written disclosures in fine print may be insufficient to correct a misleading representation.

In other words, fine print may or may not work. If you feel the need to include a detailed disclosure to explain the ins and outs of the claim you are making, I encourage you to: 1) consider revising the claim to one requiring less explanation; or 2) be very sure that the disclosure appears in a way that consumers notice it, read it, and understand it.

Substantiation. The Federal Trade Commission expects advertisers to have a “reasonable basis” for objective assertions. What constitutes a reasonable basis can change depending on the context. The substantiation issue typically arises in the context of scientific claims, but it can also arise in other contexts, including credit.

FTC guidance explains that an advertising claim must have substantiation at the time the claim is made because reasonable consumers might believe that the advertiser had support for the claim at issue when, in fact, it did not. Creating and documenting support for a claim after the claim has already been made is not sufficient substantiation. Keep in mind that substantiation must also be regularly updated. If a claim could be substantiated when it was made, but the tide changes and then the substantiation no longer exists, then the advertisement must be pulled. For example, if you advertise a “Zero Down” campaign via a radio spot and then, after two months, decide not to use the “zero down” strategy anymore, you should pull the spot. Keep this in mind when drafting these types of ads.

Many other issues lurk in the marketing compliance space. Customer reviews and testimonials are especially hot, along with social media influencers, the possible narrowing of the “reasonable consumer” doctrine, and the re-emergence of a focus on bait-and-switch ads.

It’s time to ditch the cannonballs momentarily and get to work shoring up those marketing practices. You’ll enjoy that drink on the patio much more after you do!

