

20 Regulation of Advertising and Promotion



Source: Carlos Amarillo/Shutterstock

Learning Objectives

- LO 20-1** | Explain the role and function of various regulatory agencies.
- LO 20-2** | Evaluate the effectiveness of self-regulation of advertising.
- LO 20-3** | Describe how advertising is regulated by federal and state regulatory bodies.
- LO 20-4** | Discuss the regulation of sales promotion, direct marketing, and Internet marketing.

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Privacy Regulations Will Change Digital Marketing

As discussed throughout the text, advertising through digital media has surpassed the use of traditional media such as television, radio, and print, with most of the money being spent online going to Google and Facebook. One of the primary reasons marketers have shifted their advertising spending to Google and Facebook is because of the tremendous amount of information they have about people who use their platforms. For example, Google knows your location every time you turn on your phone; your online search history across all your devices; websites you have visited; the apps you use, including how often you use them, where you use them, and who you use them to interact with; and all your YouTube history. Google also creates profiles for advertisers based on consumers' location, age, gender, occupation, interests, purchase history, and other factors. Facebook has similar profiles as well as articles and videos and other information consumers share with one another plus information from outside data providers and advertisers. The ability to use this information to target consumers with relevant advertising is what makes Google and Facebook so popular with advertisers.

People have trusted Google and Facebook, as well as other digital platforms, with their data for years. However, there have been several significant developments over

the past two years that have led to an awakening over the issue of privacy and the rights of companies to use the data they gather. The privacy issue took center stage in March 2018 when a whistleblower came forward to reveal that the research firm Cambridge Analytica had improperly harvested the personal Facebook data of millions of Americans without their knowledge to create personality profiles and help target political ads that helped Donald Trump win the 2016 presidential election. When the news broke, Facebook founder and CEO Mark Zuckerberg apologized for his company's mistakes, and Facebook immediately banned Cambridge Analytica and its parent company SCL from the platform. However, these actions did little to stem the outrage of lawmakers, privacy advocates, and the media, as well as the public. Zuckerberg was called to testify before Congress, and the Cambridge Analytica scandal became the poster child for how data can be misused as well as a catalyst for debates over the privacy rights of consumers. A few months later, Facebook had another privacy glitch that resulted in the posts of 14 million users that were intended to be private being published. This was followed by a data breach in October 2018 that allowed hackers to exploit a weakness in Facebook's code to access the "View As" privacy tool.

While Facebook's data breaches, as well as those of a number of other major companies, were bringing privacy and protection of people's data to the attention of federal and state regulatory bodies in the United States, efforts had already been well under way in Europe to address the problem. In 2012, the European Commission began developing plans for data protection reform across the European Union in order to make Europe fit for the digital age. One of the key components of the reform is the introduction of the General Data Protection Regulation (GDPR), which took effect in May 2018 across the 28-nation bloc of EU countries. The new regulations apply to any organization operating within the European Union, as well as any organization outside of the EU, that offers goods and/or service to customers in the EU. This essentially means that nearly every major company in the world needs a GDPR compliance strategy because regulators in the EU can fine companies as much as 4 percent of annual sales for the most serious violations. Some of the key privacy and data protection requirements of the GDPR include requiring the consent of data subjects when collecting and processing data from them, making collected data anonymous to protect privacy, providing data breach notification, safely handling the transfer of data across borders, and requiring certain companies to appoint a data-protecting officer to oversee GDPR compliance.

It did not take long for Facebook and Google to run into problems with the GDPR as both companies were accused of violations for forcing consumers to agree to their terms of service. Facebook let users decline enrolling for certain features like face recognition, but forced them to accept the overall terms of service in order to proceed to the social network. Google offers a similarly mandatory notice on Android phones, where users who do not accept the terms of service are not able to use the devices. Google ran into more problems a few months later when it was fined \$56.8 million under the GDPR by France's privacy regulator for infringements involving transparency, information, and consent. In the first year the GDPR was in effect, there were 144 complaints filed to national supervisory boards about various companies' data practices, and several ad-tech firms closed their European operations.

Efforts are already under way in the United States to respond to the sweeping privacy rules enacted in the European Union. California passed a new law that went into effect on January 1, 2020, that gives the state's residents the most sweeping online privacy rights in the nation and also includes some of the most stringent rules for companies. While several other states have passed laws regulating privacy, including Vermont and South Carolina, the California Consumer Privacy Act is more comprehensive and is likely to be used a guideline for other states as well as a possible model for national legislation. In fact, some industry trade groups such as the Interactive Advertising Bureau (IAB) are urging Congress to create a federal regulatory framework around privacy that will protect consumers and avoid the problem of conflicting and damaging state laws, which would create major challenges for companies.

Google and Facebook, as well as many other companies, are taking steps to address the new privacy regulations because they really have no choice but to do so. In early 2019, Mark Zuckerberg laid out plans for a new privacy-obsessed Facebook that includes less data permanence on its platform and plans for encrypted messaging across its various apps. Google has also increased the number of privacy features on its platforms in order to give consumers clear and meaningful choices around their data, although the company has been criticized for putting more of the burden on users who often do not read privacy policies. It is likely that security breaches will continue, even as more strict regulations are enacted. However, technology companies must recognize failure to protect consumers' privacy may result in the greatest breach of all—the loss of consumer trust.

Sources: Lauren Goode, "Google's New Privacy Features Put the Responsibility on Users," *Wired*, May 8, 2019, <https://www.wired.com/story/googles-new-privacy-features-put-the-responsibility-on-users/>; Ronan Shields, "As CCPA's Deadline Looms, Tech and Media Brace for Another GDPR," *Adweek*, May 28, 2019, <https://www.adweek.com/digital/as-ccpas-deadline-looms-tech-and-media-brace-for-another-gdpr/>; Issie Lapowsky, "How Cambridge Analytica Sparked the Great Privacy Awakening," *Wired*, March 17, 2019, <https://www.wired.com/story/cambridge-analytica-facebook-privacy-awakening/>; Garrett Sloane, "Mark Zuckerberg Promises a New Privacy-Obsessed Facebook," *Advertising Age*, March 6, 2019, <https://adage.com/article/digital/mark-zuckerberg-promises-a-privacy-obsessed-facebook/316888>; "IAB Urges Congress to Pass Federal Privacy Legislation to Protect Consumers & Avoid Patchwork of State Laws, *Interactive Advertising Bureau*, February 26, 2019, <https://www.iab.com/news/iab-urges-congress-to-pass-federal-privacy-legislation-to-protect-consumers-avoid-patchwork-of-state-laws/>.

LO 20-1

Suppose you are the advertising manager for a consumer-products company and have just reviewed a new commercial your agency created. You are very

excited about the ad. It presents new claims about your brand's superiority that should help differentiate it from the competition. However, before you approve the commercial you need answers. Are the claims verifiable? Did researchers use proper procedures to collect and analyze the data and present the findings? Do research results support the claims? Were the right people used in the study? Could any conditions have biased the results?

Before approving the commercial, you have it reviewed by your company's legal department and by your ad agency's attorneys. If both reviews are acceptable, you send the ad to the major networks, which have their censors examine it. They may ask for more information or send the ad back for modification. (No commercial can run without approval from a network's Standards and Practices Department.)

Even after approval and airing, your commercial is still subject to scrutiny from such state and federal regulatory agencies as the state attorney general's office and the Federal Trade Commission. Individual consumers or competitors who find the ad misleading or have other concerns may file a complaint with the National Advertising Division of the BBB National Programs, Inc. Finally, disparaged competitors may sue if they believe your ad distorts the facts and misleads consumers. If you lose the litigation, your company may have to retract the claims and pay the competitor damages, sometimes running into millions of dollars.

After considering all these regulatory issues, you must ask yourself if the new ad can meet all these challenges and is worth the risk. Maybe you ought to continue with the old approach that made no specific claims and simply said your brand was great.

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Overview of Regulation

Regulatory concerns can play a major role in the advertising and promotion decision-making process. Advertisers operate in a complex environment of local, state, and federal rules and regulations. Additionally, a number of advertising and business-sponsored associations, consumer groups and

organizations, and the media attempt to promote honest, truthful, and tasteful advertising through their own self-regulatory programs and guidelines. The legal and regulatory aspects of advertising are very complex. Many parties are concerned about the nature and content of advertising and its potential to offend, exploit, mislead, and/or deceive consumers.

Advertising has also become increasingly important in product liability litigation involving products that are associated with consumer injuries. In many of these cases the courts have been willing to consider the impact of advertising on behavior of consumers that leads to injury-causing situations. Thus advertisers must avoid certain practices and proactively engage in others to ensure that their ads are comprehended correctly and do not misrepresent their products or services.¹ The costs can be very high and consequences quite severe when companies become involved in legal proceedings regarding their advertising claims.

Numerous guidelines, rules, regulations, and laws constrain and restrict advertising. These regulations primarily influence individual advertisers, but they can also affect advertising for an entire industry. For example, cigarette advertising was banned from the broadcast media in 1970, and many groups continue to push for a total ban on the advertising of tobacco products, including e-cigarettes and other delivery forms.² As discussed later in the chapter, legislation is being considered that would either ban or impose major restrictions on direct-to-consumer advertising of drugs.³ Advertising is controlled by internal self-regulation and by external state and federal regulatory agencies such as the Federal Trade Commission (FTC), the Federal Communications Commission (FCC), the Food and Drug Administration (FDA), and the U.S. Postal Service. State attorneys general also have become more active in advertising regulation. While only government agencies (federal, state, and local) have the force of law, most advertisers also abide by the guidelines and decisions of internal regulatory bodies. In fact, self-regulation from groups such as the media and BBB National Programs, Inc. probably has more influence on advertisers' day-to-day operations and decision making than do government rules and regulations.

Decision makers on both the client and agency side must be knowledgeable about these regulatory groups, including the intent of their

efforts, how they operate, and how they influence and affect advertising and other promotional-mix elements. In this chapter, we examine the major sources of advertising regulation, including efforts by the industry at voluntary self-regulation and external regulation by government agencies. We also examine regulations involving sales promotion, direct marketing, and marketing on the Internet.

SELF-REGULATION

LO 20-2

For many years, the advertising industry has practiced and promoted voluntary **self-regulation**. Most advertisers, their agencies, and the media recognize the importance of maintaining consumer trust and confidence. Advertisers also see self-regulation as a way to limit government interference, which, they believe, results in more stringent and troublesome regulations. Self-regulation and control of advertising emanate from all segments of the advertising industry, including individual advertisers and their agencies, business and advertising associations, and the media.

Self-Regulation by Advertisers and Agencies

Self-regulation begins with the interaction of client and agency when creative ideas are generated and submitted for consideration. Most companies have specific guidelines, standards, and policies to which their ads must ^{page 670} adhere. Recognizing that their ads reflect on the company, advertisers carefully scrutinize all messages to ensure they are consistent with the image the firm wishes to project. Companies also review their ads to be sure any claims made are reasonable and verifiable and do not mislead or deceive consumers. Ads are usually examined by corporate attorneys to avoid potential legal problems and their accompanying time, expense, negative publicity, and embarrassment.

Internal control and regulation also come from advertising agencies. Most have standards regarding the type of advertising they either want or are willing to produce, and they try to avoid ads that might be offensive or misleading. Most agencies will ask their clients to provide verification or support for claims they might want to make in their advertising and will make sure that adequate documentation or substantiation is available. However, agencies will also take formal steps to protect themselves from legal and ethical perils through agency-client contracts. For example, many liability issues are handled in these contracts. Agencies generally use information provided by clients for advertising claims, and in standard contracts the agency is protected from suits involving the accuracy of those claims. Contracts will also absolve the agency of responsibility if something goes wrong with the advertised product and consumers suffer damages or injury or other product liability claims arise.⁴ However, agencies have been held legally responsible for fraudulent or deceptive claims and in some cases have been fined when their clients were found guilty of engaging in deceptive advertising.⁵ Many agencies have a creative review board or panel composed of experienced personnel who examine ads for content and execution as well as for their potential to be perceived as offensive, misleading, and/or deceptive. Most agencies also employ or retain lawyers who review the ads for potential legal problems. Exhibit 20–1 shows the homepage for the Olshan Frome Wolosky law firm in New York City, which specializes in advertising and integrated marketing communications law.

XHIBIT 20–1

The Olshan firm specializes in advertising and integrated marketing communications law.

Source: *Olshan Frome Wolosky LLP*

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Areas of Concentration

- Advertising Business Litigation
- Advertising Clearance
- Advertising Enforcement, Investigations & Litigation
- Boxing & Sports Law
- Competitor Advertising Litigation
- Consumer Class Action Defense
- Digital Marketing Law
- Direct Marketing Law
- Environmental "Green" Advertising & Claims
- Food, Drug, Dietary Supplement & Cosmetic Compliance and Transactions
- Marketing Contracts
- Privacy Law
- Regulatory Investigations & Litigation
- Social Media Law
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Self-Regulation by Trade Associations

Like advertisers and their agencies, many industries have also developed self-regulatory programs. This is particularly true in industries whose advertising is prone to controversy, such as liquor and alcoholic beverages, drugs, and various products marketed to children. Many trade and industry associations develop their own advertising guidelines or codes that member companies are expected to abide by including the Toy Industry Association, the Motion Picture Association of America, and the Pharmaceutical Research and Manufacturers of America (PhRMA). The Wine Institute, the Beer Institute, and the Distilled Spirits Council of the United States all have guidelines that member companies are supposed to follow in advertising alcoholic beverages.⁶

The advertising of hard liquor on television has been a very controversial issue as many consumer and public health groups argue that liquor is more dangerous than beer or wine because of its higher alcohol content. Critics also argue that airing liquor ads on TV glamorizes drinking and encourages children and teenagers to drink and were successful in keeping advertising for spirits off the major networks until recently. While no

specific law prohibits the advertising of hard liquor on radio or television, it was effectively banned for over five decades as a result of a code provision by the National Association of Broadcasters and by agreement of liquor manufacturers and their self-governing body, the Distilled Spirits Council of the United States (DISCUS). However, in November 1996, DISCUS amended its code of good practice and overturned its self-imposed ban on broadcast advertising.⁷

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After the DISCUS ban was lifted, the four major broadcast TV networks as well as major cable networks such as ESPN and MTV continued to refuse liquor ads, prompting consumer and public interest groups to applaud their actions.⁸ However, the major networks cannot control the practices of affiliate stations they do not own and many of them began accepting liquor ads, as did local cable channels and independent broadcast stations. While the national broadcast networks continued their self-imposed ban for many years, the amount of liquor advertising on television continued to increase as more cable and local broadcast stations began accepting the commercials. Over the past several years the major networks have been accepting commercials for liquor, although most of the ads do not air before 10 P.M., unlike on cable, where many networks allow them anytime.⁹

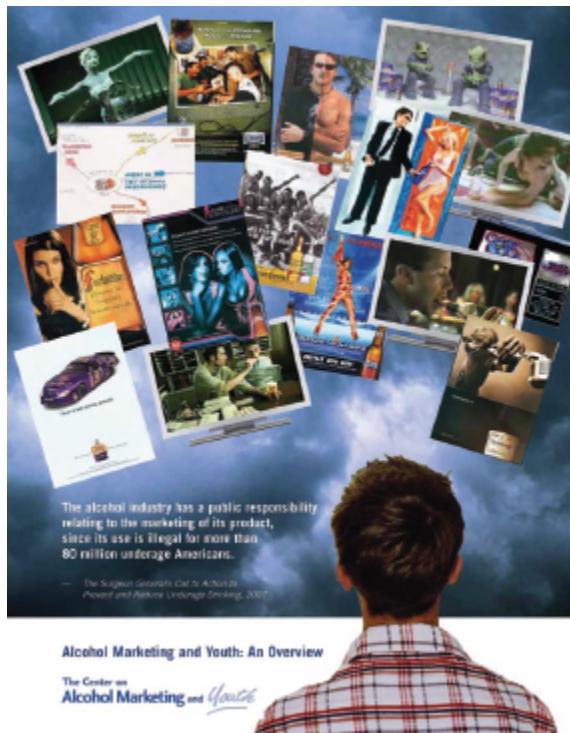
The airing of hard liquor ads on a network TV show represents a major victory for the distilled spirits industry, which has argued there should be a level playing field for alcohol advertising and that liquor should be viewed the same way as beer and wine. They also note that the Federal Trade Commission (FTC) has said there is no basis for treating liquor ads differently than advertising for other types of alcohol. For example, in 2017 the National Football League (NFL) changed its advertising policy and began allowing the television networks to accept commercials for distilled spirits. The policy change limits hard liquor advertising to no more than four 30-second spots per game as well as two spots in any quarter or during halftime. The commercials also have to include a prominent social responsibility message and cannot use a football-related theme or target underage drinkers.¹⁰ Thus, it appears that TV advertising for distilled spirits is here to

stay and it's likely that you will see a lot more liquor ads on network TV shows as well as on cable. However, as might be expected, public advocacy groups such as the Center for Science in the Public Interest and the Center on Alcohol Marketing and Youth remain opposed to the networks' softening of their stance, arguing that youth exposure to liquor ads on TV has already increased significantly (Exhibit 20–2).

XHIBIT 20–2

In this advertisement for The Center on Alcohol Marketing and Youth, it is apparent that they are opposed to the advertising of hard liquor on television.

Source: *The Center on Alcohol Marketing and Youth*



Many professions also maintain advertising guidelines through local, state, and national organizations. For years professional associations like the American Medical Association (AMA) and the American Bar Association (ABA) restricted advertising by their members on the basis that such promotional activities lowered members' professional status and led to unethical and fraudulent claims. However, such restrictive codes have been attacked by both government regulatory agencies and consumer groups. They argue that the public has a right to be informed about a professional's

services, qualifications, and background and that advertising will improve professional services as consumers become better informed and are better able to shop around.¹¹

In 1977, the Supreme Court held that state bar associations' restrictions on advertising are unconstitutional and that attorneys have First Amendment freedom of speech rights to advertise.¹² Many professional associations subsequently removed their restrictions, and advertising by lawyers and other professionals is now common (Exhibit 20–3).¹³ Although industry associations are concerned with the impact and consequences of members' advertising, they have no legal way to enforce their guidelines. They can only rely on peer pressure from members or other nonbinding sanctions to get advertisers to comply. In 1982, the Supreme Court upheld an FTC order permitting advertising by dentists and physicians, and various forms of advertising are now used by both groups.¹⁴

XHIBIT 20–3

Advertising is often used by attorneys to promote their services.

Source: *The McClellan Law Firm*



Self-Regulation by Businesses

A number of self-regulatory mechanisms have been established by the business community in an effort to control advertising practices.¹⁵ The largest and best known is the **Better Business Bureau (BBB)**, which promotes fair advertising and selling practices across all industries. The BBB was established in 1916 to handle consumer complaints about page 672

local business practices and particularly advertising. Local BBBs are located in most large cities throughout the United States and supported entirely by dues of the more than 100,000 member firms.

Local BBBs receive and investigate complaints from consumers and other companies regarding the advertising and selling tactics of businesses in their area. Each local office has its own operating procedures for handling complaints; generally, the office contacts the violator and, if the complaint proves true, requests that the practice be stopped or changed. If the violator does not respond, negative publicity may be used against the firm or the case may be referred to appropriate government agencies for further action.

While BBBs provide effective control over advertising practices at the local level, the parent organization, the **BBB National Programs Inc.**, plays a major role at the national level as the third-party administrator of the advertising industry self-regulatory system. Policies and procedures for industry self-regulation are established by the Advertising Self-Regulatory Council (ASRC), which merged into BBB National Programs Inc., a nonprofit organization that replaced the Council of Better Business Bureaus in 2019, and implemented through five programs—the National Advertising Division (NAD), the Children’s Advertising Review Unit (CARU), the Electronic Retailing Self-Regulation Program (ERSP), the Direct Selling Self Regulatory Council (DSSRC), and the Online Interest-Based Advertising Accountability Program. The BBB National Programs also has an appellate unit, the **National Advertising Review Board (NARB)**. Staffed primarily by attorneys, the NAD, CARU, ERSP, and Accountability Program review advertising claims that are national in scope. CARU reviews advertising directed to children under the age of 12, and ERSP examines advertising claims in direct-response advertising, including infomercials and home shopping channels, while the Accountability Program regulates online behavioral advertising (OBA) across the Internet.

The BBB National Programs and the NAD/NARB

In 1971 four associations—the American Advertising Federation (AAF), the American Association of Advertising Agencies (the 4A's), the Association of National Advertisers (ANA), and the Council of Better Business Bureaus—joined forces to establish the National Advertising Review Council (NARC). In 2009 the CEOs of three other major marketing organizations—the Direct Marketing Association (DMA), Electronic Retailing Association (ERA), and the Interactive Advertising Bureau (IAB)—joined the NARC Board of Directors, and in 2012 the organization changed its name to the Advertising Self-Regulatory Council (ASRC). As noted above, the ASRC was merged into BBB National Programs in 2019.

The BBB National Programs' mission is to sustain high standards of truth and accuracy in national advertising. The NAD has examined advertising for truth and accuracy since 1971 and has published more than 5,000 decisions, focusing on areas that include product performance claims, superiority claims against competitive products, and all kinds of scientific and technical claims. The BBB National Programs has a process that it follows for self-regulation and follows a specific set of policies and procedures that can be found on its website (Exhibit 20–4).

XHIBIT 20–4

The BBB National Programs partners with advertising and marketing organizations to create an effective self-regulatory system.

Source: BBB National Programs, Inc.

THE ADVERTISING INDUSTRY'S PROCESS OF VOLUNTARY SELF-REGULATION

Policies and Procedures by
Better Business Bureaus (BBB) National Programs

Procedures for:

**The National Advertising Division
(NAD)**

**The Children's Advertising Review Unit
(CARU)**

**The National Advertising Review Board
(NARB)**



Federal law requires that advertisers possess substantiation for their advertising claims before the claims are published. After initiating or receiving a complaint, the NAD requests the advertiser's substantiation, reviews the information, and reaches a determination. In cases where the substantiating evidence does not support the claim, the NAD recommends that the advertiser modify or discontinue the claim. When an advertiser or a challenger disagrees with the NAD's findings, its decision can be appealed to the NARB for additional review.

As can be seen in Figure 20–1, the vast majority of the complaints to the NAD come from marketers challenging claims made by their page 673 competitors, often in the context of a comparative advertising message.¹⁶ For example, the online dating service eHarmony filed a complaint with the NAD over advertising used by competitor [Chemistry.com](#), which claimed that it could use “the latest science of attraction to predict which single men and women [one] will have a relationship and dating chemistry with.”¹⁷ [Chemistry.com](#)’s matchmaking system was developed by an anthropologist who studies mate selection and uses responses to an extensive survey to determine people who might be attracted to one another.

The NAD concluded that the dating service could not substantiate many of the advertising claims and ruled that the company should discontinue them. Chemistry's parent company, [Match.com](#), issued a statement saying that it disagreed with some of the NAD's findings, but agreed to discontinue the claims at issue.¹⁸ In 2018, Anheuser-Busch filed a claim with the NAD over advertising used by Miller/Coors claiming that Miller Lite has more taste than Bud Light and Michelob Ultra as part of its "Know Your Beer" campaign. The campaign included digital influencer videos featuring beer drinkers who were recruited to take part in on-camera taste tests. The NAD found that Miller/Coors provided a reasonable basis for the more taste claim but also recommended that it discontinue using certain digital vignettes or modify them to remove statements suggesting that the consumers in the video participated in a taste test. Miller/Coors agreed to comply with the NAD's decision and changed the videos but continued to use the "more taste" claim in its advertising.¹⁹

FIGURE 20–1

Sources of NAD Cases and Decisions, 2018

Sources	Number	Percentage	Decisions	Number	Percentage
Competitor challenges	76	72%	Modified/discontinued	28	26%
NAD monitoring	17	16	Substantiated/modified/discontinued	34	32
Local BBB challenges	13	12	Administratively closed	8	8
Consumer challenges	0	0	Compliance	15	14
Total	106	100%	Substantiated	4	4
			Referred to government	16	15
			Compliance/referred to government	1	1
			Total	106	100%

The NAD's advertising monitoring program is also the source of many of the cases it reviews (Figure 20–1). It also reviews complaints from consumers and consumer groups, trade associations, local BBBs, and competitors. For example, the NAD received a complaint from the Center for Science in the Public Interest, a consumer advocacy group, over an ad run by Campbell Soup for the company's V8 vegetable juice that suggested a link between the tomato-based product and a reduced risk of cancer. Though the

NAD decided that Campbell provided competent and reliable evidence to support certain claims, it recommended that the company modify language stating “for prostate cancer, a lower risk is apparent when five or more servings (of tomato products) are consumed per week.” Campbell agreed to change the wording of the ad.²⁰

Lawyers at the NAD routinely scour magazines, newspapers, radio, television, and social media to find misleading advertisements. For example, the NAD staff recently challenged an ad for CoverGirl mascara featuring singer Taylor Swift, arguing that it was misleading because her eyelashes had been enhanced after the fact to look fuller. The fine print under the photo of Swift read that her lashes had been “enhanced in post-production.” However, the NAD considered the express claims made in the ad that indicated that the mascara would give eyelashes “2x more volume” and that the product was “20 percent lighter” than the most expensive mascara. The NAD attorneys argued that the photograph stood as a product demonstration and _____ page 674 at issue was what one’s lashes would look like when using the product. Procter & Gamble, the parent company of the CoverGirl brand at the time, fully cooperated with the NAD and voluntarily discontinued making the challenged claims as well as the photograph.²¹

Advertisers that disagree with NAD’s findings have an automatic right to appeal NAD’s decision to the National Advertising Review Board. The NARB is made up of 70 professionals from three different categories: national advertisers (40 members), advertising agencies (20 members), and public members (10), which includes academics and former members of the public sector. Although the self-regulatory system has no power to order an advertiser to modify or stop running an ad and no sanctions it can impose, advertisers who participate in NAD/CARU/ERSP or NARB proceedings generally comply. When companies refuse to participate in a self-regulatory proceeding or do not comply with the terms of a decision, their disputed advertising may be referred to the most appropriate federal agency for further review. In 2018, of the 106 cases handled by the NAD, 28 were modified or discontinued; 34 were substantiated, modified, or discontinued; 15 complied with the NAD; 16 were referred to government; 1 complied with the NAD was and returned to government; 4 were substantiated; and 8 were administratively closed (Figure 20–1).²²

CARU's activities include the review and evaluation of child-directed advertising in all media, as well as online privacy issues that affect children. The organization also provides a general advisory service for advertisers and agencies and has developed self-regulatory guidelines for children's advertising. CARU recognizes that the special nature and needs of a youthful audience require particular care and diligence on the part of advertisers. As such, CARU's Self-Regulatory Program for Children's Advertising goes beyond truthfulness and accuracy to address children's developing cognitive abilities.

The BBB National Programs is also involved in the self-regulation of electronic retailing through the Electronic Retailing Self-Regulation Program (ERSP). The program is sponsored by the Electronic Retailing Association (ERA), although it works independently of the ERA to create an unbiased self-regulatory system. The mission of the ERSP is to enhance consumer confidence in electronic retailing, to discourage advertising and marketing in the electronic retailing industry that contains unsubstantiated claims, and to demonstrate a commitment to meaningful and effective self-regulation. The majority of claims reviewed under the ERSP program are for direct-response TV ads, including long- and short-form infomercials. Reviews apply to all aspects of a marketing campaign, including radio and Internet marketing. Spam e-mails along with Internet pop-up ads that lead to further e-commerce are in the ERSP's purview as well as advertising on TV shopping channels.²³

In 2012 the ASRC became an independent U.S. enforcement mechanism for a new self-regulatory program, the Interest-Based Advertising Accountability Program, which was developed by the Digital Advertising Alliance (DAA) and applies consumer-friendly standards to online behavioral advertising (OBA) across the Internet. OBA uses information collected across multiple unaffiliated websites—and more recently mobile apps—to predict a user's preferences and display ads most likely to interest consumers. The new program was developed by the DAA at the urging of leading industry associations and its first product was the seven Self-Regulatory Principles for Online Behavioral Advertising, which are based on Fair Information Practices. The principles correspond with tenets supported by the Federal Trade Commission, and also address public education and industry accountability issues raised by the FTC. The OBA

Self-Regulatory Principles, which are shown in Figure 20–2, are designed to address consumer concerns about the use of personal information for interest-based advertising and focus on transparency and consumer-control issues. The OBA Principles are also the basis of additional guidance that applies self-regulatory principles developed by the DAA to mobile advertising as well as the practice of using multi-site data and cross-app data for interest-based advertising purposes. The ASRC’s Online Interest-Based Advertising Accountability Program monitors companies engaged in OBA and provides objective, independent, and vigorous oversight and enforcement of the principles.

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FIGURE 20–2

Self-Regulatory Principles for Online Behavioral Advertising

The Education Principle calls for organizations to participate in efforts to educate individuals and businesses about online behavioral advertising and the Principles.

The Transparency Principle calls for clearer and easily accessible disclosures to consumers about data collection and use practices associated with online behavioral advertising. It will result in new, enhanced notice on the page where data is collected through links embedded in or around advertisements, or on the web page itself.

The Consumer Control Principle provides consumers with an expanded ability to choose whether data is collected and used for online behavioral advertising purposes. This choice will be available through a link from the notice provided on the web page where data is collected.

The Consumer Control Principle also requires “service providers,” a term that includes Internet access service providers and providers of desktop applications software such as web browser “tool bars” to obtain the consent of users before engaging in online behavioral advertising, and take steps to de-identify the data used for such purposes.

The Data Security Principle calls for organizations to provide appropriate security for, and limited retention of, data collected and used for online behavioral advertising purposes.

The Material Changes Principle calls for obtaining consumer consent before a Material Change is made to an entity's Online Behavioral Advertising data collection and use policies unless that change will result in less collection or use of data.

The Sensitive Data Principle recognizes that data collected from children and used for online behavioral advertising merits heightened protection, and requires parental consent for behavioral advertising to consumers known to be under 13 on child-directed websites. This Principle also provides heightened protections to certain health and financial data when attributable to a specific individual.

The Accountability Principle calls for development of programs to further advance these Principles, including programs to monitor and report instances of uncorrected non-compliance with these Principles to appropriate government agencies. The CBBB and DMA have been asked and agreed to work cooperatively to establish accountability mechanisms under the Principles.

Source: Developed by American Association of Advertising Agencies, Association of National Advertisers, Council of Better Business Bureaus, Data & Marketing Association, Network Advertising Initiative, and Interactive Advertising Bureau. Reprinted with permission from Digital Advertising Alliance.

The BBB National Programs, working through the NAD/NARB/CARU/ERSP and the DSSRC, is a valuable and effective self-regulatory body. Cases brought to it are handled at a fraction of the cost (and with much less publicity) than those brought to court and are expedited more quickly than those reviewed by a government agency such as the FTC. The system also works because judgments are made by the advertiser's peers, and most companies feel compelled to comply. Firms may prefer self-regulation rather than government intervention in part because they can challenge competitors' unsubstantiated claims and achieve a more rapid resolution.²⁴

Advertising Associations Various groups in the advertising industry also favor self-regulation. The two major national organizations, the 4A's and the American Advertising Federation, actively monitor and police industrywide advertising practices. The 4A's, which is the major trade association of the ad agency business in the United States, has established standards of practice and its own creative code (Figure 20–3). The AAF

consists of advertisers, agencies, media, and numerous advertising clubs. The association has standards for truthful and responsible advertising, is involved in advertising legislation, and actively influences agencies to abide by its code and principles.

FIGURE 20–3

Standards of Practice of the 4A's: Creative Code

CREATIVE CODE

We, the members of the American Association of Advertising Agencies, in addition to supporting and obeying the laws and legal regulations pertaining to advertising, undertake to extend and broaden the application of high ethical standards. Specifically, we will not knowingly create advertising that contains:

- a) False or misleading statements or exaggerations, visual or verbal
- b) Testimonials that do not reflect the real opinion of the individual(s) involved
- c) Price claims that are misleading
- d) Claims insufficiently supported or that distort the true meaning or practicable application of statements made by professional or scientific authority
- e) Statements, suggestions, or pictures offensive to public decency or minority segments of the population

Source: Copyright © 2016. Reprinted with permission from 4A's.

Self-Regulation by Media

The media are another important self-regulatory mechanism in the advertising industry. Most media maintain some form of advertising review process and, except for political ads, may reject any they regard as ^{page 676} objectionable. Some media exclude advertising for an entire product class; others ban individual ads they think offensive or objectionable. For example, *Reader's Digest* does not accept advertising for tobacco or liquor products. A number of magazines in the United States and

other countries refused to run some of Benetton's shock ads on the grounds that their readers would find them offensive or disturbing (Exhibit 20–5).²⁵

XHIBIT 20–5

A number of magazines refused to run this Benetton ad.

Source: Benetton Group



Newspapers and magazines have their own advertising requirements and restrictions, which often vary depending on the size and nature of the publication. Large, established publications, such as major newspapers or magazines, often have strict standards regarding the type of advertising they accept. Some magazines, such as *Parents* and *Good Housekeeping*, regularly test the products they advertise and offer a “seal of approval” and refunds if the products are later found to be defective. Such policies are designed to enhance the credibility of the publication and increase the reader’s confidence in the products it advertises.

Advertising on television and radio has been regulated for years through codes developed by the industry trade association, the National Association of Broadcasters (NAB). Both the radio code (established in 1937) and the

television code (1952) provided standards for broadcast advertising for many years. Both codes prohibited the advertising of certain products, such as hard liquor. They also affected the manner in which products could be advertised. However, in 1982 the NAB suspended all of its code provisions after the courts found that portions (dealing with time standards and required length of commercials in the TV code) were in restraint of trade. While the NAB codes are no longer in force, many individual broadcasters, such as the major TV networks, have incorporated major portions of the code provisions into their own standards.²⁶

The four major television networks have the most stringent review process of any media. All four networks maintain standards and practices divisions, which carefully review all commercials submitted to the network or individual affiliate stations. Advertisers must submit for review all commercials intended for airing on the network or an affiliate.

A commercial may be submitted for review in the form of a script, storyboard, animatic, or finished commercial (when the _____ page 677 advertiser believes there is little chance of objection). A very frustrating, and often expensive, scenario for both an agency and its client occurs when a commercial is approved at the storyboard stage but then is rejected after it is produced. Commercials are rejected for a variety of reasons, including violence, morbid humor, sex, politics, and religion. Network reviewers also consider whether the proposed commercial meets acceptable standards and is appropriate for certain audiences. For example, different standards are used for ads designated for prime-time versus late-night spots or for children's versus adults' programs (see Figure 20-4). Although most of these guidelines for children's advertising remain in effect, several networks have loosened their rules on celebrity endorsements.²⁷

FIGURE 20-4

A Sampling of the TV Networks' Guidelines for Children's Advertising

Each of the major TV networks has its own set of guidelines for children's advertising, although the basics are very similar. A few rules, such as the requirement of a static "island" shot at the end, are written in stone; others, however, can sometimes be negotiated. Many of the rules below apply

specifically to toys. The networks also have special guidelines for kids' food commercials and for kids' commercials that offer premiums.

- Must not overglamorize product
- No exhortative language, such as "Ask Mom to buy . . ."
- No realistic war settings
- Generally no celebrity endorsements
- Can't use "only" or "just" in regard to price
- Show only two toys per child or maximum of six per commercial
- Five-second "island" showing product against plain background at end of spot
- Animation restricted to one-third of a commercial
- Generally no comparative or superiority claims
- No costumes or props not available with the toy
- No child or toy can appear in animated segments
- Three-second establishing shot of toy in relation to child
- No shots under one second in length
- Must show distance a toy can travel before stopping on its own

The four major networks receive nearly 50,000 commercials a year for review; nearly two-thirds are accepted, and only 3 percent are rejected. Most problems with the remaining 30 percent are resolved through negotiation, and the ads are revised and resubmitted.²⁸ Most commercials run after changes are made. For example, censors initially rejected a humorous "Got Milk?" spot that showed children watching an elderly neighbor push a wheelbarrow. Suddenly, the man's arms rip off, presumably because he doesn't drink milk. The spot was eventually approved after it was modified so that the man appears unhurt after losing his limbs and there was no expression of pain (Exhibit 20–6).²⁹

XHIBIT 20–6

This humorous “Got Milk?” commercial had to be modified slightly to satisfy network censors.

Source: *The California Milk Advisory Board*



Some digital advertising platforms also have restrictions regarding the advertising of certain types of products and services. For example, in 2016 Facebook imposed a global ban on private gun sales on its social media platform as well as on Instagram, which it also owns. The policy does not apply to licensed retailers, which can market firearms on Facebook and Instagram while completing the transaction offline. The new policy is designed to stop “peer-to-peer” sales of firearms by prohibiting people from using Facebook and Instagram to offer and coordinate private sales of firearms on the sites.³⁰

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Appraising Self-Regulation

The three major participants in the advertising process—advertisers, agencies, and the media—work individually and collectively to encourage truthful, ethical, and responsible advertising. The advertising industry views self-regulation as an effective mechanism for controlling advertising abuses and avoiding the use of offensive, misleading, or deceptive practices, and it prefers this form of regulation to government intervention. Self-regulation of advertising has been effective and in many instances probably led to the

development of more stringent standards and practices than those imposed by or beyond the scope of legislation. Moreover, over 90 percent of advertisers comply with NAD decisions since failure to do so can result in government action, which can be very expensive to companies and result in more punitive measures.³¹

A senior vice president and general counsel at Kraft Foods, while praising the NAD, summarized the feelings of many advertisers toward self-regulation. In his testimonial he stated: “NAD is superior to its competition, which is regulation by the government or regulation by the courts. Accurate, prompt, and inexpensive decisions year in and year out have earned NAD its well-deserved credibility with the industry and with regulators.” C. Lee Peeler, president-CEO of the Advertising Self-Regulatory Council, wrote: “With more than four decades of experience, the self-regulatory system built by the advertising industry and administered by the Council of Better Business Bureaus is the gold standard against which other self-regulation is judged.”³² He notes that the self-regulatory system protects consumers from misleading advertising by acting quickly and decisively against misleading advertising claims; it points the way on new media issues, providing advertisers with guidance that helps avoid missteps; it provides a fast, efficient, and expert forum that levels the playing field for all advertisers by holding them to high standards of truthfulness and requiring claim substantiation; and it provides the intellectual capital for the development of strong, new self-regulation programs. Exhibit 20–7 shows a page from the BBB National Programs website summarizing the value of the NAD.

XHIBIT 20–7

The NAD is an effective alternative to government intervention and/or litigation.

source: BBB National Programs, Inc.

About NAD

NAD provides independent advertising self-regulation.

NAD reviews national advertising in all media and its decisions set standards for truth in advertising across a variety of industries. Advertisers voluntarily participate in self-regulation when cases are opened by NAD on its own initiative or in response to challenges by third parties, including competitors.



NAD provides quick and transparent resolution of advertising disputes.

NAD works to resolve its cases with a written decision in 60 to 90 business days. A press release with NAD's decision is made public, with the entire content of NAD decisions available by subscription to our online archive of advertising self-regulatory decisions. NAD keeps confidential all data it receives in reviewing a case.

NAD process is efficient and effective.

Advertising claims are reviewed after giving parties the opportunity to explain their position and provide supporting data. Meetings with each party are held separately. Nearly all advertisers voluntarily adhere to NAD recommendations, demonstrating their support for advertising self-regulation.

NAD decisions set consistent standards for advertising.

Each NAD case is reviewed by attorneys with experience in reviewing advertising claims and substantiation. Cases are decided relying upon regulatory guidance and prior NAD case precedent to hold advertising to consistent standards across industries.

NAD helps to ensure a level playing field.

NAD has earned the respect of industries, consumers and regulators alike for providing an effective, successful self-regulatory mechanism for resolving disputes related to the truthfulness of advertising. The broad support for advertising industry self-regulation has resulted in a system that provides businesses with a forum to help build consumer trust in advertising and ensure that competitors are playing by the same set of rules.

There are, however, limitations to self-regulation, and the process has been criticized in a number of areas. For example, the NAD may take three or four months, and sometimes even longer, to resolve a complaint, during which time a company often stops using the commercial anyway. Budgeting and staffing constraints may limit the number of cases the NAD/NARB system investigates and the speed with which it resolves them. [page 679](#)
Financial support remains an important challenge for the NAD/NARB as its programs are supported by about 200 major corporations through partnership with the BBB National Programs, Inc. Support for self-regulatory programs is much smaller in the United States than in many other countries despite the fact that the advertising market in the United States is much larger.³³ And some critics believe that self-regulation is self-serving to the advertisers and advertising industry because it lacks the power or

authority to be a viable alternative to federal or state regulation. However, while state and federal agencies do not always pursue the cases referred by the NAD, the threat of referral serves as an important deterrent.³⁴

An American Bar Association (ABA) working group consisting of attorneys who practice before the NAD released a report in 2015 that reviewed and suggested improvements to the advertising industry's self-regulatory system.³⁵ The ABA report concluded that the current system of advertising self-regulation administered by the NAD works well but did find areas for improvement. Among the recommendations were that the NAD issue its decisions in a timelier manner, as well as permitting advertisers to reach settlement agreements without the issuance of a press release and instead release only case abstracts or summaries taken from the NAD decision. However, press releases would continue to be used in cases where an advertiser has refused to participate or accept the NAD's recommendations and the case has been referred to federal regulatory agencies or law enforcement. One of the most important recommendations from the report was the need for additional funding for the NAD since implementation of the recommendations would require more staff.³⁶

Many do not believe advertising can or should be controlled solely by self-regulation. They argue that regulation by government agencies is necessary to ensure that consumers get accurate information and are not misled or deceived. Moreover, since advertisers do not have to comply with the decisions and recommendations of self-regulatory groups, it is sometimes necessary to turn to the federal and/or state government.

FEDERAL REGULATION OF ADVERTISING

LO 20-3

Advertising is controlled and regulated through federal, state, and local laws and regulations enforced by various government agencies. The federal government is the most important source of external regulation since many

advertising practices come under the jurisdiction of the **Federal Trade Commission (FTC)**. In addition, depending on the advertiser's industry and product or service, other federal agencies such as the Federal Communications Commission, the Food and Drug Administration, the U.S. Postal Service, and the Bureau of Alcohol, Tobacco, Firearms and Explosives may have regulations that affect advertising. We will begin our discussion of federal regulation of advertising by considering the basic rights of marketers to advertise their products and services under the First Amendment.

Advertising and the First Amendment

Freedom of speech or expression, as defined by the First Amendment to the U.S. Constitution, is the most basic federal law governing advertising in the United States. For many years, freedom of speech protection did not include advertising and other forms of speech that promote a commercial transaction. However, the courts have extended First Amendment protection to **commercial speech**, which is speech that promotes a commercial transaction. There have been a number of landmark cases where the federal courts have issued rulings supporting the coverage of commercial speech by the First Amendment.

In a 1976 case, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, the U.S. Supreme Court ruled that states cannot prohibit pharmacists from advertising the prices of prescription drugs, because such advertising contains information that helps the consumer choose between products and because the free flow of information is indispensable.³⁷ As noted earlier, in 1977 the Supreme Court ruled that state bar associations' restrictions on advertising are unconstitutional and attorneys have a First Amendment right to advertise their services and prices.³⁸ In another landmark case in 1980, *Central Hudson Gas & Electric Corp. v. New York Public Service Commission*, the Supreme Court ruled that commercial speech was entitled to First Amendment protection in some cases. However, the Court ruled that the U.S. Constitution affords less protection to commercial speech than to other constitutionally guaranteed

forms of expression. In this case the Court established a four-part test, known as the **Central Hudson Test**, for determining restrictions on commercial speech.³⁹ In another important case, the Supreme Court's 1996 decision in *44 Liquormart, Inc. v. Rhode Island* struck down two state statutes designed to support the state's interest in temperance. The first prohibited the advertising of alcoholic beverage prices in Rhode Island except on signs within a store, while the second prohibited the publication or broadcast of alcohol price ads. The Court ruled that the Rhode Island statutes were unlawful because they restricted the constitutional guarantee of freedom of speech, and the decision signaled strong protection for advertisers under the First Amendment.⁴⁰

In the cases regarding advertising, the U.S. Supreme Court has ruled that freedom of expression must be balanced against competing interests. For example, the courts have upheld bans on the advertising of products that are considered harmful, such as tobacco. The Court has also ruled that only truthful commercial speech is protected, not advertising or other forms of promotion that are false, misleading, or deceptive.

In an important case involving Nike, the California Supreme Court issued a ruling that is likely to impact the way companies engage in public debate regarding issues that affect them. Nike was sued for false advertising under California consumer protection laws for allegedly making misleading statements regarding labor practices and working conditions in its foreign factories. Nike argued that statements the company made to defend itself against the charges should be considered political speech, which is protected by the First Amendment, rather than commercial speech, which is subject to advertising regulations. However, the California high court ruled that statements made by the company to defend itself against the allegations were commercial in nature and thus subject to the state's consumer protection regulations. Nike appealed the case to the U.S. Supreme Court, which sent it back to California for trial to determine if the company's statements were deceptive and misleading. However, Nike settled the case rather than risking a long and costly court battle. While the ruling in this case applies to only California, it is important as the courts ruled that speech in the form of press releases or public statements by company representatives can be considered commercial and subject to consumer protection laws.⁴¹

The job of regulating advertising at the federal level and determining whether advertising is truthful or deceptive is a major focus of the Federal Trade Commission. We now turn our attention to federal regulation of advertising and the FTC.

Background on Federal Regulation of Advertising

Federal regulation of advertising originated in 1914 with the passage of the **Federal Trade Commission Act**, which created the FTC, the agency that is today the most active in, and has primary responsibility for, controlling and regulating advertising. The FTC Act was originally intended to help enforce antitrust laws, such as the Sherman and Clayton Acts, by helping restrain unfair methods of competition. The main focus of the first five-member commission was to protect competitors from one another; the issue of false or misleading advertising was not even mentioned. In 1922, the Supreme Court upheld an FTC interpretation that false advertising was an unfair method of competition, but in the 1931 case *FTC v. Raladam Co.*, the Court ruled the commission could not prohibit false advertising unless there was evidence of injury to a competitor.⁴² This ruling limited the power of the FTC to protect consumers from false or deceptive advertising and led to a consumer movement that resulted in an important amendment to the FTC Act.

In 1938, Congress passed the **Wheeler-Lea Amendment**. It amended section 5 of the FTC Act to read: “Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce are hereby declared to be unlawful.” The amendment empowered the FTC to act if there was evidence of injury to the public; proof of injury to a competitor was not necessary. The Wheeler-Lea Amendment also gave the FTC the

^{page 681} power to issue cease-and-desist orders and levy fines on violators. It extended the FTC’s jurisdiction over false advertising of foods, drugs, cosmetics, and therapeutic devices. And it gave the FTC access to the injunctive power of the federal courts, initially only for food and drug products but expanded in 1972 to include all products in the event of a threat to the public’s health and safety.

In addition to the FTC, numerous other federal agencies are responsible for, or involved in, advertising regulation. The authority of these agencies is limited, however, to a particular product area or service, and they often rely on the FTC to assist in handling false or deceptive advertising cases.

The Federal Trade Commission

The FTC is responsible for protecting both consumers and businesses from anti-competitive behavior and unfair and deceptive practices. The major divisions of the FTC include the bureaus of competition, economics, and consumer protection. The Bureau of Competition seeks to prevent business practices that restrain competition and is responsible for enforcing antitrust laws. The Bureau of Economics helps the FTC evaluate the impact of its actions and provides economic analysis and support to antitrust and consumer protection investigations and rule makings. It also analyzes the impact of government regulation on competition and consumers. The Bureau of Consumer Protection's mandate is to protect consumers against unfair, deceptive, or fraudulent practices. This bureau also investigates and litigates cases involving acts or practices alleged to be deceptive or unfair to consumers. The Division of Advertising Practices protects consumers from deceptive and unsubstantiated advertising and enforces the provisions of the FTC Act that forbid misrepresentation, unfairness, and deception in general advertising at the national and regional level (Exhibit 20–8). The Division of Marketing Practices engages in activities that are related to various marketing and warranty practices such as fraudulent telemarketing schemes, 900-number programs, and disclosures relating to franchise and business opportunities.

XHIBIT 20–8

The Division of Advertising Practices protects consumers from deceptive and unsubstantiated advertising claims.

Source: Federal Trade Commission

Since the 1970s, the FTC made enforcement of laws regarding false and misleading advertising a top priority. Several new programs were instituted, budgets were increased, and the commission became a very powerful regulatory agency. However, many of these programs, as well as the expanded powers of the FTC to develop regulations on the basis of “unfairness,” became controversial. At the root of this controversy is the fundamental issue of what constitutes unfair advertising.

The Concept of Unfairness

Under section 5 of the FTC Act, the Federal Trade Commission has a mandate to act against unfair or deceptive advertising practices. However, this statute does not define the terms *unfair* and *deceptive*, and the FTC has been criticized for not doing so itself. While the FTC has taken steps to clarify the meaning of *deception*, people have been concerned for years about the vagueness of the term *unfair*.

The FTC responded to these criticisms in 1980 by sending Congress a statement containing an interpretation of unfairness. According to FTC policy, the basis for determining **unfairness** is that a trade practice (1) causes substantial physical or economic injury to consumers, (2) could not reasonably be avoided by consumers, and (3) must not be outweighed by

countervailing benefits to consumers or competition. The agency also stated that a violation of public policy (such as other government statutes) could, by itself, constitute an unfair practice or could be used to prove substantial consumer injury. Practices considered unfair are claims made page 682 without prior substantiation, claims that might exploit such vulnerable groups as children and older adults, and instances where consumers cannot make a valid choice because the advertiser omits important information about the product or competing products mentioned in the ad.⁴³

The FTC does have specific regulatory authority in cases involving deceptive, misleading, or untruthful advertising. The vast majority of advertising cases that the FTC handles concern deception and advertising fraud, which usually involve knowledge of a false claim.

Deceptive Advertising

In most economies, advertising provides consumers with information they can use to make consumption decisions. However, if this information is untrue or misleads the consumer, advertising is not fulfilling its basic function. Moreover, a study by Peter Darke and Robin Ritchie found that deceptive advertising engenders mistrust, which negatively affects consumers' responses to subsequent advertising from the same source as well as second-party sources. They note that deceptive advertising can seriously undermine the effectiveness and credibility of advertising and marketing in general by making consumers defensive toward future advertising and should be of concern to all marketers.⁴⁴ But what constitutes an untruthful or deceptive ad? Deceptive advertising can take a number of forms, ranging from intentionally false or misleading claims to ads that, although true, leave some consumers with a false or misleading impression.

The issue of deception, including its definition and measurement, receives considerable attention from the FTC and other regulatory agencies. One of the problems regulatory agencies deal with in determining deception is distinguishing between false or misleading messages and those that, rather than relying on verifiable or substantiated objective information about a

product, make subjective claims or statements, a practice known as puffery. **Puffery** has been legally defined as “advertising or other sales presentations which praise the item to be sold with subjective opinions, superlatives, or exaggerations, vaguely and generally, stating no specific facts.”⁴⁵ The use of puffery in advertising is common. For example, Bayer aspirin calls itself the “wonder drug that works wonders,” Nestlé claims “Nestlé makes the very best chocolate,” Snapple advertises that its beverages are “made from the best stuff on Earth,” and Gillette uses the tagline “The Best a Man Can Get.” Superlatives such as *greatest*, *best*, and *finest* are puffs that are often used.

Puffery has generally been viewed as a form of poetic license or allowable exaggeration. The FTC takes the position that because consumers expect exaggeration or inflated claims in advertising, they recognize puffery and don’t believe it. But some studies show that consumers may believe puffery and perceive such claims as true.⁴⁶ One study found that consumers could not distinguish between a verifiable fact-based claim and puffery and were just as likely to believe both types of claims.⁴⁷ It has also been argued that puffery has a detrimental effect on consumers’ purchase decisions by burdening them with untrue beliefs and refers to it as “soft-core deception” that should be illegal.⁴⁸

Advertisers’ battle to retain the right to use puffery was supported in the latest revision of the Uniform Commercial Code in 1996. The revision switches the burden of proof to consumers from advertisers in cases pertaining to whether certain claims were meant to be taken as promises. The revision states that the buyer must prove that an affirmation of fact (as opposed to puffery) was made, that the buyer was aware of the advertisement, and that the affirmation of fact became part of the agreement with the seller.⁴⁹

One of the most intense battles regarding the use of puffery was fought by Papa John’s and Pizza Hut and went all the way to the United States Supreme Court.⁵⁰ The central issue in the case was Papa John’s use of the tagline “Better Ingredients. Better Pizza.” Pizza Hut filed a lawsuit against Papa John’s claiming that the latter’s ads were false and misleading because it had failed to prove its sauce and dough were superior. Following a long-drawn-out legal battle that lasted nearly five years and cost the two companies millions of dollars, the U.S. Supreme Court issued a decision in support of

the use of puffery as the basis for a comparative advertising claim. The advertising industry was relieved that the Supreme Court ruled page 683 in favor of Papa John's because a ruling against the puffery defense could have opened the door for other challenges and a redrawing of the blurry line between so-called puffery and outright false advertising.⁵¹

As an interesting by-product of the case, Domino's Pizza decided to take advantage of the appellate court ruling that Papa John's slogan was considered puffery and ran TV commercials showing the company's head chef, Brian Solano, standing outside a federal court of appeals building in New Orleans talking about Papa John's and its slogan. In the spot Solano says: "For years Papa John's has been telling us they have better ingredients and better pizza. But when challenged in this court, they stated their slogan is puffery." He then turns to a lawyer standing next to him and asks him: "What's puffery?" Reading from a law book, the lawyer says: "Puffery. An exaggerated statement based on opinion. Not fact" (Exhibit 20–9). Solano then says, "Here's what's not puffery" and goes on to explain how Domino's beat Papa John's in a national taste test. The spot ends with Solano stating, "Our pizza tastes better and that's not puffery, that's proven."⁵²

XHIBIT 20–9

Domino's poked fun at Papa John's puffery defense in a clever TV commercial.

Source: Domino's IP Holder LLC



Since unfair and deceptive acts or practices have never been precisely defined, the FTC is continually developing and refining a working definition

in its attempts to regulate advertising. The traditional standard used to determine deception was whether a claim had the “tendency or capacity to deceive.” However, this standard was criticized for being vague and all-encompassing.

In 1983, the FTC, put forth a new working definition of **deception**: “The commission will find deception if there is a misrepresentation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances to the consumer’s detriment.”⁵³ There are three essential elements to this definition of deception.⁵⁴ The first element is that the representation, omission, or practice must be *likely to mislead* the consumer. The FTC defines *misrepresentation* as an express or implied statement contrary to fact, whereas a *misleading omission* occurs when qualifying information necessary to prevent a practice, claim, representation, or reasonable belief from being misleading is not disclosed.

The second element is that the act or practice must be considered from the perspective of *the reasonable consumer*. In determining reasonableness, the FTC considers the group to which the advertising is targeted and whether their interpretation of or reaction to the message is reasonable in light of the circumstances. The standard is flexible and allows the FTC to consider factors such as the age, education level, intellectual capacity, and frame of mind of the particular group to which the message or practice is targeted. For example, advertisements targeted to a particular group, such as children or older adults, are evaluated with respect to their effect on a reasonable member of that group.

The third key element to the FTC’s definition of deception is *materiality*. According to the FTC a “material” misrepresentation or practice is one that is likely to affect a consumer’s choice or conduct with regard to a product or service. What this means is that the information, claim, or practice in question is important to consumers and, if acted upon, would be likely to influence their purchase decisions. In some cases the information or claims made in an ad may be false or misleading but would not be regarded as material since reasonable consumers would not make a purchase decision on the basis of this information.

Determining what constitutes deception is still a gray area. Two of the factors the FTC considers in evaluating an ad for deception are (1) whether

there are significant omissions of important information and (2) whether advertisers can substantiate the claims made for the product or service. The FTC has developed several programs to address these issues.

Affirmative Disclosure An ad can be literally true yet leave the consumer with a false or misleading impression if the claim is true only under certain conditions or circumstances or if there are limitations [page 684](#) to what the product can or cannot do. Thus, under its **affirmative disclosure** requirement, the FTC may require advertisers to include certain types of information in their ads so that consumers will be aware of all the consequences, conditions, and limitations associated with the use of a product or service. The goal of affirmative disclosure is to give consumers sufficient information to make an informed decision. An ad may be required to define the testing situation, conditions, or criteria used in making a claim. For example, fuel mileage claims in car ads are based on Environmental Protection Agency (EPA) ratings since they offer a uniform standard for making comparisons. Cigarette ads must contain a warning about the health risks associated with smoking.

An example of a recent ruling involving affirmative disclosure is the FTC's case against PayPal Inc. over allegations that its Venmo peer-to-peer payment service misled consumers about their ability to transfer funds to external bank accounts and control the privacy of their transactions. In its complaint, the FTC alleged that when Venmo notified users that money had been credited to their balances and was available for transfer to an external account, it failed to disclose that those funds could be frozen or removed based on the results of Venmo's review of the underlying transaction. The FTC also ruled that Venmo misled consumers about the extent to which they could control the privacy of their transactions and misrepresented the extent to which consumers' financial accounts were protected by "bank grade security systems." As part of the settlement, Venmo was prohibited from misrepresenting any material restrictions on the use of its service, the extent of control provided by any privacy settings, and the extent to which Venmo implements or adheres to a particular level of security. The FTC ruled that Venmo also must make certain disclosures to consumers about its transaction

and privacy practices and is required to obtain biennial third-party assessments of its compliance with these rules for 10 years.⁵⁵

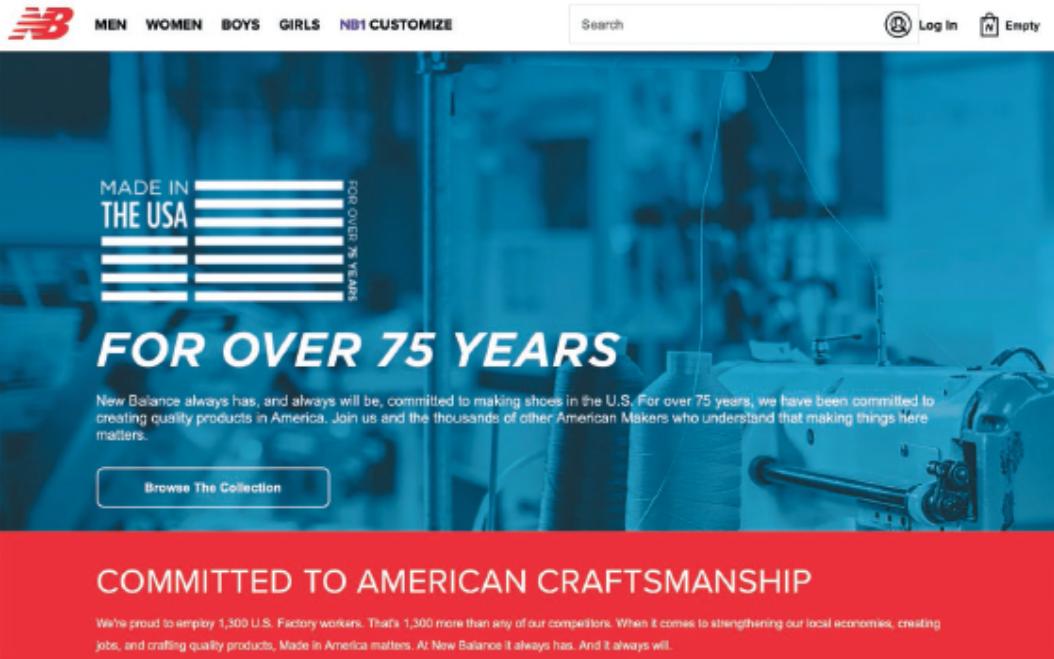
Another area where the Federal Trade Commission is seeking more specificity from advertisers is in regard to country-of-origin claims. The FTC has been working with marketers and trade associations to develop a better definition of what the “Made in USA” label means. The 50-year-old definition used until 1998 required full manufacturing in the United States, using U.S. labor and parts, with only raw materials from overseas.⁵⁶ Many companies argue that in an increasingly global economy, it is becoming very difficult to have 100 percent U.S. content and remain price-competitive. However, the FTC argues that advertising or labeling a product as “Made in USA” can provide a company with a competitive advantage. For many products some consumers do respond to the claim, as they trust the quality of domestic-made products and/or feel patriotic when they buy American. For example, athletic shoemaker New Balance is a company that promotes its commitment to domestic manufacturing and the fact that it is the only major company that assembles many of its shoes in the United States.

In 1998, the FTC issued new guidelines for American-made products. The guidelines spell out what it means by “all or virtually all” in mandating how much U.S. content a product must have to wear a “Made in USA” label or be advertised as such. According to the new FTC guidelines, all significant parts and processing that go into the product must be of U.S. origin and the product should have no or very little foreign content. Companies do not have to receive the approval of the FTC before making a “Made in USA” claim. However, the commission does have the authority to take action against false and unsubstantiated “Made in USA” page 685 claims just as it does with other advertising claims.⁵⁷ As a result of the FTC ruling, marketers must be careful in using “Made in USA” claims. For example, New Balance now qualifies its claims by noting that it labels its shoes as “Made in the USA” only where the domestic value is at least 70 percent, as shown in Exhibit 20–10.

XHIBIT 20–10

New Balance promotes its commitment to U.S. manufacturing.

Source: *New Balance Athletics, Inc.*

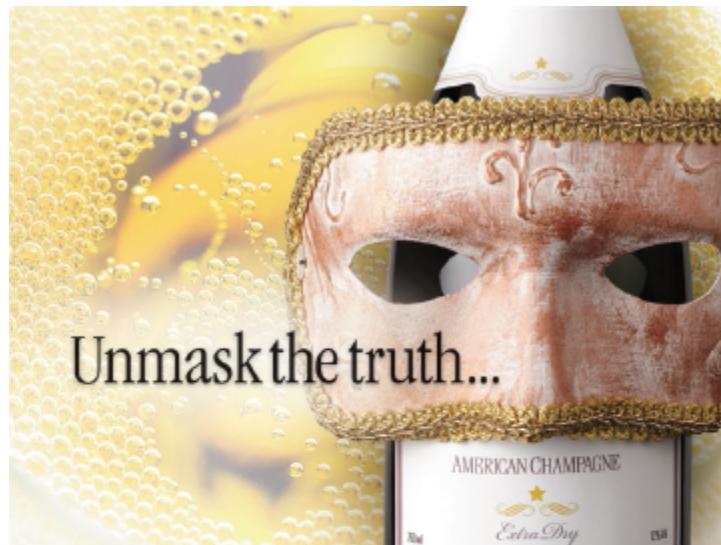


Another interesting example of a case involving product origin claims involves the U.S. Champagne Bureau, which is the trade association that represents the grape growers and houses from the Champagne region in France. The bureau works to educate U.S. consumers about the uniqueness of the wines of Champagne and expand their understanding of the importance location plays in the creation of all wines. The bureau also focuses on ensuring the Champagne name is properly protected in the United States, as it is in most of the rest of the world. As part of its efforts, the U.S. Champagne Bureau launched its “Unmask the Truth” ad campaign which has the goals of rallying consumers and demanding lawmakers protect place-of-origin names on wine sold in the United States. The ad, which is shown in Exhibit 20–11, features a mask over a sparkling wine bottle mislabeled “American Champagne” and asks consumers to voice their support for truthful labeling regarding where wine comes from. The campaign is designed to address a loophole in federal law that allows some U.S. sparkling wine producers to mislead consumers by labeling their products “Champagne” even though they do not come from the Champagne region of France. The trade association argues that names of American wine regions such as Napa Valley and Willamette also risk being misused.⁵⁸

XHIBIT 20–11

The U.S. Champagne Bureau is running ads calling for clarification of the region of origin on wine labels.

Source: *The U.S. Champagne Bureau*



No more cover-ups.

It's not just subprime mortgages and derivative insurance that bury honesty in legal mumbo jumbo. A legal loophole allows some U.S. wines to masquerade as something they're not.

There are many fine sparkling wines, but only those from Champagne can use that region's name. Names of American wine regions like Napa Valley and Willamette are also misused.

Consumer groups agree: deceptive wine labeling must stop. Tell Congress to protect consumers. Sign the petition at www.champagne.us.



Advertising Substantiation A major area of concern to regulatory agencies is whether advertisers can support or substantiate their claims. For many years, there were no formal requirements concerning substantiation of advertising claims. Many companies made claims without any documentation or support such as laboratory tests or clinical studies. In 1971, the FTC's **advertising substantiation** program required advertisers to have supporting documentation for their claims and to prove the claims are truthful.⁵⁹ Broadened in 1972, this program now requires advertisers to substantiate their claims before an ad appears. Substantiation is required for

all express or implied claims involving safety, performance, efficacy, quality, or comparative price.

The FTC's substantiation program has had a major effect on the advertising industry, because it shifted the burden of proof from the commission to the advertiser. Before the substantiation program, the FTC had to prove that an advertiser's claims were unfair or deceptive. However, ad substantiation seeks to provide a basis for believing advertising claims so consumers can make rational and informed decisions and companies are deterred from making claims they cannot adequately support. The FTC takes the perspective that it is illegal and unfair to consumers for a firm to make a claim for a product without having a "reasonable basis" for the claim. In their decision to require advertising substantiation, the commissioners made the following statement:

Given the imbalance of knowledge and resources between a business enterprise and each of its customers, economically it is more rational and imposes far less cost on society, to require a manufacturer to confirm his affirmative product claims rather than impose a burden on each individual consumer to test, investigate, or experiment for himself. The manufacturer has the ability, the know-how, the equipment, the time and resources to undertake such information, by testing or otherwise, . . . the consumer usually does not.⁶⁰

Many advertisers oppose the FTC's advertising substantiation program. They argue it is too expensive to document all their claims and most consumers either won't understand or aren't interested in the technical data. Some advertisers threaten to avoid the substantiation issue by using puffery claims, which do not require substantiation. Generally, page 686 advertisers making claims covered by the substantiation program must have available prior substantiation of all claims. However, in 1984, the FTC issued a new policy statement that suggested after-the-fact substantiation might be acceptable in some cases and it would solicit documentation of claims only from advertisers that are under investigation for deceptive practices.

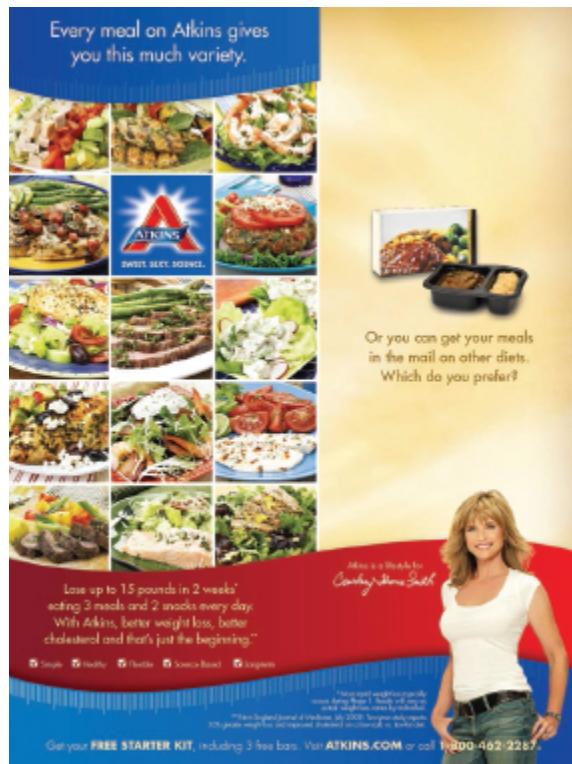
In a number of cases, the FTC has ordered advertisers to cease making inadequately substantiated claims. In the 1990s, the FTC took on the weight-

loss industry when it filed a complaint charging that none of five large, well-known diet program marketers had sufficient evidence to back up claims that their customers achieved their weight-loss goals or maintained the loss. Three of the companies agreed to publicize the fact that most weight loss is temporary and to disclose how long their customers kept off the weight they lost. The agreement required the companies to substantiate their weight-loss claims with scientific data and to document claims that their customers keep off the weight by monitoring a group of them for two years⁶¹ (Exhibit 20–12).

XHIBIT 20–12

This advertisement for The Atkins Diet gives an example of how weight-loss program marketers substantiate their claims.

ource: Atkins Nutritionals, Inc.



The FTC has continued to take actions against companies that cannot adequately substantiate their advertising claims. For example, athletic shoe companies Reebok and Skechers agreed to pay large amounts of money to settle charges that they deceived consumers by making unsubstantiated claims regarding their toning shoes. Reebok ran ads for what became known as the

“derriere-enhancing” shoes, making claims for its EasyTone shoes such as “Get a better butt” and “EasyTone shoes help you tone your butt and legs with every step.” In 2011, following an investigation, the FTC alleged that the testing done by Reebok did not substantiate certain claims and charged the company with deceptive advertising. Reebok agreed to a \$25 million settlement to resolve the charges but issued a statement saying that it was standing behind its shoes and agreed to the settlement only to avoid a protracted legal battle.⁶² A few months after settling with Reebok, the FTC also settled with Skechers after charging the company with failure to substantiate its advertising for toning shoes. Skechers ran ads featuring celebrities such as Kim Kardashian and NFL Hall of Fame quarterback Joe Montana that included claims such as “Shape up while you walk” and “Get in shape without setting foot in a gym” (Exhibit 20–13). The ads also told women that wearing the toning shoes would help tone their butt, legs, and abdominal muscles; burn calories; fight cellulite; improve posture and circulation; and reduce joint stress. Following an investigation, the FTC charged Skechers with deceiving consumers with the claims made for its Shape-up shoes and other toning products, arguing that the results related to specific muscle activation results could not be substantiated. Skechers agreed to pay \$40 million to settle the charges, which was one of the largest amounts ever agreed to with the FTC. The settlement also prohibited Skechers from making any claims about strengthening, weight loss, or any other health- or fitness-related benefits from its toning shoes.⁶³

XHIBIT 20–13

Skechers could not substantiate advertising claims made for its Shape-up toning shoes.

Source: Kevan Brooks/AdMedia/Newscom



In another high-profile case, the FTC issued a very important ruling against POM Wonderful LLC—the maker of juices, teas, and fruit products—upholding an initial finding by an administrative law judge that the company had made a number of unsubstantiated claims for its pomegranate juice. One of the ads run by the company showed a bottle with a noose around its neck and the headline “Cheat Death” while the ad copy claimed that the juice “can help prevent premature aging, heart disease stroke, Alzheimer’s, even cancer. Eight ounces a day is all you need.” The ruling by FTC commissioners stated that POM’s claims must be backed by randomized, controlled clinical trials, which is the same type of evidence the FDA requires when approving new drugs.⁶⁴ POM appealed the ruling, arguing that the FTC was taking an unprecedented step in holding food companies to the same standard as

pharmaceuticals. However, the FTC countered that its standards for food health claims are not nearly as stringent as those of the FDA for drugs.

In 2016 the US. Supreme Court rejected POM Wonderful's challenge to the FTC findings, leaving in place the agency's determination that the juice maker's advertising was misleading. FTC chair Edith Ramirez [page 687](#) issued a statement noting that "The outcome of this case makes clear that companies like POM making serious health claims about food and nutritional supplement products must have rigorous scientific evidence to back them up." The FTC ruling in the case suggests that the commission plans to continue to take a more aggressive approach toward health claims made by food companies and marketers of natural products and may require more substantiation to support any health-related claims they make.⁶⁵

In another major case involving inadequate advertising substantiation the FTC also took action against Volkswagen Group of America in 2016 charging that the company's "clean diesel" advertising campaign was deceptive. The U.S. Environmental Protection Agency discovered that special software installed in Volkswagen diesel-powered vehicles was designed to defeat emissions testing, making the cars seem far cleaner and safer for the environment than they actually were as the cars were emitting up to 40 times more toxic fumes than permitted. In its complaint the FTC alleges that during a seven-year period Volkswagen deceived consumers by selling or leasing more than 550,000 diesel cars based on false claims that the cars were low-emission, environmentally friendly, met emissions standards, and would maintain a high resale value. The FTC sought a court order requiring Volkswagen to compensate consumers who bought or leased any of the affected vehicles between late 2008 and late 2015, as well as an injunction to prevent Volkswagen from engaging in this type of conduct again. In 2017, Volkswagen agreed to pay more than \$4 billion to settle the deceptive advertising charges associated with the "Clean Diesel" advertising. This settlement is in addition to the estimated \$25 billion in fines, penalties, and restitution the company has had to pay the U.S. government and consumers in connection with the case.⁶⁶

The FTC's Handling of Deceptive Advertising Cases

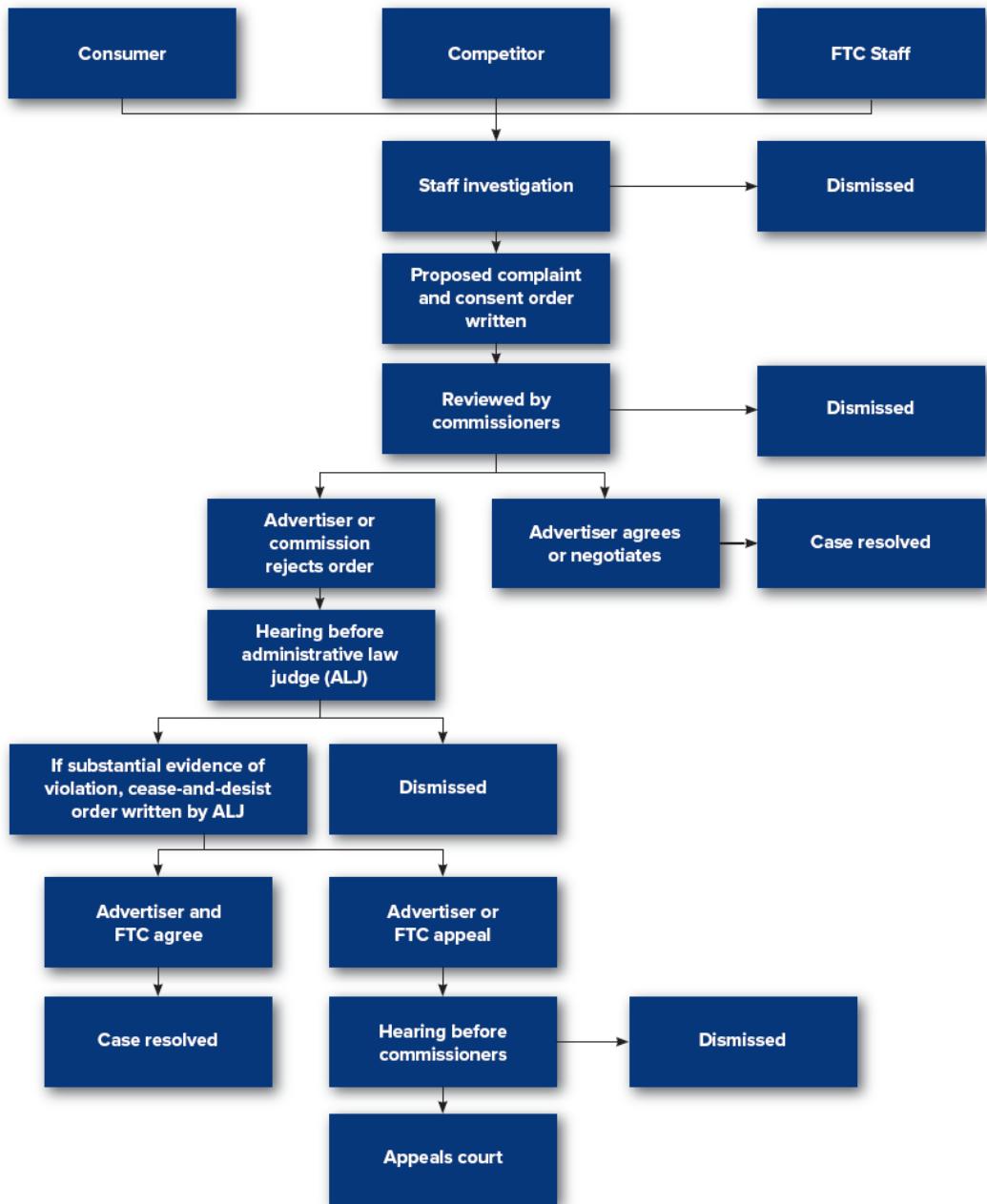
Consent and Cease-and-Desist Orders Allegations of unfair or deceptive advertising come to the FTC's attention from a variety of sources, including competitors, consumers, other government agencies, or the commission's own monitoring and investigations. Once the FTC decides a complaint is justified and warrants further action, it notifies the offender, who then has 30 days to respond. The advertiser can agree to negotiate a settlement with the FTC by signing a **consent order**, which is an agreement to stop the practice or advertising in question. This agreement is for settlement purposes only and does not constitute an admission of guilt by the advertiser. Most FTC inquiries are settled by consent orders because they save the advertiser the cost and possible adverse publicity that might result if the case went further.

If the advertiser chooses not to sign the consent decree and contests the complaint, a hearing can be requested before an administrative law judge employed by the FTC but not under its influence. The judge's decision may be appealed to the full five-member commission by either side. The commission either affirms or modifies the order or dismisses the case. If the complaint has been upheld by the administrative law judge and the commission, the advertiser can appeal the case to the federal courts.

The appeal process may take some time, during which the FTC may want to stop the advertiser from engaging in the deceptive practice. The Wheeler-Lea Amendment empowers the FTC to issue a **cease-and-desist order**, which requires that the advertiser stop the specified advertising ^{page 688} claim within 30 days and prohibits the advertiser from engaging in the objectionable practice until after the hearing is held. Violation of a cease-and-desist order is punishable by a fine of up to \$10,000 a day. Figure 20–5 summarizes the FTC complaint procedure.

FIGURE 20–5

FTC Complaint Procedure



Corrective Advertising By using consent and cease-and-desist orders, the FTC can usually stop a particular advertising practice it believes is unfair or deceptive. However, even if an advertiser ceases using a deceptive ad, consumers may still remember some or all of the claim. To address the problem of residual effects, in the 1970s, the FTC developed a program

known as **corrective advertising**. An advertiser found guilty of deceptive advertising can be required to run additional advertising designed to remedy the deception or misinformation contained in previous ads.

The impetus for corrective advertising was another case involving Campbell Soup, which when making a photo for an ad placed marbles in the bottom of a bowl of vegetable soup to force the solid ingredients to the surface, creating a false impression that the soup contained more vegetables than it really did. (Campbell Soup argued that if the marbles were not used, all the ingredients would settle to the bottom, leaving an impression of fewer ingredients than actually existed!) While Campbell Soup agreed to stop the practice, a group of law students calling themselves SOUP (Students Opposed to Unfair Practices) argued to the FTC that this would not remedy false impressions created by prior advertising and contended Campbell Soup should be required to run advertising to rectify the problem.⁶⁷

Although the FTC did not order corrective advertising in the Campbell case, it has done so in many cases since then. Ocean Spray cranberry juice was found guilty of deceptive advertising because it claimed to have more “food energy” than orange or tomato juice but failed to note it was referring to the technical definition of food energy, which is calories. The STP Corporation was required to run corrective advertising for claims regarding the ability of its oil additive to reduce oil consumption. Many of the corrective ads run in the STP case appeared in business publications to serve notice to other advertisers that the FTC was enforcing the corrective advertising program. In each case, the companies were ordered to spend 25 percent of their annual media budgets to run corrective ads.

Corrective advertising is probably the most controversial of all the FTC programs.⁶⁸ Advertisers argue that corrective advertising infringes on First Amendment rights of freedom of speech. In one of the most publicized corrective advertising cases ever, involving Listerine mouthwash, Warner-Lambert tested the FTC’s legal power to order corrective messages.⁶⁹ For more than 50 years Warner-Lambert had advertised that gargling with Listerine helped prevent colds and sore throats or lessened their severity because it killed the germs that caused these illnesses. In 1975, the FTC ruled these claims could not be substantiated and ordered Warner-Lambert to stop making them. In addition, the FTC argued that corrective advertising

was needed to rectify the erroneous beliefs that had been created by Warner-Lambert as a result of the large amount of advertising it had run for Listerine over the prior 50 years.

Warner-Lambert argued that the advertising was not misleading and, further, that the FTC did not have the power to order corrective advertising. Warner-Lambert appealed the FTC decision all the way to the Supreme Court, which rejected the argument that corrective advertising violates advertisers' First Amendment rights. The powers of the FTC in the areas of both claim substantiation and corrective advertising were upheld. Warner-Lambert was required to run \$10 million worth of corrective ads over a 16-month period stating, "Listerine does not help prevent colds or sore throats or lessen their severity." Since the Supreme Court ruling in the Listerine case, there have been several other situations where the FTC has ordered corrective advertising on the basis of the "Warner-Lambert test," which considers whether consumers are left with a latent impression that would continue to affect buying decisions and whether corrective ads are needed to remedy the situation. While the FTC's authority to order corrective advertising has been challenged in several cases, its right to do so has been upheld by appellate courts.⁷⁰

Advertisers have expressed concern that the FTC might increase its use of the remedy for deceptive advertising cases, but the agency has not substantially changed its request for corrective ads. However, there have been a number of cases where the FTC has required marketers to run corrective ads as a remedy for false and misleading advertising campaigns. The Food and Drug Administration (FDA) has also used corrective advertising in several cases.⁷¹

Developments in Federal Regulation by the FTC

Over the past decade the FTC has focused its attention on the enforcement of existing regulations, particularly in areas such as telemarketing and Internet

privacy.⁷² The FTC also has focused on eliminating false e-mail advertising and has stepped up its enforcement against senders of deceptive or misleading claims via e-mail. The FTC has been active in bringing enforcement action against deceptive as well as unsubstantiated health claims and companies and principals in the mortgage lending industry for deceptive and unfair practices in servicing mortgage loans.

The FTC has stepped up its efforts to stop fraud that targets financially distressed consumers. It has joined forces with a number of states and other federal agencies to take action against mortgage modification and foreclosure rescue scams; phony debt reduction and credit repair operations; and payday lenders, get-rich-quick schemes, and bogus government grants. To better protect consumers, the FTC is also seeking to streamline its rule-making procedures, asking for power to bring charges directly against aiders and abettors of financial fraud and expanding the commission's remedial powers.

The FTC is focusing attention on protecting consumers' online privacy and the collection of sensitive information, particularly for those using social media such as Facebook and Twitter. As discussed later in the chapter, it passed a new set of guidelines for online endorsements that requires bloggers to disclose any "material connection" to an advertiser.⁷³ The FTC also released its Self-Regulatory Principles for Online Behavioral Advertising in 2009 which were discussed earlier in the chapter and shown in Figure 20–2. In its 2018 Annual Highlights report, the commission outlined major initiatives and achievements, which include protecting consumer interests in areas that have the greatest impact on them, including health care, stopping activities related to fraud, and getting money back for consumers who have been victims of fraudulent and deceptive practices (Exhibit 20–14). The FTC will increase its efforts to enforce privacy laws and ensure that consumers' personal information is handled securely, particularly in the rapidly growing area of digital marketing.⁷⁴ The commission will continue to be the primary regulator of advertising and marketing practices in the United States, although the direction of the FTC is likely to be influenced by the political party of the presidential administration.

XHIBIT 20–14

The FTC issues an annual highlights report on its activities and initiatives.

ource: Federal Trade Commission

2018 Annual Highlights



Federal Trade Commission
March 2019

While the FTC is the major regulator of advertising for products sold in interstate commerce, several other federal agencies and departments also regulate advertising and promotion.

Additional Federal Regulatory Agencies

The Federal Communications Commission The Federal Communications Commission (FCC), founded in 1934 to regulate broadcast communication, has jurisdiction over the radio, television, telephone, and telegraph industries. The FCC has the authority to license broadcast stations as well as to remove a license or deny renewal to stations not operating in the public's interest. The commission's authority over the airways gives it the power to control advertising content and to restrict what products and services can be advertised on radio and TV. The FCC can eliminate obscene and profane programs and/or messages and those it finds in poor taste. While

the FCC can purge ads that are deceptive or misleading, it generally works closely with the FTC in the regulation of advertising.

Many of the FCC's rules and regulations for TV and radio stations have been eliminated or modified. The FCC no longer limits the amount of television time that can be devoted to commercials. (But in 1991, the Children's Television Act went into effect. The act limits advertising during children's programming to 10.5 minutes an hour on weekends and 12 minutes an hour on weekdays.)

The FCC has become very active in enforcing laws governing the airing of obscene, indecent, and profane material. For example, in page 691 2004 the commission fined "shock jock" Howard Stern \$495,000 for broadcasting indecent content and also levied fines against Clear Channel Communications (now iHeart-Communications Inc.), the nation's largest owner of radio stations, which carried his syndicated show. Concern over Stern's constant battling with the FCC led to a decision by Clear Channel to drop his daily radio show.⁷⁵ Stern subsequently signed a contract with SiriusXM Satellite radio, the subscription-based radio service, where his show is not subject to FCC regulations. The FCC also stepped up its enforcement of obscenity in the wake of the controversy following the baring of Janet Jackson's breast during the halftime show of the 2004 Super Bowl (Exhibit 20–15).⁷⁶ These incidents resulted in federal legislation dramatically increasing the amount both radio and television networks and stations can be fined for broadcast obscenity violations.

XHIBIT 20–15

Janet Jackson's "wardrobe malfunction" during the 2004 Super Bowl halftime show led to greater enforcement of obscenity laws by the FCC.

Source: Frank Micelotta/Staff/Getty Images



The FCC has also become involved in issues affecting the area of publicity and public relations. In 2005, the commission issued a missive insisting that broadcasters screen video news releases to ensure that they clearly disclose “the nature, source and sponsorship” of the material. The crackdown was designed to address a marketing practice whereby prepackaged promotional videos sent to TV stations by companies, organizations, and government agencies are represented as news stories.⁷⁷

The FCC is also currently considering the regulation of the use of product placements in television shows. Unlike some countries, the United States does not prohibit product placements in the broadcast or motion picture industries. However, the use of undisclosed commercial messages in broadcasting has been regulated by section 317 of the Communications Act of 1934, which requires broadcasters to disclose “any money, service or valuable consideration” that is paid to, or promised to, or charged by the broadcaster in exchange for product placements. However, broadcasters do not have to disclose product placements when they are offered without charge or for a nominal fee. The FCC has basically interpreted the purpose

of section 317 to be that the viewers in the TV audience must be clearly informed that what they are viewing has been paid for and that the entity paying for the broadcast must be clearly identifiable.

Critics are concerned not just by the prevalence of products appearing in shows but also by the various forms of integration whereby brands are actually written into TV plots. Some are calling on the FCC to require the TV networks to disclose product placements by using some form of onscreen notification system. Proposals range from requiring programs to run text along the bottom of the screen when a product appears in a scene, to using a flashing red light to alert viewers that a marketer is promoting a product in a TV show.⁷⁸

The Food and Drug Administration Now under the jurisdiction of the Department of Health and Human Services, the FDA has authority over the labeling, packaging, branding, ingredient listing, and advertising of packaged foods and drug products, as well as cosmetics. The FDA is authorized to require caution and warning labels on potentially hazardous products and also has limited authority over nutritional claims made in food advertising. This agency has the authority to set rules for promoting these products and the power to seize food and drugs on charges of false and misleading advertising.

Like the FTC, the Food and Drug Administration has become a very aggressive regulatory agency in recent years. The FDA has cracked down on a number of commonly used descriptive terms it believes are often abused in the labeling and advertising of food products—for example, *natural*, *light*, *no cholesterol*, *fat free*, and *organic*. The FDA has also become tougher on nutritional claims implied by brand names that might send a misleading message to consumers. For example, Great Foods of America was not permitted to continue using the HeartBeat trademark under which it sold most of its foods. The FDA argued the trademark went too far in implying the foods have special advantages for the heart and overall health.

Many changes in food labeling are a result of the Nutritional Labeling and Education Act, which Congress passed in 1990. Under this law the FDA established legal definitions for a wide range of terms (such as page 692 *low fat*, *light*, and *reduced calories*) and required

straightforward labels for all foods beginning in early 1994 (Exhibit 20–16). In its current form the act applies only to food labels, but it may soon affect food advertising as well. The FTC would be asked to ensure that food ads comply with the new FDA standards.

XHIBIT 20–16

The Nutritional Labeling and Education Act requires that labels be easy for consumers to understand.

Source: McGraw-Hill Education



The FDA has also become increasingly active in policing health-related claims for food products. General Mills received a warning letter from the FDA for violations stemming from claims the company has been making that eating Cheerios cereal can reduce cholesterol by 4 to 6 percent in six weeks. The FDA charged that the claims made for the product based on clinical studies would make it a drug, not a food, because it is intended for use in the

prevention, mitigation, and treatment of disease. General Mills worked with the FDA to resolve the issue as the cholesterol-reduction claims are an important part of the brand's positioning and used as the basis for much of its advertising.⁷⁹ However, the company did remove the specific cholesterol reduction claim and replaced it with a more general statement that the toasted oats "can help reduce cholesterol" and "along with a diet low in saturated fat and cholesterol may reduce the risk of heart disease."⁸⁰

Another regulatory area where the FDA has been heavily involved is the advertising and promotion of tobacco products. In 1996, President Clinton signed an executive order declaring that nicotine is an addictive drug and giving the FDA broad jurisdiction to regulate cigarettes and smokeless tobacco. Many of the regulations resulting from this order were designed to keep teenagers from smoking.⁸¹ However, the tobacco industry immediately appealed the order. While continuing to fight its legal battle with the federal government over the FDA regulations, the tobacco makers did agree to settle lawsuits brought by 46 states against the industry in late 1998 by signing the Master Settlement Agreement. This settlement was considered a better deal for the tobacco industry, as many of the onerous cigarette marketing restrictions contained in the original FDA proposal settlement were missing. The agreement allows large outdoor signs at retailers, whereas the original proposal banned all outdoor ads. The original deal banned all use of humans and cartoons in ads, while the current settlement bans only cartoons and even permits their use on cigarette packs. And while the original proposal eliminated sports sponsorships, the current agreement allows each company to continue one national sponsorship.⁸²

In 2000, the United States Supreme Court ruled that the Food and Drug Administration did not have the authority to regulate tobacco as a drug and that Congress would have to specifically enact legislation to allow the FDA to regulate tobacco. As a result, all FDA tobacco regulations were dropped. However, in June 2009 Congress passed a tobacco-control bill giving the FDA sweeping new powers over the packaging, manufacturing, and marketing of tobacco products, and it was signed into law by President Obama shortly thereafter. The Family Smoking Prevention and Tobacco Control Act calls for restrictions on marketing and sales to youths, including a ban on all outdoor tobacco advertising within 1,000 feet of schools and

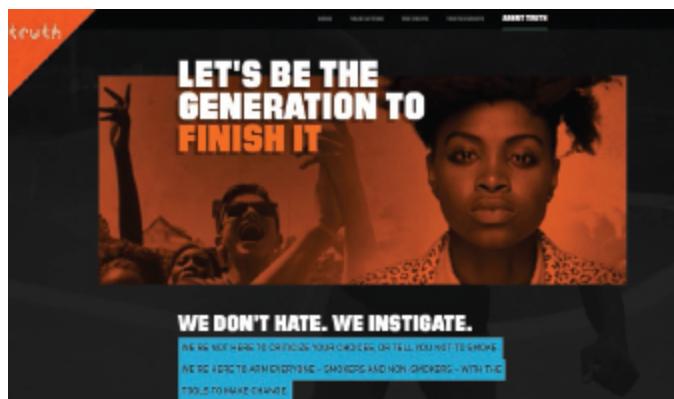
playgrounds; a ban on all remaining tobacco-brand sponsorships of sports and entertainment events; a ban on free giveaways of nontobacco products with the purchase of a tobacco product; a limit on advertising in publications with significant teen readership as well as limiting outdoor and point-of-sale advertising, except in adult-only facilities, to black-and-white ads only; and a restriction on ads on vending machines and self-service displays to adult-only facilities.⁸³

A number of consumer advocacy groups as well as health departments in many states run ads warning consumers against the dangers of smoking and tobacco-related diseases. For example, the American Legacy Foundation (ALF), which was established as part of the 1998 tobacco settlement and is dedicated to reducing tobacco use, has run a number of hard-hitting ads warning consumers of the risk of smoking. One of the most successful programs developed by the ALF has been truth®, which was launched in 2000 and is the largest national youth smoking prevention page 693 campaign. truth® exposes the tactics of the tobacco industry, the truth about addiction, the health effects and consequences of smoking, and is designed to allow teens to make informed choices about tobacco use by giving them the facts about the industry and its products. truth® is a fully integrated campaign that includes advertising in media that are popular with youth, a summer travel tour that allows teens to engage firsthand with the campaign, and a website (www.thetruth.com) that contains a number of distinctive interactive elements (Exhibit 20–17).

XHIBIT 20–17

truth® has been a very effective youth smoking prevention campaign by the American Legacy Foundation, which was created and funded by the four largest tobacco companies.

Source: Truth Initiative



In 2016 the Food and Drug Administration was given the authority to regulate electronic cigarettes (e-cigarettes) as well as other tobacco products.⁸⁴ The new regulations cover products including hookah, cigar and pipe tobacco, vape pens, and refillable vaporizers. The rules prohibit sales to minors, ban free samples, require package warning labels, and call for makers of products released after 2007 to seek FDA permission to remain on store shelves. While the tobacco industry has claimed that e-cigarettes help people trying to quit smoking, health experts argue that it is important for lawmakers to control their use as users of the product can still become hooked on nicotine and e-cigarette use has been rising steadily, especially among youth. According to the 2018 National Youth Tobacco Survey, e-cigarette use or “vaping” among middle and high school students increased has increased from just 1.5 percent in 2011 to 20 percent in 2018 with over 3.6 million teens and pre-teens currently using the product (Exhibit 20–18). In addition, the proportion of e-cigarette users in high school who vape 20 days or more a month has reached 28 percent. Flavors in tobacco products are problematic because they can be very appealing to youth and are frequently listed as one of the top three reasons this population uses e-cigarettes.⁸⁵ The FDA has responded to the problem with a series of proposals aimed at limiting sales of e-cigarette products to minors. The proposals include ending sales of e-cigarette products in flavors that appeal to kids—such as cherry, vanilla, crème, tropical, and melon—by banning their sale in many retail locations and manufacturers’ online stores that are accessible to minors.⁸⁶

XHIBIT 20–18

The use of e-cigarettes among young people is a major problem being addressed by the FDA.

Source: JUUL Labs, Inc.



Another area where the Food and Drug Administration has become more involved is the advertising of prescription drugs. Tremendous growth in direct-to-consumer (DTC) drug advertising has occurred since the FDA issued new guidelines making it easier for pharmaceutical companies to advertise prescription drugs to consumers. In 2007, Congress passed legislation giving the FDA more power to regulate DTC drug advertising. The bill gives the FDA the power to require drug companies to submit TV ads for review before they run, but it can only recommend changes, not require them. The bill also granted the FDA the power to impose fines on a drug company if its ads are found to be false and misleading. The fines can amount to \$250,000 a day for the first violation in any three-year period and up to \$5,000 for any subsequent violation.⁸⁷

The advertising of prescription drugs directly to consumers has always been a very controversial issue; the United States and New Zealand are the only two countries in the world where the practice is permitted. The pharmaceutical companies contend that DTC advertising helps inform and educate consumers about diseases and treatment options, encourages people to seek medical advice, and helps remove stigmas associated with medical

conditions. They also note that the advertising helps generate sales revenue needed to fund costly research and development of new drugs. However, groups such as the American Medical Association (AMA) are strongly opposed to the practice, arguing that DTC drug advertising misinforms patients; promotes the use of drugs before long-term safety ^{page 694} profiles can be known; medicalizes and stigmatizes normal conditions and bodily functions, such as aging and low testosterone; and has led to society's overuse of prescription drugs. They also argue that drug advertising leads patients to ask their doctors to prescribe specific drugs when other treatments or lifestyle changes might be better for them.

Ethical Perspective 20–1 >>>

Advertising Cannabis Is Difficult, Even Where It Is Legal

Over the past decade, attitudes toward the use of cannabis or marijuana in America have changed as sanctioned medicinal use is legal in 33 states in 2019 while recreational use has been legalized in 11, including Alaska, California, Colorado, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont, and Washington, as well as the District of Columbia. Canada legalized marijuana for both medical and recreational use in 2018, joining Uruguay as the only other country that has fully legalized the recreational use and sale of recreational cannabis. The U.S. cannabis market is estimated to about \$10 billion currently and is projected to reach \$80 billion over the next decade, which is why cannabis companies are racing to build national brand identities and market their products to consumers. However, there is just one problem: It is very hard to advertise your product when the federal government considers you a drug dealer and many of the media vehicles you want to use will not accept your ads.

Cannabis is regulated at the federal level by the Food and Drug Administration (FDA), and the marketing of the product falls under the Food, Drug, and Cosmetic Act. Under federal law, cannabis is still considered a Schedule I dangerous drug that is highly addictive and has no acceptable medicinal value, and it is treated like other controlled substances, such as cocaine and heroin. Federal cannabis laws are very serious, and punishment for violating them is often very steep. Doctors may not prescribe cannabis for medical use under federal law, although they can recommend its use under the First Amendment.

While cannabis is considered illegal under federal laws, its use is permitted for medicinal and/or recreational use in the states that have legalized it. Once a state legalizes medicinal and/or recreational use of marijuana, state regulators must decide how dispensaries and retailers can market their products to consumers. Regulations can affect everything from store signage, the content of advertisements, permissible locations and platforms for ads, and required disclosures. Some states have broad regulations covering all of these areas, while others have not addressed advertising at all. Further, some states model their advertising regulations on similar products such as alcohol, whereas others have decided to treat marijuana advertising uniquely. There is not much conformity between states with respect to marijuana advertising regulation, which may be due, in part, to the continuing conflict between state and federal laws relating to legalization.

Individual states have varying regulations regarding the marketing and advertising of cannabis. For example, in California, it is common in many cities to see billboards for marijuana dispensaries as well as delivery services, while Maryland prohibits most cannabis ads, including billboards. And even in states where billboard advertising is permitted, there are often restrictions regarding the images that can be used or what percentage of people in the market who will see the board are adults. Many municipalities have rules that restrict billboards from areas where young people congregate such as schools, libraries, and recreational centers.

Cannabis marketers in all states where it is legal also face a number of other challenges. The Federal Communications Commission (FCC) has strict guidelines for broadcasters regarding the advertising of controlled substances, which makes it very difficult to air a commercial that might be seen in a state where pot is not legal. Digital platforms, including Facebook, Instagram (which is owned by Facebook), and Google, do not allow drug or drug-related promotions on their sites and are unlikely to change their policies until marijuana is legalized at the federal level. Online advertising on social media or Google would be an ideal platform because the ads could be targeted to consumers in states where cannabis is legal and to people over the age of 21, but these media are off limits to marketers. Some companies open accounts on social media sites such as Instagram, which does allow “marijuana advocacy content” but are often shut down with little warning or explanation.



Source: MME, LLC

Another challenge facing marketers is that there is still a stigma associated with marijuana because users are often perceived as “stoners” who are lazy, unproductive, and even criminal. One cannabis company, MedMen, recently created an advertising campaign called “Forget Stoner” that shows photographs of a variety of people using pot, including athletes and grandparents, in an effort to refute the stigma often attached to marijuana users. The company also worked with Oscar-winning director Spike Jonze to create a two-minute film that will run on some cable TV networks and in movie theaters across three states. Many in the advertising industry see cannabis as a blank canvas with tremendous creative opportunities for brand building. However, most ad agencies and production companies are reluctant to work for cannabis accounts for fear of what other clients might think and possible backlash against them.

It is difficult to predict if the FDA will change its position regarding the classification of marijuana as a dangerous, Schedule I drug because there are still concerns regarding the long-term effects of cannabis use, potential abuse, use by minors, and impaired driving. However, the FDA has stated that it is committed to protecting public health while also taking steps to improve the efficiency of regulatory pathways for the lawful marketing of appropriate cannabis and cannabis-derived products. Any softening of the FDA's regulatory position could open the doors for widespread advertising and promotion of marijuana. However, this will also require changes in the public's perceptions and attitudes toward pot. In 2019, CBS refused to air a commercial touting the benefits of medical marijuana during the Super Bowl. However, it may only be a matter of time until cannabis ads start appearing on TV as well as online and creating a lot of “buzz.”

Sources: James Razzall, “Opinion: Navigating the Stigmas, Rules and Taboos of Cannabis Advertising,” *Advertising Age*, April 16, 2019, <https://adage.com/article/cmo-strategy/opinion-navigating-stigmas-rules-and-taboos-cannabis-advertising/2164931>; FDA Regulations of Cannabis and Cannabis-Derived Products, Food and Drug

Administration, April 2, 2019, www.fda.gov/news-events/public-health-focus/fda-regulation-cannabis-and-cannabis-derived-products-questions-and-answers; Rachel Siegel, "Even Where It's Legal to sell Marijuana, It's Hard to Advertise It," *The Washington Post*, April 5, 2018, https://www.washingtonpost.com/news/business/wp/2018/04/05/even-where-its-legal-to-sell-marijuana-its-hard-to-advertise-it/?noredirect=on&utm_term=.0dadbb191234.

The AMA, along with many other consumer and medical groups, has been calling for a total ban on DTC drug advertising. While the battle over drug advertising is likely to continue, many argue that DTC in traditional media such as television and print is likely to fade away in the coming years as consumers go online to get information about drug products. It has been noted that more than 60 percent of consumers already get their first piece of health information by going online, e-mailing their friends, or checking social media.⁸⁸ Thus, banning DTC drug advertising will not really matter because the activity is happening in areas that companies cannot control and the government really cannot regulate.

Another drug-related area that falls under the jurisdiction of the Food and Drug Administration is cannabis or marijuana, which has been approved for medicinal use in 33 states and recreational use in 11 as of 2019 but is still classified as a dangerous drug by the FDA. Ethical Perspective 20–1 discusses the legal challenges cannabis companies face in advertising their products.

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The U.S. Postal Service Many marketers use the U.S. mail to deliver advertising and promotional messages. The U.S. Postal Service has control over advertising involving the use of the mail and ads that involve lotteries, obscenity, or fraud. The regulation against fraudulent use of the mail has been used to control deceptive advertising by numerous direct-response advertisers. These firms advertise on TV or radio or in magazines and newspapers and use the U.S. mail to receive orders and payment. Many have been prosecuted by the Post Office Department for use of the mail in conjunction with fraudulent or deceptive offers.

Bureau of Alcohol, Tobacco, Firearms and Explosives The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) is an agency within the Treasury Department that enforces laws, develops regulations, and is responsible for tax collection for the liquor industry. ATF regulates and controls the advertising of alcoholic beverages through the enforcement of the Federal Alcohol Administration Act, which is designed to prevent misleading labeling or advertising that may result in consumer deception and also includes provisions to regulate the marketing promotional practices concerning the sale of alcoholic beverages. The agency determines what information can be provided in ads as well as what constitutes false ^{page 696} and misleading advertising. It is also responsible for including warning labels on alcohol advertising and banning the use of active athletes in beer commercials. ATF can impose strong sanctions for violators. As discussed earlier in the chapter, the advertising of alcoholic beverages has become a very controversial issue, with many consumer and public interest groups calling for a total ban on the advertising of beer, wine, and liquor.

The Lanham Act

While most advertisers rely on self-regulatory mechanisms and the FTC to deal with deceptive or misleading advertising by their competitors, many companies are filing lawsuits against competitors they believe are making false claims. One piece of federal legislation that has become increasingly important in this regard is the Lanham Act. This act was originally written in 1947 as the Lanham Trade-Mark Act to protect words, names, symbols, or other devices adopted to identify and distinguish a manufacturer's products. The **Lanham Act** was amended to encompass false advertising by prohibiting "any false description or representation including words or other symbols tending falsely to describe or represent the same." While the FTC Act did not give individual advertisers the opportunity to sue a competitor for deceptive advertising, civil suits are permitted under the Lanham Act.

Suing competitors for false claims was made even easier with passage of the TradeMark Law Revision Act of 1988. According to this law, anyone is vulnerable to civil action who "misrepresents the nature, characteristics, qualities, or geographical origin of his or her or another person's goods,

services, or commercial activities.” This wording closed a loophole in the Lanham Act, which prohibited only false claims about one’s own goods or services. While many disputes over comparative claims are never contested or are resolved through the NAD, more companies are turning to lawsuits for several reasons: the broad information discovery powers available under federal civil procedure rules, the speed with which a competitor can stop the offending ad through a preliminary injunction, and the possibility of collecting damages.⁸⁹ However, companies do not always win their lawsuits. Under the Lanham Act you are required to prove five elements to win a false advertising lawsuit containing a comparative claim.⁹⁰ You must prove that:

- False statements have been made about the advertiser’s product or your product.
- The ads actually deceived or had the tendency to deceive a substantial segment of the audience.
- The deception was “material” or meaningful and is likely to influence purchasing decisions.
- The falsely advertised products or services are sold in interstate commerce.
- You have been or likely will be injured as a result of the false statements, by either loss of sales or loss of goodwill.

Marketers using comparative advertising have to carefully consider whether their ads make claims that may misrepresent their company or brand relative to a competitor or make disparaging claims about a competitor that might result in result in a lawsuit. For example, the comparative advertising battle between MillerCoors and Anheuser Busch over the use of corn syrup in Miller Lite and Coors Light beer, which was discussed in Chapter 6, resulted in a lawsuit under the Lanham Act. MillerCoors accused Anheuser Busch InBev of false advertising for promoting Bud Light as having 100 percent less corn syrup than Coors/Light or Miller Lite.⁹¹ Under the Lanham Act, companies can file lawsuits for harmful comparative advertising that often result in very large settlements if the defendant is found guilty of making a deceptive or unsubstantiated claim that is harmful to a competitor. A study by Michael J. Barone and his colleagues provides a framework for

developing measures to assess the misleading effects that may arise from various types of comparative advertising.⁹²

STATE REGULATION

In addition to the various federal rules and regulations, advertisers must also concern themselves with numerous state and local controls. An important early development in state regulation of advertising was the adoption in 44 states of the *Printers Ink* model statutes as a basis for advertising regulation. These statutes were drawn up in 1911 by *Printers Ink*, for many years the major trade publication of the advertising industry. Many states have since modified the original statutes and adopted laws similar to those of the Federal Trade Commission Act for dealing with false and misleading advertising.

In addition to recognizing decisions by the federal courts regarding false or deceptive practices, many states have special controls and regulations governing the advertising of specific industries or practices. As the federal government became less involved in the regulation of national advertising during the 1980s, many state attorneys general (AGs) began to enforce state laws regarding false or deceptive advertising.

The **National Association of Attorneys General (NAAG)** moved against a number of national advertisers as a result of inactivity by the FTC during the Reagan administration. In 1987, the NAAG developed enforcement guidelines on airfare advertising that were adopted by more than 40 states. The NAAG has also been involved in other regulatory areas, including car-rental price advertising as well as advertising dealing with nutrition and health claims in food ads. The NAAG's foray into regulating national advertising raises the issue of whether the states working together can create and implement uniform national advertising standards that will, in effect, supersede federal authority. However, an American Bar Association panel concluded that the Federal Trade Commission is the proper regulator of national advertising and recommended the state AGs focus on practices

that harm consumers within a single state.⁹³ This report also called for cooperation between the FTC and the state attorneys general.

In recent years state attorneys general have been working with the FTC and other federal government agencies on false advertising cases. For example, 27 state attorneys general worked with the FDA in the deceptive advertising case for Bayer's Yaz birth-control pill that resulted in corrective advertising. A group of state attorneys general also worked with the FTC in a recent case against the makers of Airborne, a multivitamin and herbal supplement whose labels and ads falsely claimed that the product cures and prevents colds. Airborne had been making the false claims since 1999 and agreed to refund the money to consumers who had bought the product, as part of a \$23.3 million class action settlement.⁹⁴

In 2016, the State Attorney General in New York filed a lawsuit against daily fantasy sports betting sites DraftKings and FanDuel, the two biggest companies in the industry. The lawsuit claimed that the two companies consistently misled consumers with false advertising by making it appear that novice players had a realistic chance of winning big payouts when, in reality, most lost money over time. The attorney general alleged that casual and novice players were at a disadvantage when competing against frequent professional players, who often use sophisticated analytics and statistical information. Both DraftKings and FanDuel agreed to pay \$6 million to settle the claims and also were required to maintain a webpage that provides information about the rate of success of those who play in its fantasy contests, including the percentage of winnings captured by the top 1, 5, and 10 percent of players.⁹⁵ Deceptive advertising lawsuits were filed in several other states, and both companies have taken steps to provide more information to fantasy players regarding their odds of winning and to educate them regarding them about how their contests operate (Exhibit 20–19).

XHIBIT 20–19

Fantasy sports betting sites must disclose information to players regarding the odds of winning.

ource: *Draft Kings*



Advertisers are concerned about the trend toward increased regulation of advertising at the state and local levels because it could mean that national advertising campaigns would have to be modified for every state or municipality. Yet the FTC takes the position that businesses that page 698 advertise and sell nationwide need a national advertising policy. While the FTC recognizes the need for greater cooperation with the states, the agency believes regulation of national advertising should be its responsibility.⁹⁶ Just in case, the advertising industry is still keeping a watchful eye on changes in advertising rules, regulations, and policies at the state and local levels.

REGULATION OF OTHER PROMOTIONAL AREAS

LO 20-4

So far we've focused on the regulation of advertising. However, other elements of the promotional mix also come under the surveillance of federal, state, and local laws and various self-regulatory bodies. This section examines some of the rules, regulations, and guidelines that affect sales promotion, direct marketing, and marketing on the Internet.

Sales Promotion

Both consumer- and trade-oriented promotions are subject to various regulations. The Federal Trade Commission regulates many areas of sales promotion through the Marketing Practices Division of the Bureau of Consumer Protection. Many promotional practices are also policed by state attorneys general and local regulatory agencies. Various aspects of trade promotion, such as allowances, are regulated by the Robinson-Patman Act, which gives the FTC broad powers to control discriminatory pricing practices.

Contest and Sweepstakes As noted in Chapter 16, numerous legal considerations affect the design and administration of contests and sweepstakes, and these promotions are regulated by a number of federal and state agencies. There are two important considerations in developing contests (including games) and sweepstakes. First, marketers must be careful to ensure their contest or sweepstakes is not classified as a *lottery*, which is considered a form of gambling and violates the Federal Trade Commission Act and many state and local laws. A promotion is considered a lottery if a prize is offered, if winning a prize depends on chance and not skill, and if the participant is required to give up something of value in order to participate. The latter requirement is referred to as *consideration* and is the basis on which most contests, games, and sweepstakes avoid being considered lotteries. Generally, as long as consumers are not required to make a purchase to enter a contest or sweepstakes, consideration is not considered to be present and the promotion is not considered a lottery.

The second important requirement in the use of contests and sweepstakes is that the marketer provide full disclosure of the promotion. Regulations of the FTC, as well as many state and local governments, require marketers using contests, games, and sweepstakes to make certain all of the details are given clearly and to follow prescribed rules to ensure the fairness of the game.⁹⁷ Disclosure requirements include the exact number of prizes to be awarded and the odds of winning, the duration and termination dates of the promotion, and the availability of lists of winners of various prizes (Exhibit 20–20). The FTC also has specific rules governing the way games and contests are conducted, such as requirements that game pieces be randomly

distributed, that a game not be terminated before the distribution of all game pieces, and that additional pieces not be added during the course of a game.

XHIBIT 20–20

Marketers are required to provide consumers with full details of a contest or sweepstakes.

source: Scion by Toyota Motor Sales USA, Inc



A number of states have responded to concerns over fraud on the part of some contest and sweepstakes operators and have either passed or tightened prize notification laws, requiring fuller disclosure of rules, page 699 odds, and the retail value of prizes. Some of the most ambitious legal actions are taking place in individual states, where prosecutors are taking sweepstakes and contest companies to court for misleading and deceptive practices.⁹⁸

Many marketers are now using the Internet and social media sites such as Facebook, YouTube, and Twitter to run their contests and sweepstakes. This is creating additional issues that marketers must consider such as whether automated or repetitive electronic submissions will be accepted, how the contest website will detect violations, and restrictions on length, size, or

format of content submitted. If the contest or sweepstakes is being marketed using e-mail, marketers must comply with online data privacy laws as well as the CAN-SPAM Act, which is discussed later in the chapter. If the online entry form collects personal information from persons under the age of 13 (including e-mail addresses), marketers must comply with the Children's Online Privacy Protection Act.⁹⁹

Marketers that post audiovisual entries on YouTube or feature a contest on Facebook or Twitter must comply with each site's guidelines for on-site promotions. For contests that involve user-generated content, such as photos, videos, or short stories, the rules must contain specific language granting the company the necessary rights and licenses to use the content. Marketers that want to use the content for marketing purposes should obtain a liability and publicity release from every individual who appears in the photos or videos that are displayed on their website.¹⁰⁰ The Internet and social media provide marketers with a greater opportunity to promote their contests and sweepstakes to specific target audiences and make the administration of these promotions more efficient and cost-effective. However, they also bring a host of additional legal factors that must be considered by companies.

Some social media sites are also imposing their own restrictions on how marketers can conduct contests and sweepstakes using their platforms. For example, in 2014 Facebook changed its policy to prohibit marketers from "like-gating" a page to gain access to content or enter a contest. Facebook said the change was made to make sure people are liking pages because they truly want to connect with a business or brand, not because they were enticed by artificial incentives such as promotional offers.¹⁰¹

Premiums Another sales promotion area subject to various regulations is the use of premiums. A common problem associated with premiums is misrepresentation of their value. Marketers that make a premium offer should list its value as the price at which the merchandise is usually sold on its own. Marketers must also be careful in making premium offers to special audiences such as children. While premium offers for children are legal, their use is controversial; many critics argue that they encourage children to request a product for the premium rather than for its value. The Children's Advertising Review Unit has voluntary guidelines concerning the use of

premium offers. These guidelines note that children have difficulty distinguishing a product from a premium. If product advertising contains a premium message, care should be taken that the child's attention is focused primarily on the product. The premium message should be clearly secondary. Conditions of a premium offer should be stated simply and clearly. "Mandatory" statements and disclosures should be stated in terms that can be understood by the child audience.¹⁰²

Trade Allowances Marketers using various types of trade allowances must be careful not to violate any stipulations of the Robinson-Patman Act, which prohibits price discrimination. Certain sections of the act prohibit a manufacturer from granting wholesalers and retailers various types of promotional allowances and/or payments unless they are made available to all customers on proportionally equal terms.¹⁰³ Another form of trade promotion regulated by the Robinson-Patman Act is vertical cooperative advertising. The FTC monitors cooperative advertising programs to ensure that co-op funds are made available to retailers on a proportionally equal basis and that the payments are not used as a disguised form of price discrimination.

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Direct Marketing

As we saw in Chapter 14, direct marketing is growing rapidly. Many consumers now purchase products directly from companies in response to TV and print advertising or direct selling. The Federal Trade Commission enforces laws related to direct marketing, including mail-order offers, the use of 900 telephone numbers, and direct-response TV advertising. The U.S. Postal Service enforces laws dealing with the use of the mail to deliver advertising and promotional messages or receive payments and orders for items advertised in print or broadcast media.

A number of laws govern the use of mail-order selling. The FTC and the Postal Service police direct-response advertising closely to ensure the ads are not deceptive or misleading and do not misrepresent the product or

service being offered. Laws also forbid mailing unordered merchandise to consumers, and rules govern the use of “negative option” plans whereby a company proposes to send merchandise to consumers and expects payment unless the consumer sends a notice of rejection or cancellation.¹⁰⁴ FTC rules also encourage direct marketers to ship ordered merchandise promptly. Companies that cannot ship merchandise within the time period stated in the solicitation (or 30 days if no time is stated) must give buyers the option to cancel the order and receive a full refund.¹⁰⁵

Another area of direct marketing facing increased regulation is telemarketing. With the passage of the Telephone Consumer Protection Act of 1991, marketers who use telephones to contact consumers must follow a complex set of rules developed by the Federal Communications Commission. These rules require telemarketers to maintain an in-house list of residential telephone subscribers who do not want to be called. Consumers who continue to receive unwanted calls can take the telemarketer to state court for damages of up to \$500. The rules also ban telemarketing calls to homes before 8:00 A.M. and after 9:00 P.M.; automatic dialer calls; and recorded messages to emergency phones, health care facilities, and numbers for which the call recipient may be charged. They also ban unsolicited junk fax ads and require that fax transmissions clearly indicate the sender’s name and fax number.¹⁰⁶

In 2003, Congress approved a Federal Trade Commission proposal for the formation of a National Do Not Call Registry allowing consumers to opt out of most commercial telemarketing.¹⁰⁷ Consumers can place their home phone numbers, as well as personal cell phone numbers, on the National Do Not Call Registry (Exhibit 20–21). Commercial telemarketers must pay a fee to access the registry and generally are prohibited from calling the listed numbers. Telemarketers have three months to comply once a number goes on the list, and a consumer’s registration lasts five years. Political and charitable solicitation calls are not affected by the regulation, and telemarketers can call consumers with whom they have an established relationship. Marketers face penalties of \$11,000 per incident for calling someone on the list. The Federal Trade Commission, the Federal Communications Commission, and individual states are enforcing the

National Do Not Call Registry, which contains nearly 250 million phone numbers.¹⁰⁸

XHIBIT 20–21

The National Do Not Call Registry protects consumers from calls by telemarketers.

Source: Federal Trade Commission

The screenshot shows the homepage of the National Do Not Call Registry. At the top, the Federal Trade Commission logo and the text "FEDERAL TRADE COMMISSION PROTECTING AMERICA'S CONSUMERS" are visible. Below the logo, there are links for "Back to FTC.gov | Español" and "More Information | Privacy & Security | Home". The main title "National Do Not Call Registry" is prominently displayed in green, with a house icon and a telephone receiver icon to its left. A "En Español" link is located to the right of the title. Below the title are three buttons: "Submit a Complaint" (green), "Verify a Registration" (blue), and "Register a Phone Number" (orange). Further down, a section titled "What You Should Know About the National Do Not Call Registry" provides information about the registry's purpose and how it works. It includes a note about filing a complaint if you receive unwanted calls after your number was on the registry for 31 days. A warning box cautions against responding to calls from scammers claiming to represent the registry. At the bottom, a note for sellers and telemarketers directs them to the website for access.

The National Do Not Call Registry affects the direct-marketing industry because it greatly reduces the number of households that telemarketers can call. As might be expected, the direct-marketing industry is strongly opposed to the registry, arguing that it violates their First Amendment rights and, further, that such a program is not needed. The Data & Marketing Association (DMA), which is the primary trade group for the direct-page 701marketing industry, has argued that consumers already have a number of do-not-call options. They can ask to be excluded from an

individual company's telemarketing list; at the same time they can sign up with state lists or pay \$5 to sign up on the voluntary national list maintained by the Data & Marketing Association. The DMA argues that the national registry imposes more bureaucracy on the direct-marketing industry and that the same goal can be achieved by the industry itself with better education and enforcement.

The Data & Marketers Association and the American Teleservices Association, which represent callers, challenged the legality of the registry on the grounds that it took away their rights to First Amendment-protected speech and that it was excessive and poorly drafted, with competitive marketers forced to abide by different rules. However, in 2004 the U.S. Court of Appeals upheld the registry's validity, ruling that it is a valid commercial speech regulation. The appellate court said that because the registry doesn't affect political or charitable calls and because there is a danger of abusive telemarketing and invasion of consumer privacy from telemarketers, the government has a right to regulate its use.¹⁰⁹

Direct marketers have been adjusting their telemarketing strategies to deal with the restrictions imposed by the Do Not Call Registry. They are focusing more attention on generating leads through promotional efforts such as sweepstakes and direct-mail programs, prompting consumers to opt in and agree to receive calls from direct marketers.¹¹⁰ Some industry experts as well as academics argue that the Do Not Call Registry may actually improve telemarketing practice and the general efficiency of the business because direct marketers must focus more attention on consumers who are receptive to receiving their telemarketing calls.¹¹¹ However, there is also concern that some companies are finding loopholes in the rules governing the Do Not Call Registry. For example, one technique that has emerged is the use of a marketing tool called a "lead card," which invites a recipient to mail a reply card for free information. However, the cards often fail to warn consumers that by sending a reply, they are giving up their right to avoid telephone solicitations from the sender—even if their phone numbers are listed on the Do Not Call list.¹¹²

Another tactic being used by some companies to avoid the Do Not Call Registry is to use sweepstakes entry forms as a way to harvest consumers' telephone numbers for telemarketing purposes. When done correctly, this may

be a legitimate direct-marketing tool; however, the FTC has cracked down on some companies that have violated Do Not Call regulations by calling phone numbers obtained via sweepstakes entry forms. Companies that want to collect telemarketing leads through a sweepstakes entry form must clearly and conspicuously disclose that their entry-form information will be used for telemarketing purposes and include a statement to be signed by consumers expressing agreement under the Do Not Call provision.¹¹³

The direct-marketing industry is also scrutinized by various self-regulatory groups, such as the Data & Marketing Association and the Direct Selling Association, that have specific guidelines and standards member firms are expected to adhere to and abide by. But some critics argue that these self-regulatory groups are not doing enough to keep consumers from receiving unwanted marketing messages, such as calls from telemarketers and direct-mail offers and solicitations. Thus, it is likely that they will continue to call for more government intervention and regulations.

Direct mail is also an area that has been under attack as many consumers are tired of seeing their mailboxes bulging with catalogs as well other forms of direct mail and want to take action. Some states have considered legislation that would create state-run do-not-mail registries that would allow consumers to keep unsolicited direct mail out of their mailboxes. However, none of the proposed do-not-mail bills have made it beyond the hearing stage and it may take years before any type of legislation is enacted. A number of advocacy groups are not waiting for the government to address the problem, though, and are taking steps to help consumers reduce the amount of unwanted direct mail they are receiving. Several of these initiatives have been started by groups that are interested in reducing the environmental impact created by the direct-mail industry.

One initiative having a significant impact in terms of reducing the amount of direct mail is Catalog Choice, which was launched in 2007 with the mission of reducing the number of repeat and unsolicited catalog mailings, and promoting the adoption of sustainable industry best practices.¹¹⁴ The company offers an online service that allows people to compile page 702 a list of catalogs, coupons, credit-card offers, and other types of direct mail they do not want to receive. The company then contacts the retailers with a request to take the person's name off their mailing list or

makes a downloadable file available that merchants can then feed into their direct-mail database. Several thousand merchants and marketers have agreed to abide by the site's opt-out requests, including major companies such as Lands' End, Office Depot, and REI. Catalog Choice now operates as a nonprofit organization managed by the Story of Stuff Project.

The direct marketing industry has also taken steps to allow consumers to address the problem. The Data & Marketing Association has developed an online tool called DMAchoice™ that allows consumer to manage the direct mail they receive from marketers. (Exhibit 20–22). The tool allows consumers to pay a \$2 fee and unsubscribe from entire categories of direct mail, such as catalogs and advertisements, or unsubscribe from specific catalogs. The service does not unsubscribe consumers from catalogs for companies they have already been a customer of, only those for which they may be a prospect.¹¹⁵

XHIBIT 20–22

DMAchoice is an online tool that can be used by consumers to manage the direct mail they receive.

Source: Direct Marketing Association



Marketing on the Internet

The rapid growth of the Internet as a marketing tool has created a new area of concern for regulators. The same consumer protection laws that apply to commercial activities in other media apply to online as well. The Federal Trade Commission Act, which prohibits “unfair or deceptive acts or practices,” encompasses Internet advertising, marketing, and sales. Claims made in Internet ads or on websites must be substantiated, especially when they concern health, safety, or performance, and disclosures are required to prevent ads from being misleading and to ensure that consumers receive material information about the terms of a transaction. There are a number of regulatory areas companies must now adhere to when marketing on the Internet. These include privacy issues, data security, online marketing to children, endorsements made through social media or blogs, native advertising, and the use of spam or unsolicited e-mails for commercial purposes.

Privacy and Security As discussed in the chapter opener, consumer privacy and security have become major issues among government regulators as a result of high-profile data breaches and concerns over the collection and use of consumer data for marketing purposes. Marketers must ensure that their online marketing programs are in compliance with consumer privacy and data security guidelines; failure to do so can lead to government enforcement actions, expensive litigation, and negative publicity that can be very damaging to their reputations and have long-term effects.

The major privacy issue regarding the Internet that has emerged involves undisclosed profiling whereby online marketers can profile a user on the basis of name, address, demographics, and online/offline purchasing data. Marketers argue that profiling offers them an opportunity to target specific niches and reach consumers with custom-tailored messages. However, the FTC has stated that Internet sites that claim they don't collect information but permit advertisers to surreptitiously profile viewer sites are violating consumer protection laws and are open to a charge of deception.¹¹⁶ In 1999, DoubleClick, the company that is the leader in selling and managing online advertising as well as tracking web users and is now owned by Google, set off a controversy by connecting consumers' names, addresses, and other personal information with information it collects about where consumers go

online. The controversy resulted in the company being investigated by the Federal Trade Commission and lawsuits being filed in some states.¹¹⁷

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In response to the profiling controversy, companies that collect Internet usage data and information joined together under the banner of the Network Advertising Initiative (NAI) to develop a self-regulatory code.¹¹⁸ The NAI has developed a set of privacy principles in conjunction with the Federal Trade Commission that provides consumers with explanations of Internet advertising practices and how they affect consumers. The NAI has also launched a website (www.networkadvertising.org) that provides consumers with information about online advertising practices and gives them the choice to opt out of targeted advertising delivered by NAI member companies (Exhibit 20–23).

XHIBIT 20–23

The Network Advertising Initiative website provides consumers with information about online advertising practices.

Source: Network Advertising Initiative

Consumer privacy and security have become major issues with the FTC in recent years.¹¹⁹ The agency has requested that marketers voluntarily step up the disclosures they make about data they collect and seek permission from consumers before tracking their Internet surfing behavior.¹²⁰ Many marketers now adhere to the Digital Alliance Ad Choices program, which is a self-regulatory initiative that was implemented by the Advertising Self-Regulatory Council as part of its Interest-Based Advertising Accountability Program discussed earlier in the chapter. However, critics have argued that the program only blocks behavioral ad targeting rather than actually stopping behavioral data collection. There continues to be calls for the FTC to oversee the development of a Do-Not-Track program that would prohibit websites or mobile app operators from compiling or disclosing personal data to third parties for targeted marketing purposes. The FTC began work as far back as 2010 on a Do Not Track initiative that would let consumers opt out of having any of their online data shared with third parties.¹²¹ Although many digital advertising companies agreed to the idea in principle, it has been difficult to reach agreement over the definition, scope, and application

of the program, and little progress has been made over the past six years in finalizing a standard.¹²²

Concerns over privacy and security have also increased with the explosion in the popularity of social media sites such as Facebook, Twitter, and others. For example, the FTC settled a complaint against Twitter charging it deceived consumers and put their privacy at risk by failing to safeguard their personal information, marking the agency's first such case against a social networking service. The FTC ordered Twitter to establish a security program subject to government monitoring for the next 10 years. Twitter agreed to the terms in exchange for the FTC not pursuing a civil lawsuit against the company.¹²³ Facebook has also announced significant changes to its privacy policies giving users more control over their content, reducing the amount of their information that is available to others, and also making it easier to control whether applications and websites can access their information.¹²⁴

Privacy and data security are likely to remain the top of the enforcement lists for the FTC as well as state attorneys general and other regulatory groups. In 2015 the FTC won an important case against Wyndham Hotels and Resorts when an appeals court affirmed its authority to require companies to securely store customer data and punish them for failing to do so. The FTC charged that the company's security practices unfairly exposed the payment card information of hundreds of thousands of consumers to hackers in three separate data breaches. Wyndham challenged the scope of the FTC's authority to regulate data security arguing that the agency had no clear standards for what constitutes reasonable cyber security. However, the appellate court ruled in favor of the FTC, which was seen as a victory for consumer privacy, especially as companies collect increasing amounts of data and information about their customers. Many legal experts view this as a pivotal case that could lead to more scrutiny of companies' data security in the future.¹²⁵

Online Marketing to Children While various proposals are aimed at protecting the privacy rights of adults, one of the biggest concerns is over restricting marketers whose activities or websites are targeted at children. These concerns over online marketing to children led to the passage of the

Children's Online Privacy Protection Act (COPPA) of page 704
1998, which the FTC began enforcing in April 2000.¹²⁶ This act places tight restrictions on collecting information from children via the Internet and requires that websites directed at children and young teens have a privacy policy posted on their home page and areas of the site where information is collected. The law also requires websites aimed at children under age 13 to obtain parental permission to collect most types of personal information and to monitor chat rooms and bulletin boards to make sure children do not disclose personal information there. When the law was enacted in 2000, it was left to the FTC to determine how to obtain the required permission, and the FTC temporarily allowed websites to let parents simply return an e-mail to approve certain information. Since then no other solution to the permission issue has surfaced, and the FTC has made the solution permanent.¹²⁷ However, the issue continues to be an area of concern since many marketers close their websites to children under the age of 13, but children under this age will often lie about their ages to gain access to the sites. The prevalence of social media is adding to the problem; many young people want access to fan clubs, blogs, and other websites that allow online interaction.¹²⁸

As of July 1, 2013, the FTC began enforcing updates to COPPA that are designed to bring the law in line with changes that have occurred in the market, including the explosive growth of mobile device usage among kids and the data collection that goes along with it. The changes include the categorization of geolocation information, photos, and videos as personal information, requiring parental consent before such data are collected on children under age 13. The changes also extended COPPA to cover persistent device identifiers such as IP addresses and mobile device IDs that allow companies to track a user across various personal devices but do not cover mobile app stores.¹²⁹

In 2019 the FTC opened an investigation of YouTube, which is owned by Google, for allegedly violating children's privacy after receiving complaints from consumer groups and privacy advocates. The FTC complaint argued that YouTube failed to protect children who use the video streaming site and improperly collected data from them in violation of the COPPA law. The complaint could result in YouTube having to change its practices to better

protect children and is also seen as a signal that the FTC plans to step up its enforcement of the child-privacy law.¹³⁰

Online Endorsements and Native Ads The FTC has also taken action to address the issue of endorsements made through social media sites and blogs and ensure that the same rules apply in this context as they do in traditional advertising and infomercials. In 2009 the agency passed a new set of guidelines for online endorsements that require online endorsers and bloggers to disclose any “material connection” to an advertiser.¹³¹ Under the guidelines, bloggers as well as paid endorsers who post on social media sites such as Facebook, Instagram, or Twitter or post product reviews on sites such as Amazon can be held liable if they do not identify themselves as having a material connection to a company or brand. The FTC rules also apply to third-party ad networks, which are paid by advertisers and then turn around and pay bloggers or Twitterers on behalf of the ad client. The FTC issued updates to its endorsement guidelines in 2013 and 2015. Digital and Social Media Perspective 20–1 discusses how the FTC has become more active recently in enforcing rules regarding influencer marketing.

Another aspect of online marketing where the FTC has become involved is native advertising, which refers to online ads that are similar in format and topic to content on the publisher’s website. As was discussed in Chapter 15, in late 2015 the FTC published its long-awaited guidelines for native advertising, which has become a very common practice as marketers shift more of their ad spending to digital media. A major goal of the FTC guidelines is to ensure that there is no misleading representations or omissions about an online advertisement’s true nature or source. According to the policy statement: “In evaluating whether an ad’s format is page 705 misleading, the Commission will scrutinize the entire ad, examining such factors as its overall appearance, the similarity of its written, spoken, or visual style to non-advertising content offered on a publisher’s site, and the degree to which it is distinguishable from such other content.”¹³²

While the FTC has made it clear that it does not consider native ads inherently deceptive, the agency is very prescriptive about where and how disclosures should be made and what language is required. The guidelines state that when labels such as “advertisement” are necessary, they need to be

prominent on first contact with consumers, and disclosures should appear near a native ad. They also emphasize the need to disclose that native content is an ad before the consumer clicks on it and note that labels such as “sponsored content” or “presented by” may not be sufficient to avoid misleading consumers regarding the intention of the content. Many of these requirements are at odds with industry practices, which will mean that marketers and online publishers must reexamine their policies and procedures. It also means that the FTC is likely to take enforcement actions against marketers whose use of native advertising violates the new guidelines.¹³³

Spamming Another Internet-related marketing area receiving regulatory attention is **spamming**, which is the sending of unsolicited multiple commercial electronic messages. Spamming has become a major problem; studies show that the typical Internet user spends the equivalent of 10 working days a year dealing with incoming spam.¹³⁴ Spam also costs businesses billions of dollars every year in terms of lost worker productivity and network maintenance. Moreover, many of these messages are fraudulent or deceptive in one or more respects. A number of states have enacted antispamming legislation, and a comprehensive federal antispam bill, the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act), went into effect on January 1, 2004. The act’s general requirements for commercial e-mails include the following requirements:

- A prohibition against false or misleading transmission information.
- Conspicuous notice of the right to opt out and a functioning Internet-based mechanism that a recipient may use to request to not receive future commercial e-mail messages from the sender.
- Clear and conspicuous identification that the message is an advertisement.
- A valid physical postal address for the sender.

Violations of the CAN-SPAM law include both civil and criminal penalties, including a fine of \$250 (calculated on a per e-mail basis) up to a maximum of \$2 million. While the CAN-SPAM Act carries severe penalties

for violators, thus far it has done little to stop unsolicited e-mail messages. Spammers have been able to stay one step ahead of law enforcement officials by operating offshore and by constantly moving the Internet hosting source.¹³⁵

As marketers expend more of their IMC efforts online, they are facing many challenges as regulation of digital, social, and mobile advertising is becoming increasingly restrictive. They must understand and follow legal requirements in areas such as privacy and data security as well as guidelines regarding the use of endorsers and the types of online advertising formats they can use. Many companies work closely with law firms specializing in these areas to ensure that their digital marketing programs comply with rules and regulations governing online marketing. Marketers are recognizing that it is very important to embed privacy and data security considerations into their digital marketing campaigns and programs.¹³⁶ They must also understand rules and regulations regarding endorser disclosures as well as monitor what is being said and posted about their companies and brands online.

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Digital and Social Media Perspective 20–1 >>>

The FTC Tightens the Rules for Online Endorsers

Endorsements and testimonials have always been an important tool for advertisers, who know they can be very persuasive. Consumers are often influenced by ads they see on TV or in a magazine showing how a product helped someone lose weight, get in shape, or make more money. Often these endorsements come from a celebrity such as an athlete, actor, or entertainer, which can make them even more persuasive, particularly when consumers respect and admire these individuals. However, the Federal Trade Commission (FTC), which is the federal agency responsible for the regulation of advertising and other forms of marketing in the United States, has long

recognized the power of endorsements and testimonials and thus requires them to be truthful and not misleading to the reasonable consumer. To help ensure that marketers meet this standard, the FTC has provided them with a set of *Guides Concerning the Use of Endorsements and Testimonials in Advertising*. The FTC guidelines—in place for nearly three decades—were designed to cover the use of endorsements and testimonials in traditional media such as TV, print, and radio. However, with the explosive growth of the Internet, the commission recognized that changes had to be made to cover endorsements that consumers might encounter online when watching a video on YouTube or reading a blog or social media post on Twitter or Facebook.

In 2009, the FTC revised its rules and regulations regarding the use of endorsements and testimonials in advertising for the first time since 1980. One of the goals of the revised guidelines is to clarify what an endorser such as a celebrity or blogger can say about a product or service in a testimonial. The new FTC rules state that celebrity endorsers can be held liable for false statement about a product or service, and all endorsements must include results or outcomes consumers can generally expect from using it. For example, advertisers are advised that using unrepresentative testimonials may be misleading if they are not accompanied by information describing what consumers can generally expect from use of the product or service. The old days of using a disclaimer such as “results not typical” or making claims that might be misleading without disclosing limitations or conditions are gone. In addition, the FTC *Guides* let endorsers know that they shouldn’t talk about their experience with a product or service if they haven’t tried it or make claims about a product that would require proof they don’t have.

The other major area covered in the revision to the FTC guidelines applies to the use of endorsements and testimonials made online, particularly through social media. The *Guides* point out that marketers using digital media are subject to the same truthful advertising laws that other forms of advertising always have been. That means, among other things, that anyone compensated to promote or review a product should disclose it. One of the goals of the FTC has been to clarify or establish when a blogger or even a consumer promoting a product on a social media platform or a review site such as Amazon or Yelp becomes an endorser. The FTC *Guides* for endorsements and testimonials state that if there is a “material connection” between the endorser and the seller of the product or service, full disclosure is required. What this basically means is that any time an endorser receives money or something of value, such as free products or services, it must be clearly and conspicuously disclosed when they are discussing or promoting the brand on social media. For example, an individual who maintains a fashion blog and receives a pair of jeans from a company and posts a review about how well they fit must disclose that she received them free of charge. Disclosures can also apply to celebrities who are promoting a brand in ad campaigns using both traditional and social media. While it may be clear that an athlete such as Kobe Bryant is endorsing a brand such as Body Armour sports drink when he promotes in a TV commercial or print ad, the connection may not be obvious to consumers who read a Tweet where he talks about the brand, so a disclosure may be required.

The disclosure rule also applies to third-party networks that are paid by marketers and then turn around and pay bloggers or others to promote their brands online. For example, the FTC settled a case against Machinima Inc., an online entertainment network, charging that it engaged in deceptive advertising by paying “influencers” to

post YouTube videos endorsing Microsoft's Xbox One video system and several games as part of a marketing campaign being managed by Microsoft's ad agency. The influencers failed to adequately disclose their connection to Machinima and that they were being paid for their seemingly objective opinions. Microsoft and its ad agency reacted swiftly once they were aware that Microsoft's products were being endorsed by paid influencers by requiring Machinima to comply with FTC rules. The FTC also settled a case with Warner Bros. Home Entertainment (WB) over its failure to adequately disclose that it had paid influencers on YouTube to promote the launch of a video game.

Another important part of the new FTC *Guides* involves requirements for disclosures. In 2013 and 2015, the FTC issued updates to its endorsement guidelines that clarify how much disclosure is required and whether it applies to short-form platforms such as Twitter. In the updated guidelines, the FTC page 707 discusses requirements related to factors such as proximity, prominence, and multimedia. With regard to proximity, even in a space-constrained ad or promotion, the disclosure must be physically close to the statement or endorsement. The FTC also requires that the disclosure must be in understandable language, which means that using a hashtag such as #spon may not be acceptable. The FTC recommends using #Ad, "Ad:", or "Sponsored" in tweets. Prominence requirements mean that the disclosures must be prominent or viewable on any device and not buried with a web page or a page on a mobile platform. The multimedia guidelines require disclosure for audio or video claims and endorsements in the same clear and conspicuous ways as expected for written media. They also require that the form of the disclosure should match the content, which means that if a video or sound file is used, the disclosure should be done in the native format rather than included in a post or annotation on a social media site.

Kobe Bryant @kobebryant · 4 Jun 2015
#UpgradeYourSportsDrink with @DrinkBODYARMOR #ThisIsNOW

Fortune @FortuneMagazine
Watch out Gatorade, this sports drink startup is coming for you for.tn/1M7VZzD

Samir Mezrahi @samir · 4 Jun 2015
@kobebryant is this an advertisement?

Kobe Bryant @kobebryant

As in did I get \$ to tweet it @samir? No, zero\$ I ACTUALLY invested My own\$ in @DrinkBODYARMOR because I believe in our product and our team

RETWEETS 612 LIKES 1,749

10:44 AM - 4 Jun 2015

Source: Twitter

The new FTC *Guides Concerning the Use of Testimonials and Endorsements in Advertising* and the recent updates require that marketers, as well as their advertising agencies and third-party networks, clearly understand how they can use endorsers and to make sure that they are in compliance with the rules and regulations. It is very important that they know what constitutes an endorsement because they do not always require explicit wording by the endorser stating that they approve of a product or service. Simply posting a video or photo on social media may convey that the poster likes and approves of the product and be viewed as an endorsement. One legal expert notes that marketers must also track how they may be creating material connections by paying money to a celebrity or blogger to promote a brand, providing free products or discounts to bloggers offering entries into a contest or sweepstakes in exchange for posting pictures or statements about your brand, paying employees to post things about your brand on social media, or offering an incentive program to marketing affiliates.

As companies shift more of their marketing efforts online and make greater use of bloggers and other types of endorsers, it will be important for them to train their employees and monitor the way endorsers are being used. The FTC provides a very helpful and simple mnemonic for marketers it calls M.M.M: *mandate a disclosure policy*

that complies with the law, *make sure* people who work for you or with you know what the rules are, and *monitor* what they are doing on your behalf.

Sources: "Influencer Marketing Roundup," *eMarketer*, March 2018, <https://www.emarketer.com/content/influencer-marketing-roundup-2018>; Linda Goldstein, "Advertisers Will Find It Harder to Balance Marketing Objectives with New Legal Guidelines in 2016," *Advertising Age*, January 11, 2016, p. 28; Heather Dunn, "Five Best Practices in Advertising Law," *Marketing News*, December 2015, pp. 20–22; Abbey Klaasen and Michael Learmonth, "What You Need to Know about the New FTC Endorsement Rules—and Why," *Advertising Age*, October 12, 2009, <http://adage.com/article/digital/ftc-endorsement-rules/139595/>.

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Summary ——————

Regulation and control of advertising stem from internal regulation or self-regulation as well as from external control by federal, state, and local regulatory agencies. For many years the advertising industry has promoted the use of voluntary self-regulation to regulate advertising and limit government interference with and control over advertising. Self-regulation of advertising emanates from all segments of the advertising industry, including advertisers and their agencies, business and advertising associations, and the media.

BBB National Programs, Inc., the primary self-regulatory mechanism for national advertising, has been very effective in achieving its goal of voluntary regulation of advertising and other forms of marketing communication. Various media also have their own advertising guidelines. The major television networks maintain the most stringent review process and restrictions.

Advertising is viewed as commercial speech, which is speech promoting a commercial transaction, and is protected under the First Amendment. The federal government is the most important source of external regulation, with the Federal Trade Commission serving as the major watchdog of advertising in the United States. The FTC protects both consumers and businesses from

unfair and deceptive practices and anticompetitive behavior. The FTC is very active in the regulation of advertising and other marketing practices and has authority in cases involving deceptive, misleading, or untruthful advertising. The agency has a number of tools and programs that are used to regulate advertising including affirmative disclosure, advertising substantiation, cease-and-desist orders, and corrective advertising. A number of other federal agencies regulate advertising and promotion including the Federal Communications Commission, the Food and Drug Administration, the U.S. Postal Service, and the Bureau of Alcohol, Tobacco, Firearms and Explosives. The FDA regulates the advertising and promotion of cigarettes and other tobacco-related products, as well as direct-to-consumer drug advertising.

While most advertisers rely on self-regulatory mechanisms and the FTC to deal with deceptive or misleading advertising by their competitors, many are filing lawsuits against competitors under the Lanham Act for making false or misleading claims through comparative advertising. Many states, as well as the National Association of Attorneys General, are also active in exercising their jurisdiction over false and misleading advertising.

A number of laws also govern the use of other promotional-mix elements, such as sales promotion and direct marketing. The Federal Trade Commission regulates many areas of IMC, including sales promotion as well as direct marketing. Various consumer-oriented sales promotion tools such as contests, games, sweepstakes, and premiums are subject to regulation. Trade promotion practices, such as the use of promotional allowances and vertical cooperative advertising, are regulated by the Federal Trade Commission under the Robinson-Patman Act. The FTC also enforces laws in a variety of areas that relate to direct marketing and mail-order selling as well as the Internet, while the FCC has rules governing telemarketing companies.

The rapid growth of the Internet as a marketing tool has created a new area of concern for regulators. The same consumer protection laws that apply to commercial activities in other media apply online as well. Major areas of concern with regard to advertising and marketing on the Internet are privacy and security, online marketing to children, and spamming or the sending of unsolicited commercial e-mail messages. Concerns over online marketing to children have led to the passage of the Children's Online Privacy Protection

Act, which the FTC began enforcing in early 2000 and updated in 2013. The federal government passed the CAN-SPAM Act, which went into effect on January 1, 2004, and was updated in 2013. This legislation sets stringent requirements for commercial e-mail messages.

The Federal Trade Commission has become increasingly concerned over privacy issues related to the popularity of social media and is requiring various sites to protect the privacy of users. The FTC also has issued new guidelines covering online endorsements that require endorsers and bloggers to disclose any material connection to an advertiser. In 2015 the FTC published guidelines for native advertising, which has become a very common practice as marketers shift more of their ad spending to digital media. A major goal of the FTC guidelines is to ensure that there are no misleading representations or omissions about an online advertisement's true nature or source.

Key Terms —

self-regulation 669

Better Business Bureau (BBB) 671

BBB National Programs Inc. 672

National Advertising Review Board (NARB) 672

Federal Trade Commission (FTC) 679

commercial speech 679

Central Hudson Test 680

Federal Trade Commission Act 680

Wheeler-Lea Amendment 680

unfairness 681

puffery 682

deception 683

affirmative disclosure 684

advertising substantiation 685

consent order 687

cease-and-desist order 687

corrective advertising 689

Lanham Act 696

National Association of Attorneys General (NAAG) 697

Discussion Questions

- 1.** Discuss the major issues facing digital marketing platforms such as Google, Facebook, and Instagram with regard to privacy. How will impending regulations affect the use of digital marketing by marketers? (LO 20-1, 20-4)
- 2.** Discuss the need for regulation of advertising and other IMC tools. Do you advocate more or less regulation of advertising and other forms of promotion by governmental agencies such as the Federal Trade Commission and the Food and Drug Administration? (LO 20-1, 20-3, 20-4)
- 3.** Discuss the role the BBB National Programs, Inc. plays in the self-regulation of advertising and other forms of marketing communication. Evaluate the arguments for and against voluntary self-regulation as an effective way of protecting consumers from misleading or deceptive advertising and other marketing practices. (LO 20-2)
- 4.** Do you agree with the DISCUS argument that advertising for hard liquor should be treated the same as advertising for beer and wine? Should advertising for spirits be confined to late night programs on the networks or should the ads be permitted to run earlier in the evening as well as during major sporting events such as National Football League (NFL) games? (LO 20-2)
- 5.** The chapter discusses how Skechers and Reebok were fined for making advertising claims for their toning shoes that the Federal Trade Commission argues were false and misleading and not substantiated. Evaluate the claims made by these companies in their toning shoe ads from a deceptive advertising perspective. Why do you think they agreed to pay large fines to settle their cases rather than appeal them? (LO 20-1, 20-2)

- 6.** Find several examples of advertising claims or slogans based on puffery rather than substantiated claims. Discuss whether these advertising claims can be defended on the basis of puffery. (LO 20-3)
- 7.** Evaluate the charges the Federal Trade Commission brought against Volkswagen Group of America for deceptive advertising associated with its “Clean Diesel” campaign. How might the decision by Volkswagen to settle the deceptive advertising charges and pay \$25 million in fines, penalties and restitution affects consumer perceptions of the company and its vehicles? (LO 20-1, 20-3)
- 8.** Discuss the regulations governing the advertising and promotion of cannabis or marijuana in the United States and the challenges they present for marketers of cannabis products. Do you think the government should loosen the restrictions how cannabis can be advertised? Defend your position. (LO 20-3, 20-4)
- 9.** What are some of the regulatory issues marketers must take into consideration in using sales promotion and direct marketing as part of their IMC programs? (LO 20-4)
- 10.** Digital and Social Media Perspective 20–1 discusses the rules and regulations the Federal Trade Commission (FTC) has developed for online endorsements. Evaluate the guidelines used by the FTC requiring bloggers and social media influencers to disclose any material connection to a company whose product or service they are endorsing. How might this affect companies that use influencers as part of their digital marketing programs? (LO 20-1, 20-3)



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21 Evaluating the Social, Ethical, and Economic Aspects of Advertising and Promotion