

Identifying and Reporting Misleading Ads

How to Help Enforce Federal Regulations Limiting Deceptive or Unfair Marketing

This Q&A summarizes the kinds of activities that the FTC has found deceptive or unfair, and outlines how to bring a matter to the attention of the FTC.

Recent years have seen an increase in the amount and type of marketing of unhealthful foods and beverages to children and teens. Some of these marketing campaigns may violate federal laws against deceptive or unfair practices.

Researchers and advocates can help limit the marketing of unhealthy foods to youth by referring examples of deceptive or unfair marketing to the Federal Trade Commission (FTC). The FTC enforces federal laws against such advertising and marketing practices in all media, including television, radio, print, websites, mobile phones, and even word of mouth. Because the FTC has a small staff relative to its responsibilities, it relies on the public to bring violations to its attention.

By bringing examples of these practices to the FTC's attention, we can help the agency bring cases that could set strong precedents limiting the marketing of unhealthful foods to young people. This memorandum informs researchers and advocates about how to identify deceptive or unfair marketing practices.

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Commissioned by the National Policy & Legal Analysis Network to Prevent Childhood Obesity (NPLAN)

Q: What does federal law prohibit?

A: Section 5 of the Federal Trade Commission Act declares that “unfair or deceptive acts or practices in or affecting commerce” are unlawful. Other federal laws, such as the Children’s Online Privacy Protection Act and the Nutrition Labeling and Education Act of 1990, also impose certain obligations on marketers.

Q: How can I tell if an advertising or marketing practice is deceptive or unfair?

A: This Q&A summarizes the kinds of activities that the FTC has found deceptive or unfair, and outlines how to bring a matter to the attention of the FTC. However, bear in mind that the FTC has a great deal of discretion in enforcing the law, so past practice is not always a good guide to what the FTC will do in the future.

Q: What are some deceptive or unfair practices I should look out for?

A: Some examples might include:

- Claims about the health benefits or other product characteristics that are not true or not supported by studies
- Sales tactics that take advantage of children’s lack of cognitive ability, experience, and sophistication
- Marketing that pretends to be something else
- Disclaimers or disclosures that are not likely to be effective for children or teens
- Marketing that takes advantage of children’s social relationships
- Marketing that sidesteps parental decision-making and control
- Marketing that invades a child’s privacy or puts a child at risk, such as marketing that takes into account a child’s physical location and/or detailed personal information to tailor the marketing message

If you see a practice that seems wrong, but you are not sure whether it would meet the FTC’s criteria, we encourage you to forward the information to the Institute for Public Representation at Georgetown Law School for further analysis.

Q: Given the FTC’s lax enforcement of consumer laws in the past, why would the FTC take a more active role now?

A: President Obama has appointed three of the five current FTC Commissioners – the Chairman, Jon Leibowitz, and two others, Julie Brill and Edith Ramirez. In addition, Chairman Leibowitz appointed David Vladeck as Director of the Bureau of Consumer Protection. Vladeck has spent his career handling public interest litigation, often involving the First Amendment and health and safety issues, at Public Citizen and at the Institute for Public Representation. The FTC also has or is currently conducting studies on food marketing to children and youth, the marketing of violent content to youth, behavioral targeting, and mobile marketing.

Q: Wouldn’t it be better to urge the FTC to adopt specific rules curbing food marketing to youth?

A: Currently, the FTC lacks the authority to adopt rules using the relatively efficient “notice and comment” process used by most other federal agencies (although a bill in Congress proposes to change this). As a result, it is nearly impossible for the FTC to adopt rules broadly prohibiting certain types of marketing that are deceptive or unfair. Moreover, the FTC is specifically forbidden to make rules governing unfair advertising to children. However, strategic enforcement actions can sometimes establish *de facto* rules or help to pass legislation.

For example, in 1996, the Center for Media Education filed a petition requesting that the FTC bring an enforcement action against a website called KidsCom, which billed itself as a playground for children but actually promoted products to and conducted market research on children. The Bureau of Consumer Protection issued a letter concluding that it was deceptive for KidsCom to collect information from children for one stated purpose, such as earning points to redeem a prize, without disclosing that the information would be used for marketing. The letter also suggested that it was unfair for KidsCom to require children to disclose their name, age, e-mail address, and areas of interest to gain access to other parts of the website without providing parents with notice and an opportunity to control the collection and use of the information. Finally, the letter stated that KidsCom’s portrayal of product information on its website as stemming from an independent appraisal was misleading. The letter announced that the legal principles set forth in the letter would apply broadly to other websites targeting children. It was one of the factors leading to the adoption of the Children’s Online Privacy Protection Act (COPPA), which limited the collection of personal information from children and gave rulemaking and enforcement powers to the FTC to enforce those limits.

Q: What does the FTC consider “deceptive” marketing?

A: Under the FTC’s current Policy Statement on Deception, *deceptive marketing* is defined as a representation or practice that would (1) likely mislead a consumer (2) acting reasonably under the circumstances (3) in a material way.

Q: How has the FTC interpreted the first part: a representation or practice “likely to mislead a consumer”?

A: A representation likely to mislead consumers may be express or implied. An *express* misrepresentation makes a claim that is not true. For example, Kellogg claimed in a national advertising campaign that a breakfast of Frosted Mini-Wheats cereal was clinically shown to improve children’s attentiveness by nearly 20 percent. In fact, however, according to the clinical study referred to in Kellogg’s advertising, only about half the children who ate Frosted Mini-Wheats for breakfast showed any improvement in attentiveness, and only about one in nine improved by 20 percent or more.

Another case illustrates what is meant by an *implied* misrepresentation. In *Kraft Inc. v. FTC*, the court upheld the FTC's finding that certain advertisements for "Kraft Singles" processed cheese slices were misleading. The advertisements made the explicit (and correct) claim that each slice was made with 5 ounces of milk. But the ads also implied that each slice contained the same amount of calcium as 5 ounces of milk, which was not true, as much of the calcium was lost in the processing. The FTC determined that the overall impression of the advertisement was to equate the calcium content of the Kraft Singles with the calcium content of the milk.

Misrepresentation can also occur if important information is not disclosed. For example, the FTC has found consumers are likely to be misled by advertisements for home loans that offer a low monthly payment without disclosing that the low payments are for a limited period of time only.

Even when important information is disclosed, a disclosure might be "likely to mislead" if it is not sufficiently clear and conspicuous or is not understood by consumers. For example, the FTC recently brought an action against Sears for marketing a software application that would track a consumer's online browsing. In fact, the application would monitor nearly all of the consumer's behavior on the Internet, including the contents of their shopping carts, online bank statements, prescription drug records, video rental records, and web-based emails. Because this information was only disclosed in a lengthy user license agreement that was not available to consumers until after they registered, the FTC found that the Sears failed to disclose adequately that the application would do much more than merely track browsing.

Q: In considering the second part of its definition – whether marketing is likely to mislead a consumer “acting reasonably under the circumstances” – does the FTC take into account the age of the consumer?

A: Yes. If an advertisement is directed to children, the FTC examines it from a child's perspective. For example, in *Ideal Toy Corporation*, the FTC found that the toy company engaged in a deceptive practice when its television commercials showed the "Robot Commando" responding to voice commands when, in fact, it could not do so. The FTC found the advertising was misleading and "unfairly exploit[ed] a consumer group unable by age or experience to anticipate or appreciate the possibility that the representations may be exaggerated or untrue."

Q: Does the FTC need to find that consumers have actually been deceived by the representation or practice?

A: No. The FTC need only determine that a representation, omission, or practice is likely to mislead consumers, not that any particular consumers have actually been deceived. Nonetheless, it is always helpful to have some evidence of consumer confusion or misunderstanding.

Q: Can the way that a product is marketed, as opposed to what is claimed about the product in the marketing, be deceptive?

A: Yes. The FTC has brought several cases in which it alleged that certain marketing practices themselves were deceptive. For example, the FTC alleged that it was deceptive to televise a paid program-length infomercial called "Consumer Challenge" that was designed to look like an investigative news program. The Bureau of Consumer Protection has also advised Internet search engines to clearly delineate paid placements to avoid deception.

Q: For the third part of the FTC's definition of deceptive marketing, what makes a representation "material"?

A: A representation is material if it is likely to affect the consumer's conduct or decision with regard to a product or service. Express claims are presumed to be material. Whether implied claims are material depends on the context. In the Kraft case, the FTC found Kraft's implication that a single cheese slice contained the same amount of calcium as 5 ounces of milk was material because it was a health-related claim that reasonable consumers would find important, one that would induce consumers to purchase the product.

A "non-material" claim is one that consumers clearly understand to be "pure sales rhetoric" or one that does not purport to be objective. These are claims that consumers do not or should not rely on in deciding whether to purchase a product. Claims that a product "tastes great" or is "amazing" would be examples of non-material claims.

Q. How does the FTC evaluate questionable claims about a product's performance?

The FTC's Policy Statement on Advertising Substantiation states that because consumers rely on representations, advertisers must be able to substantiate express and implied claims that make objective assertions about the product advertised at the time such representations are made. In the absence of an express or implied reference to a certain level of research supporting a product claim, the FTC assumes that consumers expect a "reasonable basis" for objective claims. Where the claim about a product suggests that it is backed up by research – e.g., "tests prove" or "doctors recommend" – the FTC expects advertisers to have the amount and type of scientific or empirical support that the advertisement actually communicates to consumers. The FTC may request that an advertiser provide it with substantiation.

For example, a few years ago, an advocacy group complained to the FTC that companies such as Baby Einstein were claiming that their videos were educational for babies when there was no evidence to support such claims. After an investigation, the FTC sent a letter warning that "advertisers must have adequate substantiation for educational and/or cognitive development claims that they make for their products, including for videos marketed for children under the age of two." Because little research had focused on

the effects of viewing by young children or the effects of these products, additional research was needed before reliable conclusions could be drawn about the effects of television viewing on this audience. As a result of the FTC's investigation, the companies stopped making explicit claims about the educational value of their videos.

Q. How does the FTC evaluate testimonials and endorsements?

The FTC's recently updated Guide Concerning the Use of Endorsements and Testimonials in Advertising defines an endorsement as "any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser."

In general, endorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser. Endorsements from experts must be supported by actual examination or testing of the product. If the endorser is a consumer, the endorser's experience should be representative of what consumers will generally experience. Endorsements by organizations must be reached by a process that ensures that the endorsement fairly reflects the collective judgment of the organization.

The FTC also requires disclosure of "material connections" between advertisers and endorsers – that is, connections not reasonably expected by the consumer that might affect the weight or credibility of the endorsement. The FTC Guide provides examples of how this principle applies to "new forms of marketing." In one example, a well-known blogger posts a favorable review on his blog of a new gaming system provided to him for free by the manufacturer. In another, an employee of a company that manufactures audio devices posts messages about one of the company's products in an online forum. In a third example, a young man signs up to be part of a "street team" in which he can win points by talking to his friends about a product and exchange the points for prizes. In each case, the incentives offered or the relationship with the advertiser could materially affect the credibility of the endorsement. To avoid deception, the FTC recommends that the endorser clearly and conspicuously disclose the incentive or relationship.

Q: Are there any special requirements regarding food advertising?

A: Section 12 of the Federal Trade Commission Act, addressing the "dissemination of false advertisements," declares that false advertisements of food products are unlawful. The FTC often brings cases under the authority of both Section 5 and Section 12, because "false advertisements" are deemed "unfair and deceptive."

The FTC shares responsibility for food marketing with the U.S. Food and Drug Administration (FDA). In general,

the FTC has primary responsibility for food *advertising*. For example, the FTC brought an action under both sections against the KFC Corporation for advertisements falsely representing that KFC fried chicken was better for a consumer's health than eating a Burger King Whopper and was compatible with a low-carbohydrate weight loss program.

The FDA has primary responsibility for the way that foods are *labeled*. The FTC's Enforcement Policy Statement on Food Advertising states that it is unlikely that the FTC will take action against nutrient content and health claims if they comply with the FDA's regulations. If the FTC receives complaints concerning deceptive labeling, it forwards them to the FDA for consideration.

Q: What does the FTC consider to be "unfair" marketing?

A: In determining whether a marketing practice is *unfair*, as opposed to *deceptive*, the FTC must make three findings: (1) the practice results in substantial consumer injury that (2) is not outweighed by countervailing benefits to consumers or competition, and (3) cannot be reasonably avoided by consumers. Public policy is a relevant consideration but cannot serve as the primary basis for bringing an action.

Q: Under the first part of the unfairness standard, what constitutes "substantial consumer injury"?

A: Most cases finding substantial consumer injury involve either monetary harm or health or safety risks. Substantial injury can consist of either a small amount of harm to a large number of consumers or significant harm to a small number of consumers.

For example, the FTC found that a television ad for rice showing children cooking without adult supervision was unfair because it could induce behavior involving unreasonable risk of harm. In another case, the FTC found that television advertisements depicting passengers drinking Beck's beer on a boat were likely to cause substantial injury to consumers. The FTC noted that the risks associated with boating are greatly increased by the consumption of alcohol and that many people are unaware that even low blood alcohol levels affect coordination and balance, placing passengers at increased risk of falling overboard and drowning. In another case, an individual named Zuccarini registered Internet domain names that were misspellings of websites popular with children such as cartoonnetwork.com. Consumers who looked for a site but misspelled its web address were taken to Zuccarini's sites and bombarded with advertisements for Internet gambling and pornography, finding it difficult or impossible to escape. The FTC's complaint alleged that this practice, known as "mousetrapping," caused substantial injury to consumers through the loss of data, exposure to sexually explicit websites, and additional Internet connection fees.

Q: Under the second part of the unfairness standard, what are considered to be “countervailing benefits”?

A: The FTC weighs the risk of injury to consumers against the benefits of the practice and takes action only when it finds that the net effect is injurious to consumers. For example, a seller’s failure to present complex technical data on the product may harm consumers by providing less information but may benefit consumers by reducing the cost of the product. In addition to considering the costs to the parties directly before the agency, the FTC may take into account costs to society such as increased paperwork and reduced innovation. In practice, most unfairness cases brought by the FTC involve situations where there is no benefit to the unfair practice. In the Beck’s case, for example, the FTC found that there were no countervailing benefits to portraying consumers drinking alcohol on a boat. Similarly, in *Zuccarini*, the FTC found no benefits to consumers from being trapped in websites and exposed to material they did not want to see.

Q: Under the third part of the unfairness standard, what does it mean that the injury is “not one that consumers can reasonably avoid”?

A: The FTC expects that consumers will survey the available alternatives, choose those that are most desirable, and avoid those that are inadequate or unsatisfactory. However, it recognizes that certain types of sales techniques may prevent consumers from effectively making their own decisions, and that corrective action may be necessary. Most unfairness cases are brought to halt some form of seller behavior that unreasonably creates or takes advantage of an obstacle to consumers’ ability to make decisions freely.

The *Zuccarini* case provides an example of harm that consumers could not reasonably avoid, because consumers could not avoid the offensive web content by simply clicking on a prompt to close the page. In the Beck’s case, one FTC Commissioner voted against filing the complaint because he thought that consumers could reasonably avoid the harm: “Unlike in other unfairness cases, where ads influenced children to engage in unsafe activities, in this case the consumers of Beck’s products – through the exercise of their own adult judgment – surely can reasonably avoid any injury that they might suffer from the advertisements’ depiction of dangerous activity.” Although the other Commissioners did not discuss why they found the injury was not reasonably avoidable, it probably had to do with the fact that the advertisements were targeted to young adults who lacked the knowledge or experience to appreciate the risks of mixing alcohol with boating.

An issue that may come up with food advertising to young people is whether the effects of advertising unhealthy food can reasonably be avoided by consumers by simply not eating the advertised food or by parents controlling the diets of their children. There are no FTC cases addressing this question. Relevant factors might include the age of the children, whether they are able to buy the food themselves or consume it without parental approval, and whether they have the knowledge and ability to think critically about marketing messages.

Q: How can I tell the difference between a practice that is deceptive versus one that is unfair?

A: A single practice may be both deceptive and unfair, and FTC complaints often allege both. However, it is easier to bring a case under deception because harm from deception is generally presumed, while harm from unfair practices must be demonstrated.

Nonetheless, sometimes a practice may be unfair but not deceptive. Often these cases, such as *Zuccarini*, involve scams using the Internet or other new technologies. In the early 1990s, the FTC filed several complaints against companies advertising “900 numbers” on children’s television programs. The ads urged children to call to talk to a favorite character, such as the Easter Bunny or Santa Claus. Parents complained of receiving large phone bills as a result of unauthorized calls placed by their children. The FTC alleged that companies unfairly induced children to place calls without providing a reasonable means for adults to avoid the charges. Circumventing parental knowledge was also a factor in the KidsCom case. There, the staff found it unfair for a website to require children to disclose personally identifiable information to gain access to other parts of the website without providing parents notice and opportunity to control the collection and use of the information.

Q: What does the FTC do when it receives a complaint or request for investigation?

A: The FTC encourages consumers to file complaints online at www.ftccomplaintassistant.gov. This website states that the complaints can help detect patterns of wrongdoing and lead to investigations and prosecutions. The FTC enters all complaints that it receives into a secure online database that is used by law enforcement authorities, but it does not resolve individual consumer complaints.

Sometimes an advocacy group may file a petition with the FTC asking that it investigate certain practices as deceptive and/or unfair. The petition typically describes the practices and explains how they are deceptive or unfair. The FTC staff reviews the petition to see if it has merit and, if so, will likely conduct an investigation. The criteria for selecting which cases to bring are not public. However, it is reasonable to assume that the FTC staff would consider the seriousness of the alleged harm, whether the practice is widespread, and the precedential value of taking an enforcement action.

If the staff finds that it has reason to believe that a violation has occurred, it will draft a proposed complaint. The five commissioners vote on whether to issue the complaint. If a majority votes to issue a complaint, the staff generally tries to negotiate a consent decree with the marketer in which the marketer agrees to stop the unfair or deceptive practices.

The vast majority of cases are settled by consent decrees. The complaint and proposed consent decree are filed together, usually in a federal district court, and published in the Federal Register to allow public comment. After considering any public comments, the court generally adopts the consent order as is or with modifications. If the FTC staff is unable

to reach a settlement, it will litigate the case. If it prevails, the judge will grant relief – which can range from a simple order to stop the deceptive or unfair practice to requiring corrective advertising, paying damages to consumers, or paying fines.

Q: What types of deceptive or unfair marketing practices would the FTC be most likely to pursue?

A: The FTC is likely to be looking for violations of its newly revised Guides Concerning the Use of Endorsements. For example, websites that recruit children to send messages about their products to their friends could violate the Guide, as could other forms of viral marketing in real life and on social networks.

The FTC is also interested in preventing deceptive and unfair practices in new forms of marketing. For example, the FTC has issued voluntary guidelines that behavioral advertising (tracking consumers' online activities in order to deliver tailored advertising) should not be used to target children without parental consent. Other marketing practices that raise concerns with respect to children's privacy or safety would also be of concern to the FTC. One example might be marketing in which children or teens are enticed to give up information for one purpose, such as entering a contest or winning a prize, when the information is used for another undisclosed purpose, such as marketing.

The FTC has also issued a report that expressed concerns about cell phone marketing to young people. Like 900 numbers, mobile marketing campaigns that involve children or teens calling or texting could be considered harmful because of the costs incurred and parents' limited ability to monitor. In addition, mobile marketing campaigns that disclose the physical location of children and teens could also present safety issues.

Q: What should I do if I see marketing of non-nutritious foods or beverages to children or their parents that I think might be deceptive or unfair?

If possible, document the marketing by, for example, saving copies of relevant web pages, recording a televised advertisement, making copies of print advertising, or saving articles describing the practice. Send this information, along with an explanation why you think the marketing is deceptive or unfair, to:

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Alternatively, you may send the information directly to the Director of the FTC's Bureau of Consumer Protection, David Vladek, and the relevant division chiefs: Mary Engle for advertising, Maneesha Mithal for privacy issues, and Lois Greisman for scams involving the Internet or telecommunications. The FTC prefers to receive letters via email. Please also cc: Angela Campbell at IPR.

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In addition, please copy the appropriate division chief:

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