

BY DAVID W. KOCH

Beware the “Other” FTC

The franchising community thinks of the FTC as the “top dog” in regulation. The FTC’s Franchise Rule sets the standard for disclosure to prospective franchisees and is the basis of state regulation as well. While small by federal standards, the FTC has powerful tools at its disposal.

Lost in the glare of the Franchise Rule is that franchising is a small part of the FTC’s responsibilities. You are far more likely to encounter FTC troubles in areas other than franchising. Just a few examples are highlighted below.

Advertising practices are at the core of the FTC’s consumer protection mission, and require close attention. Consider customer testimonials and blogger endorsements. Since 2009, if you use a testimonial that gives specific results, and if those results are not likely to be typical for other purchasers, you must also disclose results that *are* typical. This is a result of an update to the FTC’s “Guides Concerning the Use of Endorsements and Testimonials in Advertising,” 16 C.F.R. Part 255.

A generic endorsement (e.g., “This is a great product” or “I’ve had a good experience with this franchise”) is not affected by changed Guides. However, a specific endorsement (e.g., “I’ve lost 30 pounds in this program” or “I’ve doubled my income with this franchise”) is greatly affected—if the franchisor knows that the stated results are not likely typical. In the first example, the franchisor also must disclose that “typical customers lose X pounds.” Obviously, this disclosure may dilute the impact of an endorser’s results—which is exactly what the FTC intended. (Research shows a generic disclaimer such as “Results are not typical” isn’t effective for many people.)

The 2009 changes also addressed blog and social networking posts, which may

be “endorsements” under the Guides. Accordingly, any blogger-marketer connection must be disclosed. So if you pay a blogger or provide free products or incentives to write a review or tweet about your products, you must be sure the blogger discloses the incentives. As the FTC wrote, “If you found out that the hotel had paid that blogger to say great things about it or that the blogger had stayed there for a week for free, it could affect how much weight you’d give the blogger’s endorsement.”

Lost in the glare of the Franchise Rule is that franchising is a small part of the FTC’s responsibilities. You are far more likely to encounter FTC troubles in areas other than franchising.

You should also keep a keen eye on FTC enforcement actions outside of franchising. In March 2009, the FTC asked the Justice Department to file suit charging that Dish Network and its dealers unlawfully called consumers whose numbers were on the “National Do Not Call Registry.” Ominously for franchisors, the government charged Dish Network with “assisting and supporting” its dealers in marketing via “robocalls,” in violation of the FTC’s Telemarketing Rule—demonstrating that a brand owner can face trouble for the marketing prac-

tices of independent businesses in its network. Dish Network moved to dismiss the claims based on the dealers’ acts (rather than those of Dish Network itself), but a federal court denied that motion.

Another example that will affect you: the FTC’s examination of “behavioral advertising,” or using clickstream data to target ads to individuals. This represents the intersection between the FTC’s decades-old regulation of advertising and its recent leadership in privacy matters. Neither Congress nor the FTC has yet acted, but the threat of regulation has spurred organizations such as the Direct Marketing Association to push self-regulation aggressively, in an effort to forestall mandates.

Meanwhile, the FTC is publicly gathering information to guide its policy decisions. Earlier this year, the Commission hosted public roundtables to explore the privacy challenges posed by social networking, cloud computing, behavioral advertising, mobile marketing, and the collection and use of information by retailers, data brokers, and third parties. The FTC’s stated goal was “to determine how best to protect consumer privacy while supporting beneficial uses of the information and technological innovation.”

Conclusion

Just one FTC staff attorney devotes full time to the Franchise Rule. By contrast, an entire division of FTC attorneys and investigators is devoted to handling advertising matters. Another entire FTC division devotes its time to privacy issues. So, as a practical matter, is it franchising or is it your (and your franchisees’) other business activities that is more likely to get you in trouble with the FTC? The answer is that the “other” FTC is where you should be on higher guard. ■

David Koch is co-founder of *Plave Koch PLC*, an entrepreneurial franchise law firm in Reston, Va., and a past Attorney-Advisor to the Chair of the FTC. Contact him at dkoch@plavekoch.com or 703-774-1202.



Plave Koch By the Numbers

- 192 Years of combined experience
- 125 Franchise brands
- 60 Countries in which we've handled transactions
- 10 Experienced partners
- 7 Named to *Int'l Who's Who of Franchise Lawyers*
- 6 *Legal Eagles*
- 3 Federal Trade Commission alumni
- / Rate increase in 3½ years
- 0 Pretense

Plave Koch PLC
12355 Sunrise Valley Drive · Suite 230
Reston, Virginia 20191

Regina **Amolsch** | 703.774.1211
Leslie **Curran** | 703.774.1215
Marisa **Faunce** | 703.774.1214
Mark **Kirsch** | 703.774.1210
Dave **Koch** | 703.774.1202
Michael **Laidhold** | 703.774.1206
Lee **Plave** | 703.774.1203
Ben **Reed** | 703.774.1207
Jim **Rubinger** | 703.774.1208
John **Tifford** | 703.774.1204