

Advertising + Marketing

Can You Back That Claim Up? FTC Sends Nearly 700 Notices About Substantiating Product Claims

The Bottom Line

- As the FTC appears focused on seeking monetary penalties in response to product claims, brands and marketers should ensure that their practices are lawful.
- While a response to a Notice of Penalty Offenses is not required by the FTC, any entity receiving such notice should conduct a review of claims about the efficacy or performance of its products.

The FTC, using its Penalty Offense Authority under Section 5 of the Federal Trade Commission Act, has put approximately 670 companies on notice that they could incur significant civil penalties of up to \$50,120 per violation if they fail to adequately substantiate their product claims. Notices of Penalty Offenses Concerning Substantiation of Product Claims (Substantiation Notice) were sent to companies involved in the marketing of over-the-counter drugs, homeopathic products, dietary supplements, and functional foods.

Substantiating Health Claims

Through litigated cases and policy statements, the FTC has made clear that advertisers must have a reasonable basis to support objective product claims. Claims about the health or safety benefits of a product must be based on “competent and reliable scientific evidence.”

Generally, the amount and type of substantiation required to meet the “competent and reliable scientific evidence” standard depends on a number of factors, including the type of claim and the amount of substantiation that experts in the field believe is reasonable. In 1998, the FTC issued *Dietary Supplements: An Advertising Guide for Industry*, which stated that “as a general rule, well-controlled human clinical studies are the most reliable form of evidence,” but results obtained in animal and *in vitro* studies, as well as epidemiologic evidence, could be considered to support a dietary supplement claim.

However, in 2022, the FTC replaced the 1998 guidance with the *Health Products Compliance Guidance*, which applies to “any health-related product,” including dietary supplements, foods, over-the-counter (OTC) drugs, homeopathic products, devices, health equipment, diagnostic tests, and health-related apps. The new guidance states that “randomized, controlled human clinical trials (RCTs) are the most reliable form of evidence and are generally the type of substantiation that experts would require for health benefit claims.” The guidance further states that animal and *in vitro* studies, while useful as supporting or background information, generally cannot substantiate health-related claims without confirmation by human RCTs. High-quality epidemiologic evidence can be used to substantiate a claim in those limited cases where it is considered an acceptable substitute for RCTs by experts in the field, and RCTs aren’t otherwise feasible.

Particularly as RCTs have been considered the gold standard – but not an absolute requirement – for health benefit claims, the new guidance appears to be a shift in FTC policy. While the *Health Products Compliance Guidance* does not have the force of law, the FTC expressly referenced the guidance in the Substantiation Notice.

Notices of Penalty Offenses Concerning Substantiation of Product Claims

A Notice of Penalty Offenses allows the FTC to seek civil penalties against a company that engages in conduct that it knows has been found unlawful in a previous FTC administrative order, aside from a consent order.

While the initial distribution of the Substantiation Notice was limited to companies making or likely to make health claims, the Substantiation Notice is **not limited to health claims** and applies to any marketer making claims about the efficacy or performance of its products. Cited deceptive acts and practices include:

- Making an objective product claim without having a reasonable basis at the time the claim is made, consisting of competent and reliable evidence;
- Making a claim relating to the health benefits or safety features of a product without possessing and relying upon competent and reliable scientific evidence that has been conducted and evaluated objectively by qualified persons and that is generally accepted in the profession to yield accurate and reliable results, to substantiate that the claim is true;
- Representing, expressly or by implication, that a product is effective in the cure, mitigation or treatment of any serious disease – including heart disease, cancer, arthritis and erectile dysfunction – without possessing and relying upon at least one human clinical trial of the

product that (1) is randomized, (2) is well controlled, (3) is double-blinded (unless the marketer can demonstrate that blinding cannot be effectively implemented given the nature of the intervention), (4) is conducted by persons qualified by training and experience to conduct such studies, (5) measures disease endpoints or validated surrogate markers and (6) yields statistically significant results;

- Misrepresenting the level or type of substantiation for a claim; and
- Representing that a product claim has been scientifically or clinically proven unless at the time the representation is disseminated, the advertiser possesses and relies upon evidence sufficient to satisfy the relevant scientific community of the claim's truth.

It is worth noting that the Substantiation Notice indicates that RCTs are required for claims about serious diseases – not for all health benefit claims. This may indicate that the FTC is taking a more flexible approach to the “competent and reliable scientific evidence” standard than indicated in the *Health Products Compliance Guidance*.

Importance of Compliance with Endorsement and Testimonial Guidelines

Recipients of the Substantiation Notice also received a copy of the previous [notice of penalty offenses regarding the use of endorsement and testimonials](#) (Endorsement Notice). [As we've discussed](#), misleading practices identified in the Endorsement Notice include:

- Falsely claiming an endorsement by a third party;
- Misrepresenting that an endorser is an actual user, a current user or a recent user;
- Continuing to use an endorsement without good reason to believe that the endorser continues to subscribe to the views presented;
- Misrepresenting that an endorsement represents the experience, views or opinions of users or purported users;
- Using an endorsement to make deceptive performance claims;
- Failing to disclose an unexpected material connection with an endorser; and
- Misrepresenting that the experience of endorsers represents consumers' typical or ordinary experience.

Note that the FTC's *Health Products Compliance Guidance* also discusses endorsements and testimonials. The guidance explains that consumer testimonials and expert endorsements do not provide a workaround from applicable substantiation requirements. In other words, a company cannot make health claims through testimonials and endorsements that would be deceptive or that could not be substantiated if made directly by the company. The company must also have appropriate evidence to support the claim and disclose the results that consumers should typically expect.

What This Means for Companies

The FTC is continuing to explore its enforcement options following [FTC v. AMG Capital Management, LLC](#), in which the Supreme Court restricted the FTC's ability to seek monetary penalties under Section 13(b) of the FTC Act. Last fall, the FTC issued several Notices of Penalty Offenses to thousands of companies, putting them on notice regarding misrepresentations by for-profit educational institutions about job and earnings prospects, misleading endorsements, and deceptive claims about money-making opportunities.

Keep in mind that receiving a Notice of Penalty Offenses is not an indication that the recipient has engaged in any wrongdoing. Additionally, the Notice of Penalty Offenses does not create any new obligations or requirements for recipients. However, if a recipient nonetheless engages in conduct that the FTC has previously found unlawful under Section 5 of the FTC Act, the recipient may be subject to substantial civil penalties.

In fact, the FTC has used its Penalty Offense Authority to obtain monetary penalties in recent enforcement actions. For example, the FTC used its Penalty Offense Authority to support a:

- Combined [\\$5.5 million civil penalty from Kohl's and Walmart](#) for violating the Textile Act when they had previously received a Notice of Penalty Offenses regarding the improper labeling and advertising of textile products.
- \$2.6 million penalty from DK Automation after the company continued to use deceptive earnings claims after they received Notices of Penalty Offenses regarding money-making opportunities and endorsements.
- \$1.7 million penalty from WealthPress for deceptive money-making claims (made after the company received a Penalty Offense Notice for money-making claims), as well as violations of the Restore Online Shoppers' Confidence Act.

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A Prime Example of Dark Patterns? FTC Sues Amazon for Use of “Dark Patterns” in Prime Enrollment

The Bottom Line

- The FTC’s lawsuit is likely to be the first of many alleging the use of “dark patterns” in e-commerce and is instructive as to the specific types of practices the FTC will find deceptive in the future.
- Against the backdrop of the FTC’s revisions to the Negative Option Rule, the FTC will continue to crack down on overly onerous cancellation procedures.
- E-commerce companies should review their online platforms to prepare for future compliance mandates and revise e-commerce user-experience flows and consumer-facing disclosures.

The Federal Trade Commission (FTC) filed a complaint against Amazon alleging that the company engaged in “dark patterns” to trick millions of consumers into enrolling in their Prime membership program. The FTC claims Amazon is “aware that its practices are legally indefensible” and is seeking civil penalties and a permanent injunction to prevent Amazon from continuing these practices.

This action, filed in the U.S. District Court for the Western District of Washington, is the latest in a recent wave of activity by the FTC on dark patterns, including the [FTC Staff Report on Dark Patterns](#) and its release of [proposed updates to the federal Negative Option Rule](#). The lawsuit alleges that Amazon used dark patterns to trick consumers into enrolling in automatically renewing Prime subscriptions, and purposefully made it difficult for users to cancel their subscriptions. Echoing the FTC’s prior guidance, “dark patterns” are specifically defined in the complaint as “manipulative design elements that trick users into making decisions they would not otherwise have made.” These include “coercive or deceptive user interface designs.” In particular, the complaint alleges that Amazon’s complex cancellation process was specifically intended to thwart consumers’ attempts at cancellation – in fact, the user flow was internally named the “Iliad Flow” after Homer’s lengthy epic.

Dark Patterns

The complaint addresses specific examples from Amazon's e-commerce sites illustrating the types of "dark patterns" cited in the FTC's prior Staff Report. The FTC's complaint is extremely instructive as to the granular types of practices it views as deceptive, from color and shading usage meant to trick consumers into a certain user pathway to obstructionary or intentionally confusing techniques.

The FTC highlighted specific types of dark practices:

Non-consensual Enrollment

Amazon allegedly "knowingly duped... customers into unknowingly enrolling in its service" by employing tactics to purposefully trick consumers into enrolling in automatically renewing subscriptions. For example, Amazon "fail[ed] to obtain the consumer's express informed consent before charging the consumer's credit card, debit card, bank account, or other financial account for the transaction." The complaint also alleges that Amazon "slowed, avoided, and even undid user experience changes that they knew would reduce Nonconsensual Enrollment."

Forced Action

The FTC alleged that Amazon used "a design element that requires users to perform a certain action to complete a process or to access certain functionality." For example, by "forc[ing] the consumer to choose whether to enroll in Prime before allowing the consumer to complete her purchase."

Interface Interference

By using "a design element that manipulates the user interface in ways that privilege certain specific information relative to other information," Amazon purportedly deceived consumers. For example, Amazon:

- Revealed the terms and conditions of Prime only once during the purchase process, in a small and easy to miss font.
- Used repetition and color to direct consumers' attention to the words "free shipping" and away from Prime's price.
- Emphasized options that divert the consumer from the flow without cancelling and by employing warning icons near the option to cancel, which "evokes anxiety and fear of loss in consumers."

Obstruction or “Roach Motel” Technique

The FTC considers this technique to be “a design element that involves intentionally complicating a process through unnecessary steps to dissuade consumers from action.” For example, the FTC alleged that Amazon made the option to decline enrollment difficult to locate, and forced consumers who already expressed an intent to cancel to view marketing and reconsider options.

Misdirection

By using “a design element that focuses a consumer’s attention on one thing to distract from another,” Amazon allegedly presented asymmetric choices that make it easier to enroll in Prime than not, including by using a less prominent looking link to decline Prime, and making it easier to abandon an attempted Prime cancellation than to complete it. Amazon also used attractors – such as animation, a contrasting blue color and text – to direct consumers to options other than cancellation (e.g., drawing attention to “Remind me later” and “Keep my benefits” options rather than “Continue to Cancel”).

Sneaking

According to the FTC, Amazon used “a design element that consists of hiding or disguising relevant information, or delaying its disclosure” to, for example, hide Prime’s price or its auto-renewal feature in the consumer’s cart. The design element also makes difficult to find Prime’s terms and conditions during the enrollment checkout flow, including its price and auto-renew attribute, the FTC added.

Confirmshaming

The FTC also alleged that Amazon used “a design element that uses emotive wording around the disfavored option to guilt users into selecting the favored option.” While the complaint redacts specific instances of Amazon’s confirmshaming, a classic example of this is using language like “No, thanks. I like full price.”

Cancellation and Upsell Tactics

The FTC also cited Amazon’s failure to provide simple cancellation mechanism as a Restore Online Shoppers’ Confidence Act (ROSCA) violation, stating that the company “fails to provide simple mechanisms for a consumer to stop recurring charges for the good or service to the consumer’s credit card, debit card, bank account, or other financial account.” Echoing its proposals on “click to cancel” and “mirror cancellation” in the proposed updates to the Negative Option Rule, the FTC highlighted Amazon’s “knowingly complicated cancellation process.”

While consumers were able to enroll in Prime from a variety of devices, to cancel, users were forced to call customer service, or use a complicated process called the “Iliad Flow,” which refers to Homer’s epic about the long, arduous Trojan War. The Iliad Flow was referred to as “labyrinthine,” as customers seeking to cancel their subscription were forced “to navigate a four-page, six-click, fifteen-option cancellation process” as compared to the one or two click sign-up system.

Amazon was also cited for its use of “upsell” tactics, as consumers attempting to cancel were presented “with at least one opportunity... – and often several opportunities – to join Prime before those consumers place their order on the final checkout page.” The FTC stated that the upsell tactics disrupted the consumers’ shopping experience with a “prominent” enrollment button and an “inconspicuous” decline link. Customers were unable to avoid the upsell, but instead forced to select one of the options to continue their checkout process.

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Talking Trash: Takeaways from FTC Workshop on Recyclable Claims

The Bottom Line

- The FTC is continuing its review of the Green Guides and companies should stay tuned for further updates.
- The FTC is accepting public comments on “recyclable” claims through June 13, 2023.

The FTC is in the process of reviewing – and potentially revising – its Guides for the Use of Environmental Marketing Claims (Green Guides). As part of this review, the FTC recently held a public workshop focused on “recyclable” claims.

The “Talking Trash at the FTC: Recyclable Claims and the Green Guides” workshop built off of the FTC’s request last year for public comment on proposed revisions to the Green Guides. Among other things, the FTC sought public comment on consumers’ understanding of the term “recyclable” (as items may not be ultimately recycled due to market demand, budgetary constraints or other factors); if the current threshold for unqualified recyclable claims should be changed; if further guidance is needed for “recycled content” claims; and if the FTC should initiate a rulemaking to codify the Green Guides.

During the workshop, a wide range of panelists generally discussed these issues, notably focusing on:

Capable of Being Recycled vs. Actually Recycled

The panel was divided regarding whether “recyclable” should mean that a product is capable of being recycled or that a product is actually recycled into something new. Capability is the current gold standard. In fact, some courts have determined that “recyclable” simply means that a product is capable of being recycled – not that the entire product will

always be recycled. Given the complexities in substantiating “actually recycled” claims, a move away from the current standard would likely need to be accompanied by very clear guidance from the FTC. .

“Wish-cycling”

There was extensive discussion on “wish-cycling,” which is when non-recyclable items are put in curbside recycling bins because consumers believe that they are (or should be) municipally recyclable.

- Some panelists indicated that “wish-cycling” is the result of consumer confusion regarding how to recycle items that are only recyclable through in-store programs. For example, the panelists discussed that film plastics (like plastic bags) are usually not recyclable in curbside programs, but are commonly collected through in-store programs. The high levels of film plastic contamination in curbside facilities may indicate that consumers believe that items recyclable in-store are also recyclable curbside.
- Resin identification codes (numbers enclosed within a solid or “chasing arrows” triangle) are used to identify plastic types, but some panelists noted that consumers may think they indicate recyclability. Because some state laws require use of a chasing arrows symbol for resin identification codes, there may be a potential conflict between FTC guidance and state laws.
- Some panelists indicated that consumers read an implied recyclability claim into products made with recycled content, despite the fact that not all products made with recycled materials can be recycled.

Negative Disclosures

Some panelists suggested that negative disclosures are needed for plastics that are generally not recyclable. This is a departure from the current Green Guides, which state that qualifiers are only needed when recyclability claims are made (e.g., a strong qualifier is needed if a product is labeled as “recyclable,” but may be recycled by only a few consumers).

- Panelists generally agreed that consumers look to product labels to determine recyclability, but there was a lack of consensus on if negative disclosures were needed for all product labels or only for product labels that may cause confusion (e.g., only recyclable in-store, resin identification codes or recycled content claims).

The “Substantial Majority” Test

The Green Guides state that a company can make an unqualified “recyclable” claim as long as a substantial majority (60%) of communities or consumers where a product is marketed have access to recycling facilities that will accept the item. The FTC is very interested in whether the 60% threshold should be changed. The panelists did not suggest an alternate threshold, but some emphasized that the localized nature of the recycling system (which can vary by municipality) may create difficulties if a stricter standard is used.

Chemical Recycling

While the workshop was not intended to discuss environmental policy, there was a very interesting debate on chemical recycling. Plastics are primarily recycled through manual means (e.g., sorting, grinding and washing), but chemical recycling breaks down plastic polymers and can be used to create new plastics or even fuel. Some panelists were particularly concerned with the harms of chemical recycling, as there may not be a net overall environmental benefit given pollutants. In light of this discussion, the FTC may provide guidance on chemical recycling claims (e.g., requiring a life cycle analysis to show an overall benefit).

Rulemaking

Since *FTC v. AMG Capital Management*, the FTC has been focused on avenues to obtain monetary penalties – including through rulemaking. Some panelists pushed for rulemaking while others argued that the FTC’s relatively limited enforcement regarding false or misleading recyclability claims indicate that enforcement is not needed. Moreover, the discussion of chemical recycling raised concerns that a rule may be too ridged to keep up with evolving technologies in this area.

While the general comment period on the Green Guides ended in April, the FTC is accepting public comments on issues related to “recyclable” claims through June 13, 2023.

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The Deep Dive: FTC Updates Endorsement Guides for Modern Marketing and Advertising

The Bottom Line

- The FTC has revised its Endorsement Guides to take into account how businesses reach modern consumers in the digital era. Brands, agencies and influencers should revisit their standard policies and practices now to ensure they comply with the FTC's new guidance.
- Many commonly used disclosures, including ones built into platforms, and even standalone hashtags, may no longer be considered sufficient.
- The FTC proposed a new rule to combat misleading consumer review and testimonial practices just a day after releasing the updated Endorsement Guides. More rulemaking – and more enforcement – is coming.

On June 29, the FTC announced [new Endorsement Guides](#) (Endorsement Guides) governing the use of endorsements and testimonials in advertising. The FTC last revised the Endorsement Guides in 2009. After proposing the updates in May 2022, the FTC received thirty substantive public comments. The final Endorsement Guides reflect these comments and include several notable departures from the agency's first proposals that will change marketers', agencies' and influencers' approach to endorsements in the digital era.

A Higher Bar for “Clear and Conspicuous” Disclosures

In the new Endorsement Guides, the FTC articulates a stricter definition for “clear and conspicuous” disclosures, going above and beyond the prior standard that such disclosures be “noticeable and easily understandable” to mandate that online disclosures must be “unavoidable.” “Unavoidable” means that a consumer cannot miss the disclosure and must not be required to click through or take other actions to see material information.

The FTC's illustrative examples make clear that many common forms of disclosures across print, digital, social, and audio advertising are in for a major industry shift.

Placement Matters

The Endorsement Guides explain that disclosures should be placed where ordinary consumers will not miss them and displayed in an easy-to-read font that contrasts enough to stand

out from its background. For example, on an image-centric social media platform, disclosures would not be conspicuous enough if they were included only above a photo, buried at the end of a post's long caption, or in small font that blends into the background. Similarly, for video ads, a disclosure in the corner of the video may be too easy for consumers to miss. Instead, the FTC recommends including audio and visual disclosures if the endorsement is made via both mediums. The FTC also recommends that the disclosure be made upfront or in close proximity to the representation that requires the disclosure, which may mean multiple or continuous disclosures throughout a video. The FTC's guidance states that proper disclosures on platforms such as Instagram Stories and TikTok may consist of clearly contrasting and centrally placed disclosures superimposed onto the video reel.

Ordinary is Relative

The disclosures must be clear and conspicuous to ordinary consumers in the targeted group. If the ad is targeted at older adults, it must account for that demographic's vision or hearing abilities. Similarly, if an ad is in Spanish and targeting Spanish-speaking audiences, the disclosures must also be in Spanish.

When in Doubt, Add the Brand

In its guidance document that accompanies the Endorsement Guides, "[FTC's Endorsement Guides: What People are Asking](#)" (the FAQs), the FTC is now advising that commonly used disclosures that do not contain the brand or product name may be ambiguous, since they do not properly identify the sponsoring advertiser. While the FTC continues to advise that starting a post with "Ad:" or "Paid ad" or "#ad" or "Advertising:" or "Advertisement" would likely be effective, and that the words "Sponsored" and "Promotion" at the beginning of a post "might" also be effective, it is now saying that disclosures like "Sponsored by XYZ" or "Promotion by XYZ" would be clearer (where "XYZ" is a brand name).

In addition, while the FTC previously advised that the use of #employee to denote an employer-employee relationship "may confuse" consumers, they are now more definitively advising that #employee alone is unlikely to be understood. Perhaps most notably, in a more conservative stance than previously taken by the FTC, hashtags like #freeproduct or #sweepstakes alone would likely not be effective to disclose a gifted product or an incentivized sweepstakes entry. The FAQs recommend the use of disclosures such as "I was given a free [name of product] from XYZ to review," or #XYZ_sweepstakes, in each of these scenarios instead.

Bypass Built-In Tools

The new Endorsement Guides caution that many forms of disclosure built into platforms may not be sufficient. As such, the FTC recommends that brands and influencers add their own disclosures - though the FTC has offered to work with platforms that want to improve their disclosure tools.

Repost at Your Own Risk

The Endorsement Guides also warn against reposting or sharing third-party endorsements or testimonials without proper disclosures attached to the repost. Brands could face liability on a number of fronts, including for failing to disclose the relationship with the influencer if the original post's disclosure was ambiguous or obscured in the repost; or for failing to confirm that the endorser still holds the same opinion of a product whose formulation has changed since the original post.

Results Not Typical

The FTC is particularly focused on misleading ads for weight-loss products and provides several new examples to further clarify what adequate disclosure looks like in that realm, suggesting that enforcement efforts may be focused on this sector going forward. For example, even when brands use a real customer's testimonial, if the results were atypical, they must say so and disclose the expected or typical results based on reliable scientific evidence. Moreover, advertisers cannot pair a testimonial with a misleading image – for example, if a customer went from 300 pounds to 250 pounds but the ad features a 100-pound person, it would be deceptive.

Review Your Review Practices

Fake positive reviews are seen by the FTC as endorsements that require proper disclosures. While fake negative reviews are not technically endorsements, they are also problematic because they can be misleading and deceptive. Further, businesses that report negative reviews as fake without a reasonable basis for doing so are likely engaging in deceptive practices.

Moreover, when procuring, suppressing, boosting, organizing, publishing, upvoting, downvoting, reporting, or editing consumer reviews of their products, the Guides state that advertisers should not take actions that have the effect of distorting or otherwise misrepresenting what consumers think of their products, regardless of whether the reviews are considered endorsements.

Using fake social media followers to indicate greater influence, while not an endorsement issue per se, is still a deceptive practice. The FTC also calls out companies in the business of selling fake followers or other fake indicators of social media influence for engaging in deceptive practices.

The day after releasing the updated Endorsement Guides, the FTC announced a new [proposed rule banning fake reviews and testimonials](#) that would make violators liable for civil penalties. While the final rule will likely provide greater and more granular clarity on the practices that the FTC may find deceptive, businesses should heed the guidance in the Endorsement Guides for now.

Sharing Liability with Influencers

Brands, as well as their PR, marketing, advertising, reputation management and other creative partners, could also be liable if an influencer misrepresents a product's efficacy or their personal experience with the product. Brands or their intermediaries must provide guidance to the influencer on avoiding misleading statements and making proper disclosures. Brands who act in good faith and provide effective guidance may reduce the risk of facing an FTC enforcement action. As such, it is important that brands and agencies properly vet, instruct and monitor their influencer partners for compliance.

"Special Concern" for Children

The Endorsement Guides end with a cautionary warning to advertisers that none of the examples provided apply to advertisements directed at children, which "may be of special concern because of the character of the audience." As the FTC noted in response to comments on the proposed rule, research shows that disclosures do not work for children as they do for adults. Thus, ads that include endorsements and are directed at kids may fall short of the FTC's requirements, even if they include a disclosure that any adult would find clear and conspicuous.

With the release of the updated Endorsement Guides, brands, advertising, PR and marketing agencies, and influencers should revisit their standard policies and practices now to ensure they comply with the FTC's new guidance.

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