



FOLEY  
HOAG LLP

# 10 Insanely Important FTC Advertising Enforcement Trends for 2016

February 25, 2016

- Advertising Law Basics
  - What constitutes “advertising”?
  - What rules govern advertising claims?
- Federal Trade Commission’s Role
  - Authority and scope
  - Investigation and enforcement
- Enforcement Trends
- Discussion and Questions

- Advertising Self-Regulatory Council:
  - “Any paid commercial message, in any medium (including labeling), if it has the purpose of inducing a sale or other commercial transaction or persuading the audience of the value or usefulness of a company, product or service.” See ASRC Policies and Procedures, at § 1.1(A).
- FTC:
  - Any written or verbal statement, illustration, or depiction designed to effect a sale or create interest in the purchasing of products or services, regardless of the medium.” See, e.g., Consent Order, In the Matter of Health Discovery Corporation (Feb. 23, 2015).
- Massachusetts Attorney General:
  - “Any commercial message ... which is delivered or made available to any customer or prospective customer in any manner whatsoever.” See 940 CMR 3.01.

## ■ Federal Law

### - FTC Act:

- Prohibits “unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45.
- Enforced by FTC (along with 50+ additional consumer protection statutes).

### - Lanham Act:

- Prohibits misrepresentation of the “nature, characteristics, qualities, or geographic origin” of any person’s goods, services, or commercial activities. 15 U.S.C. § 1125(a).
- Private right of action for competitors (not consumers).

## ■ State Law

### - Unfair or Deceptive Acts or Practices (“UDAP”) Statutes

- G.L. c. 93A: prohibits “unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.”
- Often include government regulation and private action.

### - False Advertising Statutes

- G.L. c. 266, § 91: criminal statute prohibiting false, deceptive, or misleading advertising.
- Robust civil false advertising statutes in NY and CA.

### - Regulation by Attorneys General

## ■ Self Regulation (National Advertising Division)

# Advertising Law Basics: Truth in Advertising



- Advertising must:
  - Be truthful and non-deceptive
  - Have evidence to support express and implied claims
  - Not be unfair
- Disclosures may be okay, but they must:
  - Explain the claim, not change its meaning
  - Be clear and conspicuous

Deceptive ads contain a statement, or omit information, that is:

Likely to mislead reasonable consumers

Important to a consumer's decision to buy or use the product

Unfair ads:

Are likely to cause substantial consumer injury not reasonably avoidable

Are not outweighed by any benefits to the consumer

# Advertising Law Basics: Express and Implied Claims

Advertisers must be able to support both express and implied claims.

## Express

Claims literally made in the ad

Example:

*“America’s newest network, built from the ground up.”*

## Implied

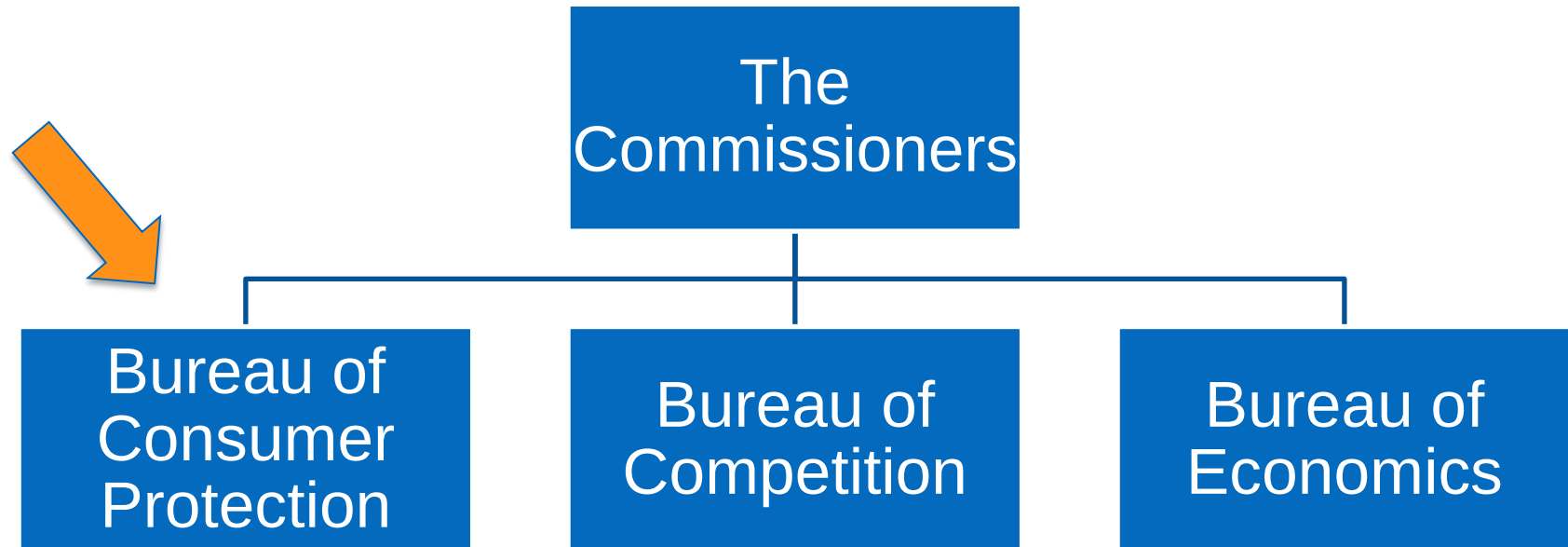
Claims that a reasonable consumer would infer from the ad

Example:

*Advertiser’s current network contains no portion of its previously existing network*

- **FTC STANDARD:** If the disclosure of information is necessary to prevent deception, the disclosure must be “clear and conspicuous.”
  - PROMINENCE. Is it big enough for consumers to notice and read?
  - PRESENTATION. Is it worded in a way that’s easy for consumer to understand?
  - PLACEMENT. Is it where consumers will look?
  - PROXIMITY. Is it close to the claim it modifies?

**FTC Mission:** To protect consumers and promote competition.



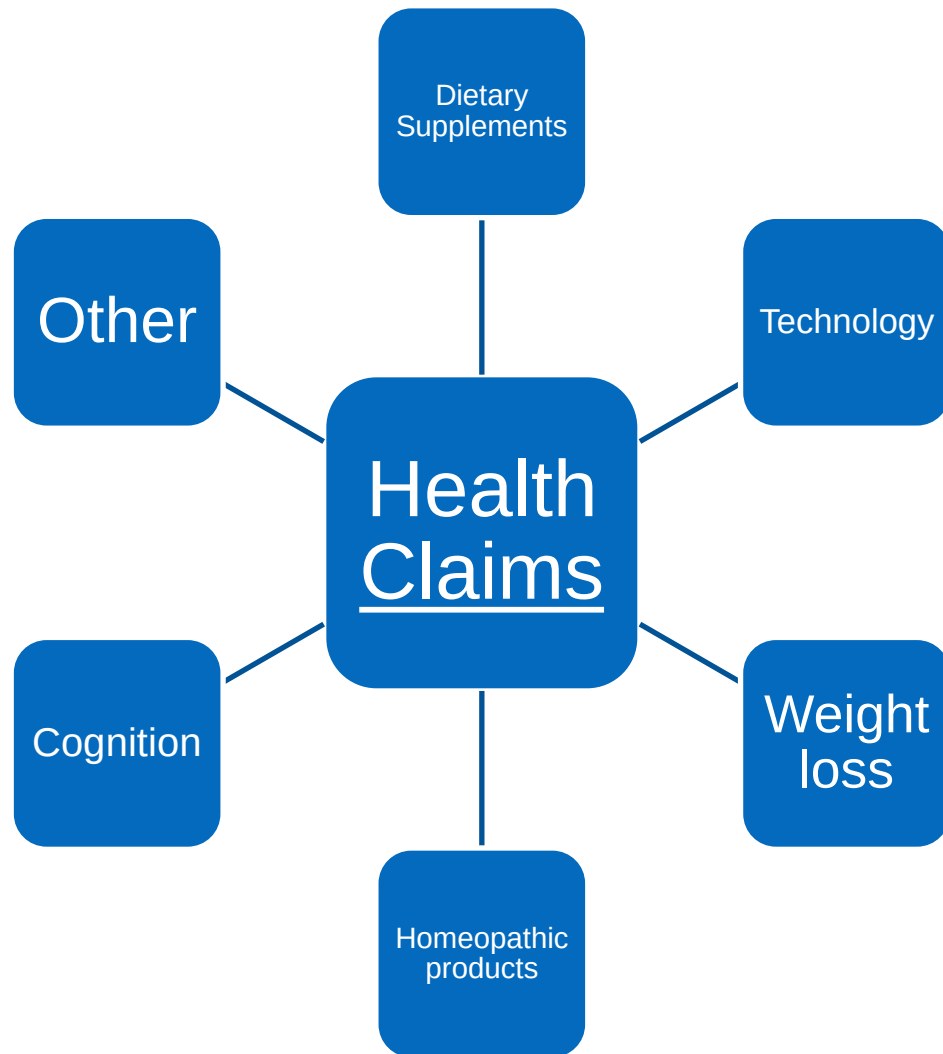
- **Privacy / Identity Protection**
  - **Advertising Practices**
  - **Marketing Practices**
    - **Enforcement**
    - **Education**

- **BCP's Mission:** To stop unfair, deceptive and fraudulent business practices.
  - Collects complaints and conducts investigations
  - Sues companies and individuals
  - Develops rules to maintain a fair marketplace
  - Educates consumers and business about their rights and responsibilities
- **Enforcement Tools**
  - Warning letters
  - Civil Investigative Demands
  - Administrative action
  - Federal court action
  - Consent orders



**TOP  
10**

Based on activity over the last few years, we expect the FTC to focus on ten key areas in the coming year.



## Weight loss

*FTC and State of Maine v. Dill, et. al* (D. Maine 2016)

- FTC and Maine AG alleged false claims and deceptive marketing practices.
- “Gut Check” Claims:
  - “Proven breakthrough in weight loss”
  - “So powerful, works while you sleep”
  - “Keep eating your favorite foods and still lose pounds”
- Marketing Practices
  - “Risk free trial”
  - “Stay tuned to the following public service announcement”
  - “The following is not a radio commercial.  
It’s a gift to anyone listening today who needs to lose weight.”
- Stipulated order settling claims (\$16+ Million, liquidation of assets)



## Technology

*FTC v. Lasarow, et. al* (N.D. Ill. 2015) (settlement of claims related to defendant's melanoma detection smart phone app)



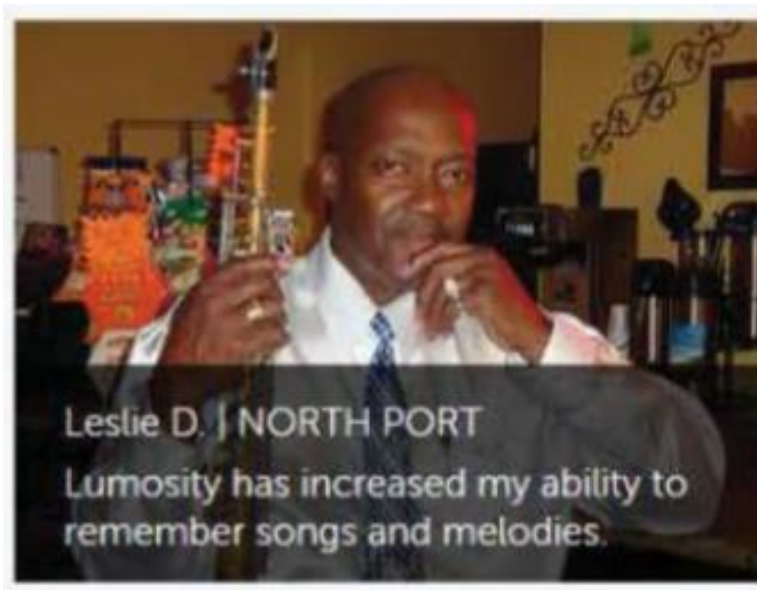
## Homeopathic Products

FTC held a workshop in September 2015 regarding the advertising of homeopathic medicine.

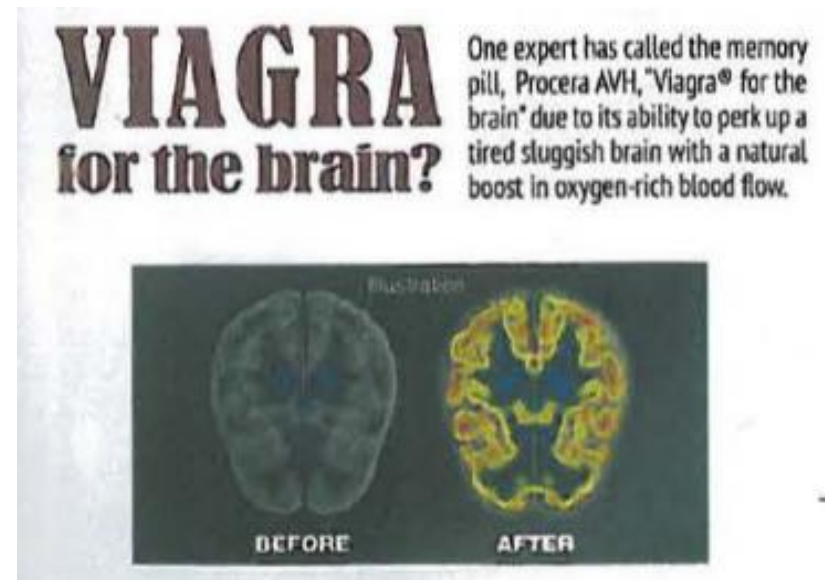
- Homeopathy = healing the sick by using substances capable of causing the same symptoms when administered to healthy people.
- FTC has indicated concern about potential consumer confusion about homeopathic medicine.
- FTC staff attorney: “As a general rule, for treatment claims, we expect randomized, double-blind, placebo-controlled human clinical studies – not in vitro studies, not animal studies, not anecdotal evidence, no matter how compelling it is.”

<https://www.ftc.gov/news-events/press-releases/2015/06/ftc-host-september-workshop-washington-dc-examine-advertising>

## #2 Cognition Claims



*FTC v. Lumos Labs, Inc., et al. (2016)*



*FTC v. Brain Research Labs, Inc., et al. (2015)*

## ■ Recent cases

- *FTC v. Lumos Labs, Inc., et al.* (2016)
- *In the matter of Focus Education, LLC* (2015)
- *FTC v. Keyview Labs, Inc., et al.* (2015)
- *FTC v. Wordsmart Corp., et al.* (2014)

## ■ Key Takeaways

- FTC viewed cognition improvement claims as unsubstantiated.
  - No competent and reliable scientific evidence.
- FTC will closely scrutinize products marketed towards children and the elderly.
- Advertisers should take care when using testimonials
  - Luminosity failed to disclose that testimonials were solicited and that prizes were awarded.
  - Advertisers must be able to substantiate all express and implied claims contained in testimonial.
- Substantiation must match claim (“clinically proven”)

## #3: Native Advertising

*Old Concept, New Term*

“The column uses the format and has the general appearance of a news feature or article which purports to give an independent, impartial, and unbiased view of the cuisine facilities. Since the column in fact consists of a series of commercial messages which are paid for by advertisers, the Commission is of the opinion that it will be necessary to clearly and conspicuously disclose it is an advertisement.”

*FTC Advisory Opinion 191 (1968)*

OPINION DIGEST

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which appear in news format.

ed an advisory opinion involving the ques-  
tive to publish an advertisement in the for-  
thout disclosing it is an advertisement, as  
its press release of November 28, 1967.

presented to the Commission involved the  
a newspaper which advertised the cuisine  
ants. Written in narrative form, the writeup  
ally identified the chef and/or head waiter,  
f how a certain meal is prepared, and con-  
mation concerning the hours during which  
r dancing is permitted, whether cook  
al indication of the price range of the  
mission concluded:

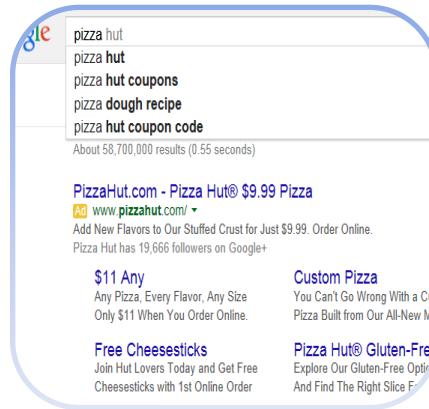
format and has the general app  
blic information which purports to  
ed view of the cuisine facilities  
restaurant. Since the column in fact consists of a series of commercial  
which are paid for by the advertisers, the Commission is of the opinion th  
will be necessary to clearly and conspicuously disclose it is an advertisement  
as outlined in the aforementioned press release. This conclusion would not be  
altered even though the column carried the exact cost of each meal being  
advertised, or if it listed the price range of the various meals.

(File No. 683 7080, released Feb. 16, 1968.)

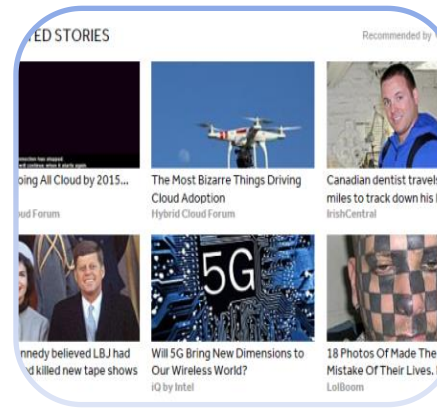
- No universally accepted definition, but native ads generally mimic the form and style of the media in which they appear
- Several common forms



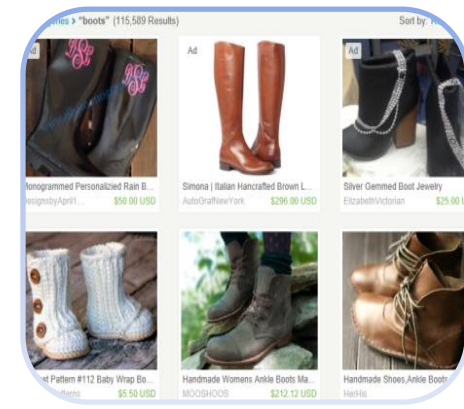
**In-feed ads**  
*Twitter*



**Search ads**  
*Google*



**Recommendation  
Widgets**  
*Boston.com*



**Promoted  
Listing**  
*Etsy*



- December 2013: FTC held “Blurred Lines” Workshop
- December 2015: FTC published two key documents:
  - Enforcement Policy Statement on Deceptively Formatted Advertisements
  - Native Advertising: A Guide for Businesses

- Key Takeaways from 2015 guidance:
  - Transparency is critical. An advertisement or promotional message should not suggest or imply that it is anything other than an ad.
  - No one-size-fits-all approach.
    - Some native ads may be so clearly commercial that they are unlikely to mislead consumers even without a specific disclosure.
    - Other native ads may require a disclosure to ensure that consumers understand that the content is advertising
  - If a disclosure is necessary to prevent deception, it must be clear and prominent.
  - FTC's Guide for Businesses provides informal guidance and supplements the Enforcement Policy Statement. It does not provide a safe harbor.

## #4: Made in the USA

### ■ Recent cases

- *FTC v. Chemence, Inc.* (N.D. Ohio 2016)
- *In the Matter of Made in the USA Brand LLC* (FTC 2014)
- *In the Matter of E.K. Eksessories, Inc.* (FTC 2013)

### ■ Key Takeaways

- To make an unqualified “Made in the USA” claim, product must be *all or substantially all* made in the USA and final assembly or processing must take place in U.S.
- 1997 Enforcement Policy: “All or substantially all” means that all significant parts and processing that go into the product must be of U.S. origin.
- Must have substantiation before making U.S. origin claim (competent and reliable evidence)



## #5: Education and Training Claims



*FTC v. DeVry Education Group, Inc. (C.D. Cal. 2016)*

## According to FTC, inadequate substantiation

- People were included who should have been excluded.
  - Students who graduated and went back to their same jobs.
  - Students who graduated and got a job outside their field of study.
    - Used car salesman ≠ “Business Administration”
- People were excluded who should have been included.
  - Calculation excluded students who, prior to being classified as “inactive,” were actively seeking employment.
- Bottom line according to the FTC: The claims don’t match the substantiation.

## ■ Recent cases

- *FTC v. Stratford Career Institute* (N.D. Ohio 2016) (filed last week)
- *FTC v. DeVry Ed. Group, Inc., et al.* (C.D. Cal. 2016)
- *FTC v. Stepping Stonez Development, LLC* (D. Ariz. 2016)
- *FTC v. Capital Network Distance Learning Programs LLC* (D. Ariz. 2016)
- *Memorandum of Agreement between FTC and Veterans Administration* (2015) (enhancing cooperation between FTC and VA regarding unfair or deceptive advertising or enrollment practices)

## Key Takeaways

- Not all substantiation is created equal.
  - Having data behind your claims is only step one. The data must fully support your claims and stand up to FTC scrutiny.
- Always assume that the FTC will take a careful look at your substantiation.
- Avoid small print disclosures, especially lengthy ones.
- If a disclosure changes the meaning of the claim, the FTC will likely view the claim as deceptive.
- Consider your audience.

## #6: Dealership Claims



**LABOR DAY SALE!**

**\$0 0% 0 0**

STARTS TODAY  
**WED AUGUST 28TH**  
THROUGH  
**MON SEPTEMBER 2ND**

DOWN\* APR FINANCING\* PAYMENTS\* PROBLEMS

\*On Select Nissan Models. 0 Payments for 90 days. On Approved Credit.

**LOWEST PAYMENTS OF THE YEAR** **LOWEST PRICES OF THE YEAR** **LOWEST RATES OF THE YEAR**

**WE ACCEPT TRADES AS DOWN PAYMENT • WE CAN HELP YOU LOWER YOUR CURRENT CAR PAYMENT**

**WE ARE CREDIT EXPERTS** **BANKRUPTCY ✓** **FORECLOSURE ✓** **LOW CREDIT SCORE ✓**

All financing is subject to lender approval. **REWARD YOUR GOOD CREDIT WITH RATES AS LOW AS 1.9%**

|                                                                                                                                  |                                                                                                                                             |                                                                                                                                              |
|----------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------|
|  <p>Nicely Equipped,<br/>Amazing Condition</p> |  <p>2003 HONDA CR-V EX<br/>High Quality, Low Payment</p> |  <p>2006 HONDA CR-V EX<br/>This CR-V Has Been Babied</p> |
| <p><b>2005 NISSAN SENTRA S</b></p> <p><b>BUY FOR \$99 PER MONTH*</b></p>                                                         | <p><b>BUY FOR \$139 PER MONTH*</b></p>                                                                                                      | <p><b>BUY FOR \$159 PER MONTH*</b></p>                                                                                                       |

*In the Matter of City Nissan, Inc. (Ross Nissan of El Monte) (FTC 2015)*

- March 2015 – FTC announces results of “Operation Ruse Control,” a nationwide crackdown on deception in automobile sales, financing, and leasing.
  - More than 250 enforcement actions, in conjunction with local law enforcement.
  - Follow-up to FTC’s 2014 “Operation Steer Clear,” in which actions brought against ten dealers.
- Key areas of inquiry
  - Vehicle purchase add-ons (extended warranties, roadside service, theft protection, etc.)
  - Deceptive advertising (\$0 Down, 0% APR, 0 Payments, 0 Problems)
  - Loan modification fraud

## ■ Representative cases

- *In the Matter of City Nissan, Inc. (Ross Nissan of El Monte)* (FTC 2015)
- *In the Matter of Jim Burke Auto., Inc. (Jim Burke Nissan)* (FTC 2015)
- *In the Matter of National Payment Network, Inc.* (FTC 2015)

## ■ Key Takeaways

- Context matters.
  - Add-on features offered after purchase decision made, with little time for consumer to consider offer.
  - Pressure-filled, point-of-sale advertising will garner more scrutiny.
- Fine print disclosures will not cure otherwise deceptive claim.
  - Explain meaning, not change meaning.
- Fees and other material information should be prominently disclosed.



*In the Matter of ECM BioFilms, Inc. (FTC 2015)*



 **MASTERBATCH  
PELLETS**

MasterBatch Pellets™ is a revolutionary additive, which when combined as a one-percent load to the most widely used plastic resins, renders the finished plastic products biodegradable while maintaining their other desired characteristics.

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- [OUR TECHNOLOGY](#)
- [PRODUCT LIFE EXPECTANCY](#)

- FTC has relied heavily on warning letters to regulate environmental claims.
  - February 2015: 20 warning letters to manufacturers and marketers of “biodegradable” and “compostable” dog waste bags.
  - September 2015: 37 warning letters to companies that offer or display environmental seals and certifications.
- A word on performance seals:
  - Powerful marketing tools, but increasingly under scrutiny.
  - Capable of misleading consumers into believing that product offers a *general environmental benefit*.
  - To withstand scrutiny, seal must state basis for certification and be backed up with substantiation.
  - Seals also subject to endorsement guidelines.



Biodegradable  
Recyclable  
Compostable

## FTC Green Guides (updated 2012)

- Cautions against making unqualified general environmental benefits claims (“eco-friendly”).
- Offers specific guidance regarding substantiation for common types of environmental claims
  - “*Degradable*” or “*Biodegradable*”
  - “*Compostable*”
  - “*Free-of*”
  - “*Non-toxic*”
  - “*Ozone-Safe*” or “*Ozone-Friendly*”
  - “*Recyclable*”
  - “*Renewable*” (*energy or materials*)
- Discusses limitations of seals and certifications
  - “Third party certification does not eliminate a marketer’s obligation to ensure that it has substantiation.”

## Key Takeaways

- Consider what implied claims a reasonable consumer might take away from your ad.
  - Seals and certifications often communicate unintended implied claims.
  - Must be able to substantiate *all* claims (express or implied).
- Disclosures can help avoid implied claims, but they must be clear and conspicuous.
  - “Four Ps” : Prominent, Presentation, Placement, Proximity.
  - Seals should include limiting language to avoid “general benefit” claim.
- Consider FTC guidance when assessing the strength of your substantiation
  - Often, the FTC has very specific guidance.
  - If the FTC challenges your substantiation, you could be in for a long, expensive journey.



*In the Matter of General Workings, Inc. (FTC 2016)*

■ Recent cases:

- *In the Matter of General Workings, Inc.* (FTC 2016)
- *In the Matter of Carrot Neurotechnology, Inc.* (FTC 2015)
- *FTC v. TracFone Wireless, Inc.* (N.D. Cal. 2015)
- *FTC v. Lasarow, et al.* (N.D. Ill. 2015)



*In the Matter of Carrot Neurotechnology (FTC 2015)*

## ■ Key Takeaways

- FTC is paying attention to what goes on in the app store.
  - Both the “Running Fred” and “Mole Detective” cases involved claims made in the app store.
- User-reviews are increasingly a source of promotion. A few things to keep in mind:
  - “Astroturfing” is a problem (Business Insider reports that 20% of Yelp reviews in 2014 were fake).
  - Generally, not a great source for substantiation
- FTC often investigates ad claims and privacy protection at the same time.

## #9: Testimonials and Endorsements



*In the Matter of Deutsch LA, Inc. (2015)*



- One thing can be said about PlayStation Vita....it's a #gamechanger
- PS Vita [ruling] the world. Learn about it!  
[us.playstation.com/psvita](http://us.playstation.com/psvita) #GAMECHANGER
- Thumbs UP #GAMECHANGER – check out the new PlayStation Vita
- This is sick....See the new PS Vita in action. The gaming #GameChanger
- Got the chance to get my hands on a PS Vita and I'm amazed how great the graphics are. It's definite a #gamechanger!

*In the Matter of Deutsch LA, Inc. (2015)*

## FTC Endorsement Guides 16 C.F.R. § 255:

“Where there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (*i.e.*, the connection is not reasonably expected by the audience), such connection must be fully disclosed.”

## ■ Recent Cases

- FTC and State of Maine v. Dill, et. al (D. Maine 2016) (fictitious endorsers)
- FTC v. Lumos Labs, Inc., et al. (2016) (real endorsers, but advertiser failed to disclose that endorsements were given as part of contest)
- In the Matter of Carrot Neurotechnology, Inc. (FTC 2015) (undisclosed material connection: researcher cited in ads was owner of app)

## ■ Key Takeaways

- If there's a material connection, disclose it.
- Endorsements should be from real people, and they should represent the views of the people at the time of the ad.
- If an endorser makes a claim that is not substantiated, do not use the endorsement in your ad campaign.
- Be careful with social media.

### POM Wonderful: Will It Affect Substantiation?

- The type and amount evidence needed to substantiate a claim is largely dictated through FTC consent judgments.
- For claims relating to the “diagnosis, cure, mitigation, treatment, or prevention of any disease,” the FTC had been requiring two randomized, controlled, human clinical trials (RCTs).
  - The D.C. Circuit in *POM Wonderful* struck down that part of the Commission’s order and required only one RCT.
  - Will this start a trend in the other direction?
  - At least one Commissioner seems concerned about the chilling effect of stringent substantiation standards on safe health products.



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- [Testimonial and Endorsement Guides](#)
- [Native Advertising Enforcement Policy](#)
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*Thank you*  
**Any questions?**

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