

FTC ENFORCEMENT

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The FTC may “prosecute any inquiry necessary to its duties in any part of the United States.” 15 U.S.C. § 43

I. FTC’s Jurisdiction

A. Section 5 of the FTC Act – 15 U.S.C. § 45

1. “The Commission shall have no authority ... to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.” 15 U.S.C. § 45(n).
2. An advertising message or business practice is unfair if it causes or is likely to cause substantial consumer injury which a consumer could not reasonably avoid; and it is not outweighed by the benefit to consumers. FTC Policy Statement on Unfairness: <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm>
3. An advertising message is considered deceptive if it contains a statement or omits information that is likely to mislead reasonable consumers under the circumstances and the information is “material” or important to a consumer’s decision to buy or use the product. See FTC Policy Statement on Deception appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984).
4. A statement also may be deceptive if the advertiser does not have a reasonable basis to support its claims. See FTC Policy Statement on Advertising Substantiation, appended to *Thompson Medical Co.*, 104 F.T.C. 648, 839 (1984), *aff’d*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987).

B. Section 12 of the FTC Act – 15 U.S.C. § 52

1. It is unlawful to disseminate any false advertisement for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, services, or cosmetics.

II. How the FTC Makes Contact With a Defendant

A. Non-Public Inquiry Letter

1. Requests information (typically substantiation, marketing materials, business information, and complaints). Sometimes requests a meeting to discuss the subject of a potential investigation.

B. Civil Investigation Demand (CID)

1. A CID is a formal service of process requesting information issued pursuant to Section 20 of the Federal Trade Commission Act (15 U.S.C. § 57b-1). Requires production of documents and/or answers to interrogatories.

C. Petition to Quash

1. Under 16 C.F.R. § 2.7 a defendant may file a petition to quash to raise objections to a CID. There are strict time limitations for a defendant to file a petition. Motion on the petition is ruled upon by the Commission.

D. Confidentiality

1. 15 U.S.C. §§ 46(f) and 57b-2 and the Federal Trade Commission Rules of Practice, 16 C.F.R. §§ 4.10 – 4.14.

III. Enforcement Actions

A. Administrative Action

1. The FTC may issue an administrative complaint, tried before an FTC Administrative Law Judge. If an administrative complaint is issued, a formal proceeding that is much like a court trial begins: evidence is submitted, testimony is heard, and witnesses are examined and cross-examined. If a violation is found, a cease and desist order or other appropriate relief may be issued. Initial decisions by an administrative law judge may be appealed to the full Commission.

B. District Court Actions

1. The FTC can institute an action in federal court seeking civil penalties for violations of the FTC Act, and may obtain injunctive relief, including consumer restitution, appointment of a receiver, and freezing of defendants' assets. FTC frequently files such actions on an *ex parte* basis, asking the Court to freeze defendants' corporate and personal assets and appoint a receiver for the business without first providing defendants with an opportunity to present a defense.

Epixtar – The FTC obtained an *ex parte* asset freeze and the appointment of a receiver over a publicly-traded company. The FTC alleged that defendants violated the FTC Act by failing to disclose important information regarding the company's refund and cancellation policies. *FTC v. Epixtar Corporation, et al.*, (S.D.N.Y.), Civil Action No. 03-CV-8511.

C. Inconsistent Standards

1. The United States Supreme Court has recognized that the FTC does not have unlimited discretion to seek enforcement of an order against one company for which it has not sought against other competitors who may have committed similar violations of the law. *See FTC v. Universal-Rundle Corp.*, 387 U.S. 244, 251 (1967) (recognizing that FTC “does not have unbridled power to institute proceedings which will arbitrarily destroy one of many law violators in an industry.”).

D. No Right To Jury Trial

1. The FTC has consistently taken the position that there is no Seventh Amendment right to a jury trial in an action seeking only injunctive relief, even if it means requiring a defendant to pay millions of dollars in consumer redress. Courts have supported this position.

IV. Resolution

A. Settlement

1. The FTC and a defendant may agree on how to resolve the dispute and the parties will settle the case by signing a Stipulated Final Order. Things to consider when negotiating a Stipulated Final Order with the FTC include:
 - a. The defined terms.
 - b. Issues regarding fencing-in. In *Ruberoide*, the Supreme Court stated how the FTC may prohibit other similar practices and cover similar products with fencing-in provision. "In carrying out [its] function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *FTC v. Ruberoide Co.*, 343 U.S. 470, 473 (1952).
 - c. Express and implied claims which are covered by the Order.
 - d. Civil Damages or Consumer Redress.
 - e. Compliance and Monitoring Issues.

B. Stipulated Permanent Injunction

1. The FTC and a defendant can enter into an agreement whereby a defendant will agree to be bound by the injunctive relief set forth in the order.

C. Commission Approval of Settlements

1. Before a settlement between the FTC and a defendant becomes final, the full Commission must approve the settlement.

D. Avalanche Clauses

1. Over the past several years the FTC has been inserting ‘avalanche clauses’ in stipulated final orders when defendants claim they are not financially able to pay some or all of a civil penalty or redress.
2. An ‘avalanche clause’ allows the FTC to reopen a case against a defendant and have a Court enter judgment against a defendant for an amount usually equal to the maximum that could be awarded after trial if the FTC discovers a defendant “failed to disclose any material asset, or materially misrepresented the value of any asset, or made any other material misrepresentation in or omission from any financial statement.”
3. **Mark Nutritionals Inc.** – In October 2004, Harry Siskind, the former president of Mark Nutritionals agreed to settle charges by the FTC that he falsified financial statements in an effort to hide assets and to obtain a more favorable settlement to a lawsuit filed against him by the FTC. Specifically, Siskind allegedly misrepresented the nature, cost, and value of assets worth approximately \$600,000 and failed to disclose \$300,000 worth of assets. The agreed order calls for a reinstatement of the ‘avalanche clause’ for a judgment of \$155,000,000. *Federal Trade Commission, vs. Mark Nutritionals, Inc., Harry Siskind, and Edward G. D’alessandro, Jr.*, U.S. Dist. Court, W.D. of Texas, San Antonio Division, FTC Matter No. X0300120, Civil Action No. SA02CA1151 XR.

E. Contempt Procedures

1. The FTC will file a civil contempt action against a defendant for continuing to violate the terms of a previous order.
2. **Enforma** – The FTC brought a contempt action against Enforma Natural Products, Inc. and its president, Andrew Grey for violating the terms of a previous Consent Order prohibiting unsubstantiated claims for weight loss products. The FTC alleged that Enforma and Grey were advertising two new weight loss products using false and unsubstantiated representations and without the court-mandated disclosure that reducing caloric intake and/or

increasing exercise is required to lose weight. *FTC v. Enforma Natural Products, Inc. and Grey*, FTC Matter No. CV 00-04376-JSL.

F. Post Order Requirements

1. A defendant will be required to file a compliance report after an order is signed. The reporting requirements will usually last for five to eight years.
2. A defendant will also be required to provide copies of the order to numerous individuals, including, directors, officers, agents, independent contractors and various employees engaged in the covered conduct.