

The Impact of COVID-19 on Your Advertising and Marketing Campaigns

Strategic Questions Companies May Face, Regulatory Issues Companies Must Address and Governmental Agency Interests of Note

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Holland & Knight Alert

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Highlights

- The coronavirus (COVID-19) global pandemic has resulted in changes to advertising, marketing, promotional and media spends, forcing businesses and brands to reevaluate their thinking about current and future advertising and marketing campaigns to maintain a steady stream of income. While brands currently seek to strike the right tone during a global health emergency, the future portends market alteration, increased competition and a demand for creative and aggressive marketing practices.
- As brands adapt and figure out how to promote products and services in the midst of the COVID-19 crisis, governmental agencies are closely monitoring potential unfair and deceptive business practices to protect vulnerable consumers, monitor aggressive marketing campaigns and terminate COVID-19 scams. The Federal Trade Commission (FTC), Consumer Financial Protection Bureau (CFPB), U.S. Food and Drug Administration (FDA) and state attorneys general have sent subpoenas, warning letters and cease and desist notices to businesses that are attempting to capitalize on vulnerable consumers through deceptive marketing, scams and price gouging of "essential" supplies.
- With the FTC and other regulatory authorities taking a more active role in cracking down on deceptive, unfair or abusive advertising and marketing, brands must approach their marketing campaigns and scheduled content timelines with caution and carefully evaluate both the language and imagery used in advertisements and marketing materials – with social media marketing in particular. To minimize the potential of enforcement actions or inquiries, as well as challenges by competitors, brands must comply with regulations pertaining to social media and the use of influencers and endorsers, promotional devices, gift cards and charitable sales promotions.

The 2019 novel coronavirus known around the world as COVID-19 has led to unprecedented economic and public health concerns, which will likely transform how businesses operate going forward. This transformation will be limited not only to how businesses operate but also to how they sustain and grow their brand and customer base. Central to this concern is how businesses attract consumers and promote their products and services. A business' advertising, marketing campaigns and promotional practices will be a core focus of its ability to thrive in the future.

This Holland & Knight alert provides an overview of the impact of COVID-19 on the advertising, marketing and promotional practices of businesses. This alert also includes practical best practice tips that can help companies understand their responsibilities and enhance their regulatory compliance programs to minimize the risks associated with advertising, marketing and other promotional activities in the wake of the COVID-19 pandemic.

Current State of Affairs and Strategic Business Challenges Presented by the COVID-19 Pandemic

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As countries implement necessary quarantines and social distancing practices to contain the pandemic, the International Monetary Fund projects global growth in 2020 will fall to minus-3 percent.¹ This is a downgrade of 6.3 percentage points from January 2020, a major correction in only a few months. The industries suffering most include hospitality, aviation and retail, along with downstream industries such as energy, textiles, transportation equipment, furniture and appliances, machinery and fabricated metal products.² Hotel occupancy rates sit below 20 percent across the country, while aviation travel is down close to 95 percent compared to the same period in 2019.³ The industries that showed some growth in March include food, chemicals, electronics, plastics and rubber products.

Many businesses are reevaluating their marketing and media spends and have refocused their advertising, marketing and promotional efforts in an attempt to generate a sustained stream of consumer interest and spending, while maintaining sufficient returns on media spends.

As companies grapple with what the future will look like, several issues come to the forefront:

- How to sustain the brand when markets and industries are reshuffled
- Whether to develop new products that align with a "new reality"
- How to deal with the competitive landscape when consumers' spending habits are fundamentally altered, and
- How brands can address consumer concerns about health, wellness, community – as well as personal fulfillment and meaning

These issues raise several core questions concerning sustainability and strategic planning:

- How can a major and trusted brand develop an effective business strategy when the government has not adopted uniform criteria as to when businesses should be reopened?
- How do brands promote a product or service in the midst of the COVID-19 crisis in a way that resonates with consumers?
- How does a brand communicate with consumers in an effective way after fear subsides and a sense of "normality" returns?
- Beyond communication, how does a brand engage consumers to promote spending on the brand's products?

Impact of the COVID-19 Pandemic on Advertising and Marketing

Many marketing and advertising departments will be up to the challenge: thinking through creative and innovative marketing strategies and practices that will navigate the business through this new normal. For brands, this means dealing with market alteration because of the economic impact on all industry sectors; facing increased competition given consumers' and social "new normal"; addressing sustainability; evaluating operational options and challenges presented by strategic planning in an environment of uncertainty; analyzing brand reputation issues; identifying potential new products and services needed to meet consumers' needs and expectations; focusing on creative and strategic marketing campaigns and targeted advertising; and using social media effectively.

These are made all the more important since, as a result of COVID-19, advertising spending is expected to decrease for some in 2020 as stores close and revenue decreases. For example, one online rental home booking company announced that it will suspend all marketing activities in 2020 in order to save hundreds of millions of dollars.⁴ Other businesses have refocused their spends to purpose-driven marketing, mission-based marketing and cause-related marketing to better satiate consumers' increased media consumption while working from home. For example, 45 percent of global consumers are devoting more time to social media, online video streaming has increased by 26 percent, online gaming traffic has increased exponentially on one telecommunication company's servers, and the

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number of consumers using online food delivery and essential goods delivery has risen dramatically.⁵

As a result, many brands may look to optimize their marketing practices to better reflect the increase in online transactions, communications and face time with consumers.

The Interest and Role of the FTC, CFPB and State AGs

As brands adapt, governmental consumer protection agencies are watching closely because of public policy as well as political pressures. The Federal Trade Commission (FTC), Consumer Financial Protection Bureau (CFPB) and state attorneys general are redoubling their efforts to protect vulnerable consumers, monitor aggressive marketing campaigns and terminate COVID-19 scams or aggressive campaigns. There has been a surge in class action litigation alleging false advertising under applicable state and federal laws relating to the coronavirus pandemic, such as allegations that companies have improperly claimed their sanitizing products kill more than 99 percent of germs.⁶ Similarly, the U.S. Department of Justice and state attorneys general have stepped up enforcement and have warned businesses and individuals not to engage in deceptive business practices and price gouging relating to the pandemic.⁷

The FTC and CFPB have disseminated several COVID-19-focused literature to educate consumers about COVID-19 scams, which often involve "public health" scams, government check scams, business email scams, information technology scams, supply scams, robocall scams and data scams.⁸ In fact, the FTC and the U.S. Food and Drug Administration (FDA) sent warning letters to seven companies alleging that they made deceptive or scientifically unsupported claims about their products' ability to treat COVID-19.⁹ The CFPB released guides on mortgage relief options, protecting consumers' credit, online and mobile banking tips, and avoiding scams relating to elder care and grocery, prescription and necessary supplies pick-up.¹⁰ State attorneys general are ramping up price gouging and similar enforcement efforts, including temporary restraining orders against unproven virus treatments, cease and desist letters and letters to online sellers urging them to help fight price gouging.¹¹

In the midst of this rapidly changing environment surrounding advertising and marketing, the FTC is focused on its revisions of the FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising (Guides), regulations that set out recommendations for online testimonials and influencer marketing. The Guides are designed to ensure that endorsements are truthful and not misleading, especially pertaining to the adequacy of current disclosures by endorsers on social media platforms, whether children can understand social media disclosures and how to treat affiliate links.

The agency has made clear that it takes an expansive view of the kinds of material connections between online endorsers and advertisers that necessitate disclaimers. Specifically, the FTC has stated that social media users who have any relationship with the businesses or people they endorse should disclose those connections when writing reviews or posting on social media platforms.

The key message is that law enforcers and regulators have a heightened interest in all communications to consumers during a national emergency, a time when millions of people are unemployed and vulnerable to deceptive or unfair business practices.

Practical Tips for Advertising and Marketing Initiatives During the COVID-19 Pandemic

When a defining cultural event occurs such as the COVID-19 pandemic, it is critical for brands to be tactful, employ mindful marketing and be empathetic to consumers' plight. Brands must acknowledge the crisis while continuously reflecting positive values that will keep consumers coming back for more. This can be accomplished through adjusting marketing campaign and scheduled content timelines, evaluating the language and imagery used in advertisements and marketing materials and awareness of consumers' increased anxiety at this time. Brands must also evaluate prior to release new slogans, logos or other intellectual property for compliance with the appropriate regulatory framework.

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To that end, brands have to answer several questions:

- How do we currently promote our product or service in the midst of the COVID-19 crisis in a way that resonates with consumers?
- How do we communicate with consumers in an effective way after fear subsides and a sense of "normality" returns?
- What influencers and endorsers (if any) should we use to promote the brand now and in the future? Who are the "heroes" that we can applaud?
- What promotional activities can we engage in that: (1) promote our brand; (2) promote positivity in the market place; and (3) promote a "good cause?"

Social Media and the Use of Influencers and Endorsers

With the FTC looking to take a more active role in cracking down on deceptive paid endorsements in influencer marketing, brands should consider implementing clear, direct disclosure language, tightening and strengthening the approval process, utilizing indemnity clauses and creating awareness of disclosure requirements for large and small buys alike. Whenever a company intends to use bloggers and influencers for social media advertising, the company's website for advertising or third-party websites for advertising, the company must look to the FTC's Guides Concerning the Use of Endorsements and Testimonials in Advertising as well as the FTC's recent Disclosures 101 for Social Media Influencers.

It is imperative that brands ensure truthful, clear and accurate content is disseminated from influencers and endorsers. This also applies to messaging from employees and their family members. Brands must also remember that when using a representative to market on behalf of the company, whether an influencer, endorser or employee, the brand and the speaker must disclose any material connection between the brand and the speaker. Indeed, the material connection disclosure must be clear, conspicuous and simply unavoidable within that promotional communication so that a consumer may give appropriate weight to the content of that communication.

Simply put, while there is a growing focus on the actions of speakers, brands must remain vigilant in their compliance efforts as they will ultimately remain accountable for the communications.

Use of Promotional Devices (Sweepstakes, Contests and Giveaways)

The sweepstakes and contest industry has been severely impacted by COVID-19 since brands do not want to seem out-of-touch or tone-deaf to the effects of the pandemic. Notwithstanding the risks involved, sweepstakes, contests and giveaways provide brands with an opportunity to engage consumers during an uncertain time.

For example, brands could award consumers with gift cards to restaurants and retailers or award grocery gift cards to front-line healthcare workers, which, in turn, increase customer goodwill and loyalty. With that said, brands must ensure that they comply with all applicable federal, state and local laws that apply to promotional devices. These requirements include (among others) compliance with state lottery laws, preparing official rules and including appropriate disclosures regarding the prize offered, odds and entry methods. These rules, including the requirements for free entry or alternative methods of entries (AMOE), can be very complex and may vary state to state and by promotion type.

Gift Cards

COVID-19 has forced many businesses and restaurants to close or provide limited services to their customers. In an attempt to offset the loss of income, businesses have placed an emphasis on selling gift cards to consumers for current or future use. This facilitates purchasing once businesses return to "normal," and brands essentially receive a microloan while the pandemic continues to disrupt business as usual. The use of gift cards enables brands to sustain a

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stream of income with no cost of goods sold in an otherwise slow time for business.

Still, gift card issuers must remember to comply with federal and state gift card laws that require specific disclosures, impose restrictions on expiration dates and fees and impose other regulatory requirements.

Charitable Sales Promotions, Commercial Co-Ventures and Cause Related Marketing

With millions of individuals around the world being impacted by the COVID-19 pandemic, brands instinctively want to help. A commercial co-venture, also known as a for-cause marketing campaign, is an increasingly popular way for brands to align their products and services with social impact initiatives to assist victims of the COVID-19 pandemic.

However, it is important for brands to understand that commercial co-ventures are heavily regulated with more than 30 states having statutes that specifically govern these types of promotions, including some states with special registration and bonding requirements. Generally, these laws require commercial co-venture agreements between the brand and charity. In addition, these laws include mandatory contract provisions and advertising disclosures relating to charity name, maximum gift amount and any per unit or percentage of sale limits. Finally, brands and the charities must ensure that they comply with all accounting and auditing requirements imposed by both state and federal law.

How We Can Help

Prudent counsel is essential now more than ever. Holland & Knight appreciates the imperative of adhering to consumer protection laws against the backdrop of empowering advertising and marketing innovation and creativity during these times. Through our business-focused approach, combined decades of experience, and insights from trusted relationships with senior federal and state agency officials, Holland & Knight can assist you with navigating these times.

Holland & Knight's [Consumer Protection Defense and Compliance Team](#) includes a robust social media practice, with experienced attorneys that are recognized thought leaders in the field. From representing dozens of companies and individuals in federal and state investigations concerning advertising and marketing to compliance counseling and transactional contract matters involving celebrities, the firm's practice includes regulatory, compliance, litigation, investigation and transactional work in the social media space.

For more information or questions about the specific impact that social media advertising and marketing regulations can have on you or your company, contact the authors.

DISCLAIMER: Please note that the situation surrounding COVID-19 is evolving and that the subject matter discussed in these publications may change on a daily basis. Please contact your responsible Holland & Knight lawyer or the authors of this alert for timely advice.

Information contained in this alert is for the general education and knowledge of our readers. It is not designed to be, and should not be used as, the sole source of information when analyzing and resolving a legal problem. Moreover, the laws of each jurisdiction are different and are constantly changing. If you have specific questions regarding a particular fact situation, we urge you to consult competent legal counsel.

Notes

¹ Gina Gopinath, [The Great Lockdown: Worst Economic Downturn Since the Great Depression](#), IMF Blog: Insights & Analysis on Economics & Finance, April 14, 2020.

² Milton Ezrati, [First Statistical Signs Of The COVID-19 Recession](#), Forbes.com, April 1, 2020.

³ Aaron Cooper and Leah Asmelash, [Nearly 80% of hotel rooms in the US are empty, according to new data](#),

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CNN.com, April 9, 2020; Dawn Gilbertson, [How empty are airports? TSA screened fewer than 100,000 passengers Tuesday, a record low](#), *USA Today*, April 8, 2020.

⁴ See, e.g., Joshua Franklin and Munsif Vengattil, [Airbnb suspends marketing to save \\$800 million, top executives take pay cut: source](#), Reuters, March 27, 2020.

⁵ Jason Mander, [Coronavirus: Insights From Our Multinational Study](#), GlobalWebIndex Blog, March 23, 2020; Johnny Crisp, [How COVID-19 Is Changing Online Streaming Behavior Globally](#), NPAW; Academy Blog, March 27, 2020.

⁶ Christina Davis, [Target Class Action Says Hand Sanitizer May Not Kill COVID-19](#), March 24, 2020.

⁷ William Ezzell, Andrew Fox, Melissa Ho, [Across the Country, U.S. Attorneys and States Attorneys General Join Forces in COVID-19 Enforcement Measures](#), *National Law Review*, April 9, 2020.

⁸ Federal Trade Commission, [Coronavirus Scams: What the FTC is doing](#); Lesley Fair, [Seven Coronavirus Scams Targeting Your Business](#), March 25, 2020,.

⁹ Federal Trade Commission, [FTC, FDA Send Warning Letters to Seven Companies about Unsupported Claims that Products Can Treat or Prevent Coronavirus](#), March 9, 2020.

¹⁰ Consumer Financial Protection Bureau, [Protecting Your Finances During The Coronavirus Pandemic](#).

¹¹ National Association of Attorneys General, [COVID-19 Resources](#).



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