

Ad Infinitum™ Checklists

Legal Review of Advertising Claims



An Annotated Checklist of Legal Requirements for Advertising Claims

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Checklist

1 - Product Category

- Regulated industry: _____
 - Securities
 - Banking
 - Food
 - Drugs
 - Alcohol
 - Telecommunications
 - Other
- Enforcement precedent: _____
 - Health-Related Products
 - Diet
 - Fitness
 - Home Business Opportunity
 - Children's Products
 - Other _____
- High product liability risk: _____
 - Health
 - Automotive
 - Recreational Vehicle
 - Other

2 - Claims Substantiation

- Identification of claims: _____
 - Express: _____
 - _____
 - _____

Checklist

Implied: _____

Substantiation: _____
 Express: _____

Implied: _____

Claims requiring further substantiation: _____

3 - Unfair Advertising

Portrayal of dangerous conduct: _____

Portrayal of conduct that violates any law: _____

Portrayal of conduct that violates any industry guidelines: _____

Presence and proper use of all safety equipment: _____
i. Helmets
ii. Seat belts
iii. Car seats

Likelihood of objectionable content being alleged by public interest groups: _____

Checklist

4 - Use of Disclaimers

Are they needed in the ad in order to: _____
 Clarify ambiguous claim?
 Supply additional information?
 Correct inaccurate statement in the ad (improper use of disclaimer)?

Are they in close proximity to triggering claim? _____
 Are they placed against a contrasting background? _____
 Is the format compliant with network guidelines? _____
 Is it possible to include the disclaimer in the main body of the ad? _____

5 - Comparative Advertiser Claims

Are all comparative claims truthful and substantiated? _____
 Are the claims "apples to apples?"
 Is the substantiation sufficient under FTC guidelines?

Are there any implied claims that might be misleading? _____

Has all survey evidence been scientifically gathered and analyzed? _____

Are there key disclosures that should be made in order to render the material claims accurate and not misleading? _____

Have competitor trademarks, trade dress and other materials been accurately portrayed? _____

Checklist

- Has careful thought been given to the universe of potentially objecting competitors and how to limit their objections? _____

6 - Puffery

- Are there any intentionally-exaggerated claims that may be understood to be objective? _____
- Is there surrounding text that may lend objectivity to an otherwise subjective claim? _____
- Would a reasonable consumer understand the claim to be puffery? _____
- Would a competitor be inclined to object to the claim? _____

7 - Dietary Supplements

- Identification of health claims: _____
- Have health claims been authorized by FDA? _____
- Identification of structure-function claims: _____
- Have structure-function claims been substantiated? _____
- Have clinical studies been performed on the combined ingredients of the product? _____
- Has consideration been given to use of the DSHEA disclaimer in advertising? _____

8 - Production Issues

- Identification of potential production mock-up issues: _____

Checklist

- Resolution for handling of these issues: _____
 - Revision to mock-up concept
 - Disclosure in advertisement
 - Other
- Production agreement acknowledgement of FTC prohibitions on undisclosed mock-ups: _____
- Signed affidavit from production company: _____
- Representative of advertiser present at production sessions: _____

9 - Continuity Programs

- Disclosure of required enrollment in club program: _____
- Disclosure of frequency of shipments: _____
- Disclosure of frequency and method of billings: _____
- Disclosure of method for cancellation: _____

10 - Online Marketing

- Define required disclosures: _____
- Confirm placement of disclosures on same page as triggering claim: _____
- Hyperlinks: _____
 - In proximity to triggering claim?
 - Conspicuous by virtue of wording or appearance?
- Confirm all disclosures are conspicuous and fully accessible prior to check-out: _____
- Confirm that website Terms of Use and Privacy Policy are consistent with disclosures: _____

Checklist

11 - Free Offers

- Is product truly free? _____
 - i. Any companion products?
 - ii. If so, have the price charged for the companion products been inflated to offset the free good?
- Has there been a free offer within the prior six months? _____
- Have all material conditions to the offer been clearly and conspicuously disclosed? _____
- Are there any implied claims regarding the offer that should be clarified? _____

12 - Testimonials

- Signed releases from each consumer testimonialist: _____
- Signed agreement with each celebrity and expert testimonialist: _____
- Adequate independent substantiation for all testimonial claims: _____
 - Substantiation for express claims
 - Substantiation for implied claims
- Disclosure of all material connections between endorser and advertiser: _____

13 - Use of the Word "New"

- Confirm materiality of the "new" feature: _____
- Limit campaign to 6 months (exclusive of testing): _____
- Consider any potential competitor issues: _____

Checklist

14 - Shared Liability

- Have responsibilities for claims substantiation been allocated among the parties? _____
- Has each party fulfilled its obligations as agreed? _____
- Have deficiencies been addressed prior to distribution of the material? _____
- Where appropriate, have the parties contractually addressed issues of indemnification? _____