



2023 REGULATORY FORECAST

McDermott
Will & Emery

CONSUMER PROTECTION

Enforcement by the Federal Trade Commission (FTC), among other consumer protection regulators, was particularly vigorous in 2022 and the trend is expected to continue in 2023. In light of the increased regulatory focus on social media, marketing and advertising, businesses should be aware of the ever-evolving guidance in this realm.

FTC PROPOSED REVISIONS TO ENDORSEMENT AND .COM DISCLOSURE GUIDES

The FTC's proposed revisions to its Endorsement Guides reflect advertisers' current methods for promoting products and services to consumers, such as via social media. In the proposed revisions, the FTC warns social media platforms about inadequate disclosure tools and seeks to prevent manipulation via fake positive reviews or the suppression of negative reviews. The FTC is seeking public comment on the proposed revisions, which will strengthen and tighten its Endorsement Guides.

WHAT TO WATCH: The FTC will likely finalize the proposed revisions to its guidance in 2023.

DARK PATTERNS

The FTC increased its enforcement efforts against illegal dark patterns that deceive or trap consumers into signing up for subscriptions (e.g., websites that employ "negative option" marketing or make it difficult for customers to cancel a subscription).

WHAT TO WATCH: The FTC is expected to maintain its enforcement in the digital advertising space in 2023. Companies should incorporate clear and conspicuous disclosures on their websites, obtain consumers' express and informed consent, and ensure that it is easy for consumers to cancel subscriptions.

CONTRIBUTORY FALSE ADVERTISING LIABILITY

The courts have increasingly accepted liability for contributory false advertising. Demonstrating such liability requires a plaintiff to show that a third party directly engaged in the false advertising that injured the plaintiff and to allege that the defendant contributed to that conduct either by knowingly inducing or causing the conduct, or by materially participating in it.

WHAT TO WATCH: The issue of contributory false advertising liability will continue to evolve in the courts with a potentially significant impact on the bottom line for defendants.

PROPOSED RULEMAKING AND PUBLIC COMMENT

In 2022, the FTC proposed various rulemaking on matters including proposed earnings claims, telemarketing sales, automotive fees and advertising, commercial surveillance and privacy, and impersonation of government and business. The agency seeks public comment on its proposed rulemaking from interested stakeholders.

WHAT TO WATCH: The FTC is likely to follow through on the proposed rulemaking announced in 2022 and potentially announce additional efforts in 2023.

FTC AUTHORITY STATEMENT ON UNFAIR METHODS OF COMPETITION FOR ADVERTISERS

In November 2022, the FTC released a policy statement detailing its intent to broaden enforcement under Section 5 of the FTC Act to encompass more types of conduct that could constitute "unfair methods of competition in or affecting commerce" than ever before.

WHAT TO WATCH: The list of conduct includes marketing and advertising, demonstrating that the FTC plans to continue to pursue unfair marketing and advertising strategies broadly and aggressively as legal violations, including violations of the antitrust laws.