

The FTC's New Year's Resolution for 2023: Healthier Health Claims

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Just in time for your health-focused new year's resolutions, the FTC released an updated guide for marketers: [The Health Products Compliance Guidance](#). This guide last issued in 1998 under a more narrow title, focusing on dietary supplements. The world of health has changed a lot since 1998. While the larger concepts in this updated guide may seem like nothing new, the FTC has helpfully walked us through more than fifty examples applying the concepts to modern products and forms of advertising. If your company advertises

health-related products or services, we suggest reading this business guide cover-to-cover with a nice glass of green juice. The FTC makes every effort to draft their guides with non-lawyers in mind. If you only have a few minutes between your next walking meeting and your morning matcha, we'll take you through the highlights:

The foundational rules remain the same – (1) Advertising must be truthful and not misleading and (2) Before disseminating an ad, advertisers must have adequate substantiation for all objective product claims conveyed, expressly or by implication, to consumers acting reasonably.

The FTC and FDA share jurisdiction on health-related products – Just because your products fall under FDA law does not mean you can ignore the FTC. The agencies coordinate their enforcement and regulatory efforts and the FTC's jurisdiction extends to

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all advertising claims, even those made on labeling, for which the FDA has primary responsibility. However, the FTC gives deference to the FDA and health claims that meet the FDA “significant scientific agreement” standard will be presumed to be substantiated under FTC law.

Health claims require competent and reliable scientific evidence – Randomized, controlled, human clinical trials (“RCTs”) are the most reliable form of evidence and are generally the type of substantiation that experts would require for health benefit claims. It is important to note that anecdotal evidence about the individual experiences of consumers, including surveys of consumer experiences, are never sufficient to substantiate claims about the effects of a health product. Similarly, public health recommendations from advisories from medical organizations cannot serve as a substitute for RCTs.

Let the basic principles of scientific research guide your studies – The FTC’s guide recommends that advertisers ensure that the research upon which they rely for any health-related claims complies with the basic principles relied on by the scientific community for research. These key concepts include the use of control groups, randomization, double blinding, reliance on statistically significant results, and reliance on meaningful results.

Match your claim to your study – The Guides note that this is a common problem for advertisers: valid studies, but those studies don’t support the claim being made. Another warning to take to heart is that claims should be carefully worded to avoid overstating the certainty of science in areas where the science is still emerging. If there are significant limitations or inconsistencies within the scientific literature, your consumers should be made aware.

Advertising in the form of consumer or expert testimonials still require substantiation – As FTC guidance has repeated over and over again: advertisers should not make claims through consumer testimonials or expert endorsements that would be deceptive or deemed unsubstantiated if the advertiser made them directly.

The Guide closes with two overarching recommendations:

To ensure compliance with FTC law, marketers of any health-related product should follow two important steps: 1) Consider what express and implied messages consumers are likely to take from your ads. Where appropriate, carefully qualify your claims – in other words, clearly explain the limited circumstances in which the advertised benefits or results apply; 2) Carefully review the support for each claim to make sure it is scientifically sound, adequate in the context of the surrounding body of evidence, and relevant to the specific product and advertising claim.

Cheers to a healthy 2023.