

KIRKLAND ALERT

February 2015

BBB Code of Advertising Updated After 30 Years

The Better Business Bureau (“BBB”) recently announced updates to its Code of Advertising to reflect the new technological avenues in which advertisers can now reach consumers. The Code of Advertising, which was initially developed in the 1970s to provide guidance to 112 BBB chapters across the United States and Canada for reviewing advertising claims made by businesses across North America, was last updated in 1985. While the core tenets of the Code remain unchanged (e.g., advertisers are still required to possess a reasonable basis for their claims *before* they are made), the 2015 amendments include several notable updates, including those discussed in more detail below.

Testimonials and Endorsements in Social Media

Touted as “one of the most significant changes” of the 2015 amendments, the Code includes several key provisions for using testimonials in social media, which parallel the Federal Trade Commission’s guidance on this issue.¹ Section 30 of the Code, which governs testimonials and endorsements, now provides that advertisements are likely to mislead or confuse if:

30.1.12 Endorsements placed by advertisers in online blogs or on other third-party websites do not clearly and conspicuously disclose the connection to the advertiser and comply with each of the provisions in this Code;

30.1.13 Advertisers compensate consumers for leaving feedback on third-party online blogs or websites but fail to ensure that consumers disclose such facts on those blogs or websites.

These additions address the increasing weight that consumers place on product endorsements on social media, including blogs and YouTube, as well as the inherently nonobvious nature of the connection between the endorser and the advertiser. Therefore, advertisers should consider whether there are any material connections with endorsers, even those perceived as trivial (such as providing free samples in exchange for a review) that may need to be disclosed.

Elimination of Minimum Range Requirement for “Up To” Savings Claim

Another revision to the Code is that advertisers are no longer required to state the range of savings when making an “up to” price savings claim. Previously, advertisers

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were required to state both the minimum and maximum savings when advertising a group of items with a range of savings. The 2015 amendments to the code eliminated the minimum savings requirement, and only require that a significant percentage of the items advertised — at least 10 percent — be available at the advertised maximum percentage. That said, advertisers should still consider and take care to adhere to individual state laws and regulations on these types of claims (i.e., some states may still require advertisers to disclose the minimum range of savings).

Clarification of Superlative Claims

Although the previous version of the Code contained provisions on distinguishing between objective and subjective superlative claims as those relating to tangible and intangible qualities of a product, respectively, the 2015 amendments provide further clarifications on how to distinguish between such claims. For example, Section 28 of the Code provides that “such claims, like ‘#1 in new car sales in the city,’ can be proved or disproved” and therefore constitute objective claims that require substantiation. Puffery, on the other hand, does not require substantiation, and is described in the Code as follows:

29.2 Puffery may include statements such as “best food in the world” and “we try harder” as well as other individual opinions, statements of corporate pride, exaggerations, blustering and boasting statements upon which no reasonable buyer would be justified in relying. Puffery also includes general claims of superiority over comparable products that are so vague that it can be understood as nothing more than a mere expression of opinion.

The Code also cautions that “whether any particular statement or claim is puffery will depend upon the context in which it is used in the advertisement” — echoing the National Advertising Division of the Council of Better Business Bureau’s long-standing principle that defining puffery is more an art than a science.

Environmental Benefit Claims

The Code now includes a new section on environmental benefit claims, largely mirrored after the FTC’s *Green Guides*. Like the FTC’s *Green Guides*, Section 36 of the Code prohibits “broad, unqualified general environmental benefit claims like ‘green’ or ‘eco-friendly.’” Rather, advertisers must expressly qualify general claims with specific and significant environmental benefits, and must specify whether those benefits are tied to the product, product’s packaging, a service, or just to a portion of the product, package, or service. Section 36 also provides instruction on specific types of environmental benefits claims. For example, Section 36.5 of the Code governs the use of certifications and approvals, and provides that:

36.5.2 In addition, environmental certifications and seals that do not clearly convey the basis for the certification are likely to convey

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general environmental benefits. Because claims making general environmental benefits should not be used (see section 36.1) advertisers must clearly and conspicuously disclose the specific and limited benefits to which the certificate or seal applies.

Other environmental benefits that are specified in the Code consist of: degradable (Section 36.2), recyclable (Section 36.3.1), recycled content (Section 36.3.3), and non-toxic (Section 36.4). Each of these claimed environmental benefits require substantiation and must be clearly and conspicuously qualified to the extent necessary to avoid misleading or confusing consumers.

Country of Origin Claims

Newly added section 37 is directed to the requirements for substantiating country of origin claims. Such country of origin claims may be express (e.g., “Made in USA”) or implied (e.g., display of U.S. flag). The Code provides guidance on the amount of foreign components allowed in order to substantiate varying types of such country of origin claims.

For unqualified “Made in USA” claims, an advertiser must show that “all or virtually all” of the product — including all significant parts and processing thereof — are of U.S. origin. A product bearing an unqualified “Made in USA” claim must contain no, or negligible, foreign content. For products containing foreign components, an advertiser may make “Assembled in USA” claims or qualified “Made in USA” claims, which indicate the product is not entirely of domestic origin (e.g., “Made in USA of U.S. and imported parts” or “60 percent U.S. content”). At minimum, however, both claims require that the products be manufactured or substantially assembled domestically.



This *Kirkland Alert* only contains a general overview of the revisions made to the Code of Advertising, and reflects the authors’ selection of the most notable updates to the Code. As such, it does not include other changes and additions to the Code, including but not limited to, close-out and liquidation sales, duration of sale periods, rebate promotions, and continuity programs offered with free and low-cost merchandise. The newly updated Code of Advertising can be found at: <http://www.bbb.org/code-of-advertising/>.

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¹ <http://www.ftc.gov/news-events/media-resources/truth-advertising/advertisement-endorsements>

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