

ADVERTISING RULES ON THE WEB

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ADVERTISING REGULATORS

Advertising content is governed by the Federal Trade Commission (the "FTC") and the advertising industry's self-regulator, the National Advertising Division of the Council of Better Business Bureaus, Inc. (the "NAD"). The NAD was founded in 1971 by and for the advertising industry as a self-regulatory mechanism to foster truth and accuracy in national advertising. The NAD has handled more than 3,200 cases challenging truth and accuracy in national advertising. Challenges from competitors constitute the majority of the NAD's cases, but the organization reviews many cases as a result of its own investigations. The NAD will soon begin monitoring online advertising.

ADVERTISING RULES AND THE "REASONABLE BASIS" STANDARD

The primary responsibility for truthful and accurate advertising belongs to the creators of the advertising. Advertisers must have valid support for any claims before such claims are made. In addition, advertisers must be able to support all reasonable interpretations of the advertisement's claims.

A landmark 1972 FTC decision that dealt with advertising by Pfizer, Inc. established the "reasonable basis" standard as the foundation of truthful, accurate, and non-misleading advertising. That is, the advertiser must have a "reasonable basis" for all matters stated or implied in the advertisement. The FTC stated in the Pfizer case that a reasonable basis is "essentially a factual issue which will be affected by the interplay of overlapping considerations." It provided several examples of issues that should



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be taken into account, including:

"(1) the type and specificity of the claim made -- e.g., safety, efficacy, dietary, health, medical; (2) the type of product -- e.g., food, drug, potentially hazardous consumer product, other consumer product; (3) the possible consequences of false claims -- e.g., personal injury, property damage; (4) the degree of reliance by consumers on these claims; and (5) the type and accessibility of evidence adequate to form a reasonable basis for making particular claims."

In several places in the Pfizer opinion, the FTC states that the above five factors are only a partial list, and that ultimately what determines a reasonable basis is to be:

"determined by the circumstances at the time the claim was made, and further depends on both those factors known to the advertiser, and those which a reasonably prudent advertiser should have discovered." [Emphasis added.]

The Pfizer decision has become the standard that the courts, the FTC, state regulators, and the NAD use in "unfair

competition" cases under the Federal Lanham Act.

APPLYING EXISTING RULES TO THE INTERNET

Under existing law, an advertisement is reviewed by considering the "four corners of the ad" or "the ad on its face" to determine whether both the advertisement's explicit and implicit claims are truthful and accurate. This analysis will not be quite so easy on the Web. Hypertext, by its very nature, is "multi-layered" and therefore "the four corners" and the "face" of an ad are not quite so definable. Material information about the product or service may not be evident from the face of the ad but may instead only exist in later pages of the Web site advertisement. This raises a question that has not yet been answered: What steps must the advertiser take to ensure that all information necessary under the reasonable basis standard has been provided to the consumer?

It is not yet clear if advertisers will have satisfied their responsibility by providing necessary information on later pages in the Web site rather than placing all such information on the home page or other pages that they know the consumer will see.

COMPARATIVE ADVERTISING

Comparative advertising is acceptable so long as it complies with the reasonable basis standard. Under that standard, the advertisement should compare similar characteristics of the service or product, and those characteristics that are compared must be significant in terms of usefulness or value. Comparisons that attempt to convey superiority of one product or service over another cannot be based upon a comparison of characteristics that is incomplete or of limited utility, and the comparison cannot omit

characteristics that clearly favor the competitor.

Moreover, consumers cannot be misled by the omission of material information that, had it been included, would have conveyed a different message. For this reason it becomes clear that the flexibility that Hypertext and the Web provide also create traps for the unwary in the preparation of advertisements. In the future advertisers may be found liable for misrepresentation simply because of the layout of the advertisement on a Web site and the way the information about the product or service is contained in the site.

TELEMARKETING REGULATION

Electronic marketing and “900” telephone advertising fall under the FTC’s Telemarketing and Consumer Fraud and Abuse Prevention Act (the

“Telemarketing Rule”) that was enacted in 1994. The Telemarketing Rule prohibits misrepresentations of any material characteristic of goods and services being purchased or sold over the telephone.

The Telemarketing Rule is currently being reviewed for changes to deal with certain abuses that have developed in telemarketing. Among those abuses are advertisers omitting material information before payment is requested; the misrepresentation of material information during the solicitation; and asking for or receiving payment of any fee for the sale of investment opportunities, or goods and services sold in connection with a prize promotion, until the purchaser receives a written disclosure and executes an acknowledgement that he or she understands the terms of the disclosure. The Telemarketing Rule is directly applicable to Web advertising if

a telephone call is involved in the purchase or sale of the good or service. In addition, the Rule will likely be broadened to cover direct purchases over the Web in the future even if a phone call is not involved.

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