

Health Law Alert

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Federal Trade Commission Rejects Request To Alter Methods For Investigating Health- Related Advertisements

On April 20, 2004, the Federal Trade Commission ("FTC") announced that it had rejected a petition for rulemaking which had been submitted by the First Amendment Health Freedom Association ("Association"). The Association had requested the FTC to alter its methods for investigating whether health-related advertisements were deceptive in violation of Section 5 of the Federal Trade Commission Act.

The petition and the FTC's response follow a proliferation of health-related advertising, particularly on the Internet, and the FTC's stepped-up effort to monitor and regulate such advertising through initiatives such as "Operation Cure.All." The FTC's customary practice has been to open an investigation when it receives a complaint about a potentially misleading advertisement. At the outset of its investigation, the FTC may demand that the advertiser produce a wide variety of information regarding the creation and dissemination of an advertisement. These investigations often involve considerable effort and expense for the advertiser. Advertisers may conclude that it is in their interest to accept a consent order (agreeing to stop the advertising in question) to avoid the ongoing cost of fighting the FTC in administrative and judicial proceedings.

The Association's petition asserted that the FTC's current investigative practices created a "chilling effect" on the First Amendment right to engage in "commercial speech." The petition also claimed that the FTC's practices violated the Administrative

Procedure Act. More specifically, the petition complained that FTC investigations were initiated without a sufficient basis to conclude that a health-related advertisement was misleading. In addition, the petition asserted that the FTC failed to provide advertisers under investigation with an early notice of which particular health-related claims made in an advertisement may be misleading. Furthermore, the petition asserted that the FTC relied on an overly formal investigation process that was burdensome and expensive for advertisers.

To address these concerns, the petition requested the FTC to adopt rules which would require the FTC to: (1) consult with "scientific experts" about the reliability of a particular health-related advertisement *before* the FTC commences an investigation into whether the ad is misleading; (2) advise the advertiser (when the FTC first demands information from the advertiser) which particular claims in a health-related ad are "inherently misleading" or "potentially misleading," and which portions of the ad are not being challenged; (3) notify the advertiser of the FTC's "scientific justification" for believing that a health-related advertisement is misleading; and (4) issue warning letters and suggested corrective language for an ad, in lieu of civil investigative demands and access letters, as the enforcement mechanism for misleading advertisements.

In rejecting the Association's petition, the FTC asserted its authority under the Federal Trade Commission Act to regulate false or misleading commercial speech consistent with the First Amendment. Moreover, the FTC determined that the procedures requested by the petition were not required by federal law and were not feasible for investigating misleading advertisements. The FTC noted that it does not need to substantiate a violation in order to commence an investigation; the FTC may investigate to assure that the law is not being violated. In most cases, the FTC must initiate an investigation and obtain information from an advertiser before the FTC can evaluate whether an advertisement may be misleading. For the same reason, the FTC stated that it could not be required at

the outset of an investigation to specify which health-related claims in an advertisement are misleading and to provide the specific grounds for asserting that the claims are misleading. Furthermore, the FTC stated that it may exercise its discretion to utilize "formal enforcement" as a means to regulate misleading advertisements.

The FTC's rejection of the petition is not surprising. The petition essentially asked the FTC to develop an "early warning system" in which the agency would first determine whether a health-related ad was misleading before it commenced an investigation, then notify the advertiser of the particular advertising claims which were misleading and why, and issue a warning letter that provided the advertiser an opportunity to stop the advertisement without adverse consequences. The procedures proposed in the petition are fundamentally contrary to the FTC's existing practice.

The FTC has repeatedly noted that, unlike the Food and Drug Administration, the FTC does not review and approve ads before they are publicly disseminated. Thus, the FTC expects advertisers to ensure that an advertisement complies with federal law *before* the ad is disseminated. While the FTC has issued general advertising guidelines, there are few bright lines indicating which particular health-related advertisements are permissible and which are impermissible. See generally FTC Policy Statement on Deception, *appended to Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984); FTC Policy Statement on Advertising Substantiation, *appended to Thompson Medical Co.*, 104 F.T.C. 648, 839 (1984). The burden is on advertisers to discern how the general standards apply to their particular ads. The use of misleading advertisements may subject a company to a costly FTC investigation or litigation. Accordingly, it is important that advertisers—including those in the health care industry—subject their advertisements to legal review before the ads are disseminated.

James Holloway
202.778.1124
jholloway@proskauer.com

NEW YORK LOS ANGELES WASHINGTON BOSTON BOCA RATON NEWARK PARIS

Proskauer's Health Care Department includes over 30 attorneys with significant and diverse health care experience. The following individuals serve as contact persons and would welcome any questions you might have:

New York, NY

Robert M. Kaufman	212.969.3285	rkaufman@proskauer.com
Edward S. Kornreich	212.969.3395	ekornreich@proskauer.com
Lee A. Barkan	212.969.3115	lbarkan@proskauer.com
Ellen H. Moskowitz	212.969.3232	emoskowitz@proskauer.com

Washington, DC

Mark J. Biros	202.778.1104	mbiros@proskauer.com
Joseph E. Casson	202.778.1111	jcasson@proskauer.com
Malcolm J. Harkins, III	202.778.1103	mharkins@proskauer.com
James P. Holloway	202.778.1124	jholloway@proskauer.com
Stephen D. Solomon	202.416.6819	ssolomon@proskauer.com
Susan A. Turner	202.416.6808	sturner@proskauer.com

Boca Raton, FL

Albert W. Gortz	561.995.4700	agortz@proskauer.com
Marcy Hahn-Saperstein	561.995.4774	mhahn-saperstein@proskauer.com

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