



# THE GUIDE TO MANAGING AD PARTNERS IN REGULATED INDUSTRIES

How online advertisers can navigate and thrive in highly regulated industries.

presented by

THE  
**SEARCHMONITOR**

[www.thesearchmonitor.com](http://www.thesearchmonitor.com)



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# How This Guide Will Improve Your Online Advertising

► "My goal with this guide is to show advertisers how to thrive in 4 highly regulated industries."

- Lori Weiman  
CEO, [The Search Monitor](#)

Are you a marketer or affiliate in Finance, Retail, Education or Pharmaceuticals? If you answered yes, then this guide is for you.

**Did you know** that online marketing activities for these industries are heavily regulated by various government organizations? Governing bodies like the FTC or CFPB (Consumer Financial Protection Bureau) publish hundreds of pages of regulations that apply to both advertiser and affiliate marketing activities like email, blogs and web pages.

**Did you also know** that your marketing partners are regulated as thoroughly as your direct advertising efforts? If you are like our regulatory clients, then your partner relationships are probably very lucrative to both you as the advertiser and your affiliates.

The goal of this guide is to help online advertisers and their partners navigate the complex regulatory environment and hundreds of pages in regulations.

After you complete this guide, you will have a high-level understanding of the regulations governing your particular industry and how to foster healthy partner marketing efforts to thrive, not languish, in highly regulated industries. We will cover four heavily regulated industries:

- Finance (e.g., insurance, banking, investment)
- Retail (e.g., food, beauty, health)
- Education (e.g., universities, especially for-profit and online)
- Pharmaceuticals (e.g., drug companies)

# Advertising Challenges in Regulated Industries

Let's start by explaining the advertising challenges specific to these industries:

- 1 Rules are complex.** Government regulations are rarely simple and succinct. The FTC's Truth In Lending Act, for example, is a 317-page document — and the part which explains FTC rules concerning affiliate endorsements and testimonials alone is 6,500 words long. Regulations apply to all of your online marketing activities, no matter what channel you use, and can change without you knowing. It's daunting.
- 2 Teams of lawyers.** In order to cover the regulatory environment, you likely have a team of lawyers at your company that help you to interpret and understand the mounds of regulations. On the flip side, most of your partners will not have access to expensive legal resources, and therefore, it is up to you to educate and assist your partners with compliance.
- 3 Partners are the advertiser's responsibility.** Regulations treat partners' activities as if they were conducted directly by the advertiser. It's the advertiser's butt on the line if they fail to educate, monitor and halt a partner's bad behavior. This applies to any affiliate, re-seller, manufacturer or

designated broker or agent.

- 4 Partner reviews need disclosures.** Partners who recommend an advertiser's product must disclose this relationship, according to a 2013 FTC decision. The disclosure cannot be 8-point type in the footer of a blog, however. Partners need to know when, where and how to provide these disclosures.
- 5 Native advertising can be tricky.** This increasingly popular ad format deserves extra vigilance in regulated industries. Its ability to blend in with scientifically backed stories, for example, makes it easier for bloggers to mislead consumers and get their advertisers in trouble.
- 6 Lawsuits happen.** The penalty for rule-breaking is much higher in regulated industries. Repercussions range from cease-and-desist orders and small fines to multi-million-dollar lawsuits and negative publicity at the national level.

This guide dives into greater detail about these four industries, including examples of good and bad ads and tips on how to monitor ads run by your partners. To start, a summary of ad regulations by industry follows, but be sure to continue reading for a deep dive into each industry with more specific tips.

## Advertising regulations in finance

The two big watchdogs for financial advertisers are the Consumer Financial Protection Bureau (CFPB) and the Financial Industry Regulatory Authority (FINRA). While Sarbanes-Oxley does control disclosures in public material, it's less focused on consumer advertising.

The CFPB was created to protect consumers following the 2008 financial crisis and focuses on finding and stopping "unfair, deceptive, or abusive practices." They collect consumer complaints, send them to the companies, and then publish them on their site to help educate consumers. Their site reports that financial companies have responded to more than 577,000 complaints so far.

Here's what the most common CFPB advertising regulations for financial companies cover:

- **Deceptive statements about the benefits of financial services.** A recent example involving partners was a 2014 lawsuit of Amerisave Mortgage Corporation for \$19 million dollars. The suit found that the company ran misleading interest rates on the website of a third-party rate publisher.
- **Lack of advertising disclosure on fees or other rules affecting consumers.** Examples include not disclosing APR rates or setup fees, failing to mention how fees rise in the

future and not mentioning how a consumer can cancel their services.

FINRA, meanwhile, is the financial industry's self-regulatory agency, though it does have oversight from the Securities and Exchange Commission (SEC). According to FINRA, they "review firms' advertisements and other communications with the public to ensure they are fair, balanced, not misleading and comply with the standards of the SEC, MSRB and SIPC advertising rules."

The agency says it reviews more than 100,000 communications each year and, in some cases, has fined its members for issues with advertising compliance.

## Advertising regulations in retail

The main regulatory agency governing retail is the Federal Trade Commission. They created the Truth In Advertising laws, which say that "when consumers see or hear an advertisement, whether it's on the Internet, radio or television, or anywhere else, federal law says that ad must be truthful, not misleading, and, when appropriate, backed by scientific evidence."

They acknowledge that they pay special attention to retail advertising that:

- promises health benefits, such as claims about food, weight-loss products and dietary supplements;

- makes “high-performance” claims related to computers, ISPs and other high-tech products; or
- makes “environmentally friendly” claims.

Their response to fraudulent advertising is powerful. It involves federal-level actions to stop scams, prevent future scams, freeze advertisers’ assets, secure compensation for the victims, and even force advertisers to run corrective advertising to address the deceptive claims.

Recent legal actions can be found in the [FTC’s pressroom](#) and include filing suits with:

- 1 | An [affiliate marketing operation](#) using emails and websites to pitch bogus weight-loss products.
- 2 | Skin care marketers for deceiving consumers with risk-free trials.
- 3 | [This blogger for failing to disclose her relationship with an advertiser](#) when recommending the company’s dietary supplements.

### Advertising regulations in education

Regulations governing educational advertising also fall under the watchful eye of the FTC.

A common violation on the FTC’s radar is an educational institution misleading consumers about its legitimacy, typically using false accreditations or associations with recognized equivalency programs.

Recently, the [FTC brought two separate lawsuits](#) against operators of online “high schools” offering essentially worthless diplomas. The companies used bogus website names and misleading site meta tags to deliver their fraudulent claims to consumers.

The FTC also monitors educational advertising for claims about a student’s chances of securing employment or specific income levels after graduation. Similar to the retail industry, advertising must not promise any benefits to consumers that are misleading or not backed by evidence.

### Advertising regulations in pharmaceuticals

The US is one of only two developed countries allowing direct-to-consumer advertising by pharmaceutical companies (New Zealand is the other), so the temptation is ever-present to promise health benefits that science does not support.

The FTC is responsible for regulating advertising for over-the-counter (OTC) drugs, while the Food & Drug Administration (FDA) covers prescription drug advertising. Both agencies look for ads whose claims are not supported by evidence, misrepresent data, overstate benefits or downplay risks and so on.

[The FDA reports](#) that it does not require ads to be submitted for approval before going to market, but they do work with advertisers before they release TV ads. For drug ads, the

FDA requires that product claims include a major usage of the drug, its generic name and all risks.

Recent FDA fines have been for drug makers promoting their medicines for off-label uses, including a \$3 billion fine paid in 2012 by GlaxoSmithKline. There are few FDA examples so far involving partner claims in partner advertising.

### Monitoring your partners

I've summarized the regulations and potential for violations from partner advertising in four highly regulated industries. So, how does an advertiser manage their partners to avoid these admittedly scary scenarios?

The plan looks like this:

- 1 | **Educate partners.** Share the knowledge discussed in this article with your partners and repeat often. Make it abundantly clear how serious their compliance is and what the repercussions are for violations.

- 2 | **Monitor partners.** There can be thousands of locations where content is published, such as email, landing pages, blogs, social, mobile and video. Monitoring all of these marketing channels is tricky to do manually, but it becomes quite efficient if you deploy an automated rules-based monitoring solution like The Search Monitor or Corsearch.

- 3 | **Optimize partner relationships.** If you've found partner violations of federal rules and have given sufficient warning, it's time to remove them from your program and identify new partners. An affiliate network can help with this. Or get access to a database of affiliates scored by their compliance history, offered by some content monitoring platforms.

This is just a summary, and we'll provide much greater detail in the sections to come. ■

## Managing Ad Partners in the Finance Industry

This section of the guide will look specifically at the finance industry and how monitoring your affiliates can keep you off the government's radar and improve your ad performance. The Search Monitor, monitors ads, websites and

blogs for policy and regulatory compliance and gives me a unique perspective on this topic.

A couple of things to remember about the advertiser-affiliate relationship:



- You, the advertiser, are responsible for their advertising actions on your behalf.
- They, the affiliates, need your help. They're skilled at driving traffic, not staying current on complex government regulations and obeying them. They don't have your legal resources.

## Regulations governing financial ads

Let's start by describing the regulatory environment for financial ads. The main organization in control is the Consumer Financial Protection Bureau (CFPB), which was created following the 2008 financial crisis.

The CFPB collects consumer complaints (they're up to 600,000 so far), sends them to the companies, and then publishes them on its site to help educate consumers. After the crisis, the CFPB updated and strengthened many of the ad regulations that were already present in the Truth In Lending Act.

Here are a few of the CFPB's most noteworthy regulations that affect advertisers and their affiliates:

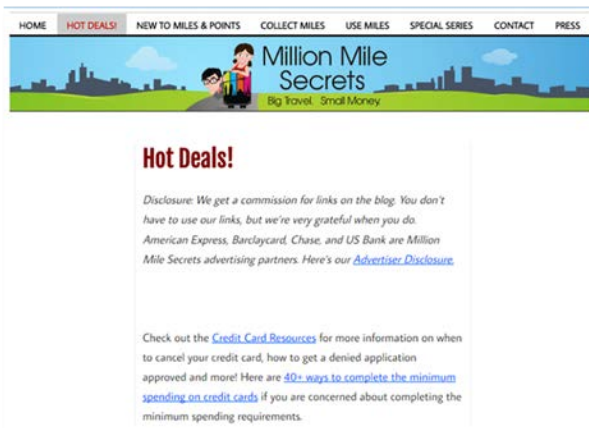
- **Disclosures:** Includes items such as interest rates, payments (initial and ongoing), fees, and even the period of repayment. Further, these must be a "clear and conspicuous disclosure" close to or easily referenced by the initial advertisement.
- **"Fixed" language:** One hot button for the CFPB is the misleading usage of the term "fixed" in relation to interest rates. For example, advertisers are prohibited from using this term if the rate may be subject to adjustment.
- **Government endorsement:** The CFPB does not allow advertisers to falsely claim a loan is part of a government-sponsored program or is endorsed by the government in any way, if that is not the case.
- **Future claims:** The CFPB knows that financial advertisers will want to promote lower payments to consumers than will actually be available after they sign up. Advertisers cannot make a future claim such as "pay only \$99 in interest" if that amount could change during the term of the loan.
- **Endorsements:** This is a big one for financial advertisers, and it's an easy one to violate. It applies to non-financial institutions as well, but it's definitely worth mentioning here. According to the Federal Trade Commission, "Endorsements must reflect the honest opinions, findings, beliefs or experience of the endorser. Furthermore, an endorsement may not convey any express or implied representation that would be deceptive if made directly by the advertiser." This second sentence says that an endorser's claims are considered as if they were from the advertiser. Further, there are separate rules if the endorsement comes

from a consumer, an expert or an organization, so check out the FTC’s exact language for more detail. We will cover this in more detail in our third article, which addresses the issues facing retailers.

By the way, the CFPB is not toothless when it comes to enforcing their regulations against affiliates and advertisers. Their newsroom is filled with articles about lawsuits and multimillion-dollar penalties against violators, including this \$19-million dollar suit against a company that ran misleading interest rates on the website of a third-party rate publisher.

A good way to drive home these regulations is to look at a few representative ads run by an advertiser’s affiliate.

### Example #1: Credit card blogger







The above screen shot shows an offers page on a financial blog providing tips for earning credit card frequent flier miles. The blogger’s disclosure is a great example of a conspicuous, detailed statement that helps consumers better

understand the basis for the recommendations farther down the page.

**Lesson:** This blogger is an affiliate of several very strong financial brands and is using a disclosure that acknowledges this relationship. These actions should make the brands, and the CFPB, very happy.

### Example #2: Loan comparison site

This example shows a home loan comparison

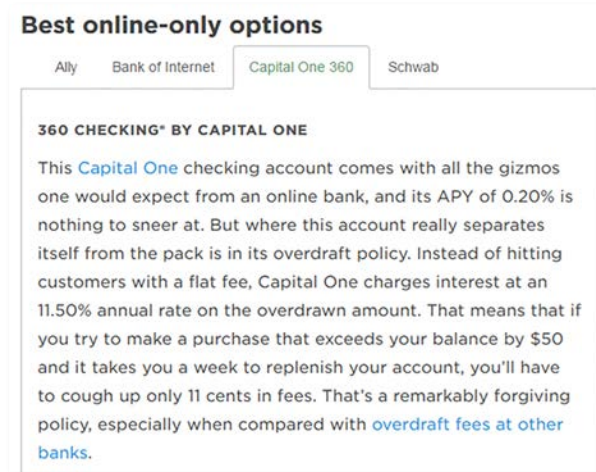
Lender	APR	Rate	Est. Fees	Questions?
 ★★★★★ NMLS ID 113206	3.125%	3.000% at 1 pts 30 day rate lock 30 Year Fixed	Payment \$1,349 Fees \$5,539 <a href="#">More details</a>	(866) 607-2490 <a href="#">Next</a> <small>(Not Free, no obligation)</small>
 Not yet rated NMLS ID 227765	3.186%	3.125% at 1 pts 30 day rate lock 30 Year Fixed	Payment \$1,371 Fees \$2,445 <a href="#">More details</a>	(800) 555-1212 <a href="#">Next</a> <small>(Not Free, no obligation)</small>
 Not yet rated NMLS ID 227765	3.630%	2.750% at 1 pts 30 day rate lock 30 Year Fixed (FHA)	Payment \$1,521 Fees \$6,400 <a href="#">More details</a>	(800) 555-1212 <a href="#">Next</a> <small>(Not Free, no obligation)</small>
 ★★★★★ NMLS ID 15899	3.222%	3.125% at 1 pts 30 day rate lock 30 Year Fixed	Payment \$1,371 Fees \$3,925 <a href="#">More details</a>	(844) 920-2163 <a href="#">Next</a> <small>(Not Free, no obligation)</small>

site featuring various lenders, their rates, payments and fees, where a single affiliate is likely servicing multiple advertisers. The site appears to be disclosing the key rates in a clear, comparative way. The Truth In Lending Act requires it to be easy for consumer to compare similar loans.

**Lesson:** The affiliate and its advertisers need to make sure the information is accurate, including that the rates are actually available, the published fees are not misleading, and the use of the term “Fixed” refers to the full term of the loan. In this case, I’d recommend the

advertiser use an ad monitoring technology that can be programmed to look for specific words that should or should not appear.

### Example #3: Checking account review site



This recommendation appeared on a well-known financial advice site in an article on the best checking accounts of 2016. The affiliate recommends four banks that have the best online-only options, and lists a specific APY and interest rate for its advertiser, Capital One.

**Lesson:** It would be easy for this affiliate to miss an important update from Capital One that the company increased its APY and interest rates for this checking account — or to forget to include an end date for a specific interest rate promotion. With these little slip-ups, this affiliate would be making misleading financial claims and risking scrutiny from the CFPB. Smart advertisers need to help their affiliates keep their rates updated at all times.

### Another important scenario: your affiliate's sub-affiliates

So far, we've discussed affiliates who drive traffic directly to their advertisers. Some financial affiliates, however, farm out their lead generation to other companies (aka sub-affiliates) and do it without the advertiser's knowledge. Advertisers are virtually blind to the identity of the sub-affiliates and therefore have no way of educating or monitoring sub-affiliates for compliance, which is very risky for the advertiser.

The Search Monitor's ad monitoring platform has seen this happening frequently. Examples include quote comparison sites designed for lead generation, such as with insurance, home loans, and especially payday loans. To manage this situation, financial advertisers should:

- clearly state in their agreement with affiliate networks if the use of sub-affiliates is allowed or not;
- and require affiliates to disclose the list of sub-affiliates so that the advertiser can monitor these channels.

### Your handy affiliate monitoring checklist for finance

The regulations and scenarios discussed are meant to be shared. If this information stays hidden in a browser bookmark or printout on your desk, we haven't done our job. We created

the handy checklist below to share with your team, client, boss and affiliates:

**1 | Monitor.** Monitor your affiliates' (and their sub-affiliates') content, including blogs, webpages, search ads, third-party review sites and lead gen sites. Monitoring should include these areas:

- **Claims:** Make sure your affiliates' claims are factual. CFPB is clear that you must avoid misleading comparisons between hypothetical gains and actual gains.
- **Disclosure:** Make sure your affiliates' offers properly disclose all key fees, rates, payments and time periods. Disclosures relating to claims or offers must be clear and conspicuous. Are they clear and conspicuous to the consumer?
- **Endorsements:** Make sure affiliate endorsements are honest and transparent about their connection with the advertiser.

**2 | Enforcement.** When your ad monitoring tool identifies regulatory issues, notify your partners immediately, with clear proof. The best way to help your partners stay in compliance is to provide the partner with a screen shot of its webpage, blog or ad that highlights the problem sections so that the partner knows exactly what to fix, and then continue to monitor the page daily until resolution.

## Final thoughts on financial ad regulations

For financial advertisers, it's become a business necessity to educate affiliates on financial regulations and then monitor them closely and frequently for compliance. If not, there are enough financial ad regulations to shut down your affiliate channels, attract lawsuits and harm your brand in the eyes of consumers. ■

# Managing Ad Partners in the Retail Industry

To start, we'll discuss the federal agency that rules the roost for retail advertisers, The Federal Trade Commission (FTC), whose mission is to "protect consumers and promote competition."

## Ad regulations for retailers

A cornerstone of FTC policy has always been its Truth In Advertising laws, which say that

"when consumers see or hear an advertisement, whether it's on the Internet, radio or television, or anywhere else, federal law says that ad must be truthful, not misleading, and, when appropriate, backed by scientific evidence."

The advent of digital advertising has led the FTC to update its rules to account for more

complex forms of advertising. In general, the FTC pays special attention to retailers that:

- promise health benefits, such as claims about food, weight-loss products and dietary supplements;
- make “high-performance” claims related to computers, ISPs and other high-tech products;
- make “environmentally friendly” claims; or
- use paid endorsements in a potentially deceptive way.

## Native advertising

The FTC also pays attention to certain ad formats and elements. One area is native advertising (aka sponsored content) which has the potential to deceive consumers by blending into a website’s editorial content. The FTC released a [special enforcement policy statement for native advertising](#) (PDF) in December 2015. Check it out to get the full detail.

In a nutshell, this relatively new ad format must abide by [Section 5 of the FTC act](#) (PDF), which prohibits “unfair or deceptive acts or practices in or affecting commerce.” In addition to the policy statement above, the FTC released a [guide on how to properly use native advertising](#), along with 17 examples. Share this with your affiliates ASAP, as you are responsible for their actions!

## Paid endorsements

This is a critical topic for your affiliates. The FTC created a [Guide Concerning Use of Endorsements and Testimonials In Advertising](#) that you should review. It includes 35 examples of advertisers using endorsements — both the good and the bad — including several involving social media and personal blogs.

The guide shows how the rules apply to the three major types of endorsements: consumers (often called testimonials), experts and organizations.

### A few important highlights:

- **Content:** Must be truthful and not misleading. Unsubstantiated claims are prohibited, as are claims that do not represent the typical results expected after product usage.
- **Connection:** Must disclose any connection between the endorser and advertiser that would affect consumers’ opinions of the product (e.g., endorser is part owner of the brand).
- **Compensation:** Must tell readers if they were compensated in some form by the advertiser. [Tricia Meyer](#), an affiliate marketing consultant, explains that the “compensation to a blogger means anything of value, including commissions, free products, or special treatment that other consumers or bloggers are not receiving.”

Further, Tricia explains that even without any payment, just the fact that the “advertiser asks for the blogger’s endorsement would create a connection between the two, and any future activity between the two would be closely scrutinized.”

- **Language:** As stated in this guide by the Performance Marketing Association (PMA) (PDF), “there is no magical disclosure language.” Language must be used that any “reasonable consumer” (an important phrase for the FTC) would know that an affiliate is getting paid for their endorsement.
- **Location:** Endorsement disclosures must appear above any review or affiliate link, not in the footer or on a separate page. For video endorsements, disclose all important connections before the endorsement begins.
- **Space-limited disclosures:** These still apply to small spaces like Facebook and Twitter. The PMA recommends putting “AD:” at the beginning of a tweet, for example, rather than just adding a hashtag at the end.

## Product claim disclosures

In addition to policing the use of endorsements, the FTC wants to improve how advertisers disclose important claims about a product’s performance.

The FTC takes product claim disclosures very seriously, having issued a 53-page FTC guide to disclosures (PDF). I recommend grabbing an espresso and a comfy chair and reviewing the guide.

Here are a few highlights in the meantime:

- **Proximity:** List the disclosure as close as possible to the claim, for both text and image claims. Do not simply link to a disclosure elsewhere.
- **Prominence:** It’s all about being “clear and conspicuous.” Make sure you use the appropriate size, colors, contrast, and even supporting graphics/icons if they help. Don’t bury it with less important copy. Further, make sure the prominence is consistent across all devices, especially mobile.
- **Distractions:** Make sure other factors do not distract the viewer from the disclosure, including links, buttons or unrelated graphics.

## Retail advertising lawsuits

The regulations previously discussed are not mere suggestions from the FTC. The FTC’s newsroom contains many examples of costly lawsuits filed against retailers. A few interesting examples are:

- 1 The FTC sued a major fashion retailer for running a seemingly objective native advertisement and for not disclosing it had paid 50 fashion influencers to post product usage photos on a social media site.
- 2 The FTC sued an affiliate network for posting deceptive product claims on fake news sites to promote weight-loss products.

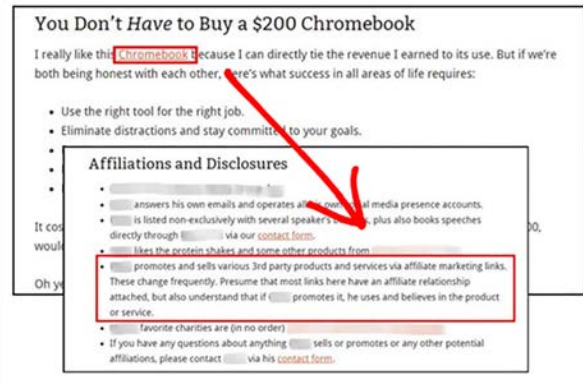
### Endorsement example: health affiliate



This blogger was paid to create a blog and promote a menopause product (Amberen), but did not disclose her relationship with the company. The FTC filed a \$40-million suit against Lunada, the maker of the drug, for failing to disclose this business relationship, since the relationship would be “material to consumers” in deciding to purchase Amberen. The suit claimed that the blog appeared to be a personal account of the blogger’s, and not created for marketing purposes.

**Lesson:** Affiliates must disclose their paid relationship with an advertiser or risk running afoul of the FTC’s deceptive advertising rules.

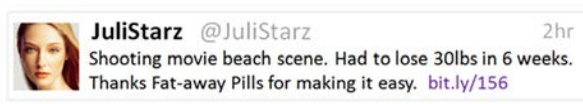
### Endorsement example: electronics affiliate



Here, we see an electronics blogger recommending the Chromebook. The link contains an affiliate ID, so they are being compensated for the recommendation. However, the disclosure about this paid relationship appears on a separate page, in a list of bullets. (Thanks to [this blogger](#) for providing this example and for helping educate other affiliates on this tricky issue.)

**Lesson:** This blogger needs to put the text about the paid relationship before the affiliate link. It’s as simple as that.

### Endorsement example: health tweet



The affiliate is a paid endorser for Fat-away pills and shares her results from taking the pills. This example comes from the FTC itself in [their disclosures guidelines](#) (PDF). Did you spot the two things the affiliate and her advertiser need to pay attention to?

**Lesson:** The endorser fails to mention that this is effectively a paid ad. She should put “AD:” at the start of the tweet. And since her results were much better than the average for the product, she needs to explain that her results were not typical.

### Next steps for retail advertisers

- 1 | **Train your affiliates.** Share this article and its links, and follow up with training. Get confirmation that the rules are understood.
- 2 | **Monitor your bloggers.** Use ad monitoring technology to alert you if your affiliates’ ads do not contain required disclosures or are making unsubstantiated claims.

Let the technology do the heavy lifting, since it’s impossible to do a thorough job manually. Also, require your affiliates to monitor their own ads as a backup.

- 3 | **Enforce FTC rules.** Don’t stand for repeat violations. Remove affiliates who break your rules.

**Note:** [The Performance Marketing Association reports](#) (PDF) that when deciding how to deal with infractions, the FTC considers the presence of a blogger education program and strict enforcement policies as positive factors. Another reason to monitor your affiliates closely. ■

## Managing Ad Partners in the Education Industry

In this section we tackle the education industry. An important note before we jump in—when we say “ad partners,” it refers to the full partner spectrum, including:

- individual bloggers paid with free products;
- commissioned affiliate marketers; and
- more established resellers.

At [The Search Monitor](#), we help advertisers find examples of ad violations from these groups. We mostly hear that partners “just didn’t know the rules” and “the brand holders never told us

to stop what we were doing.” It’s the perfect time of year for us to go back to school on this complex subject.

### The FTC

The Federal Trade Commission (FTC) is the government agency responsible for regulating ads for educational products and services. Its [Truth In Advertising](#) laws describe how “when consumers see or hear an advertisement, whether it’s on the internet, radio or television, or anywhere else, federal law says that ad must



be truthful, not misleading, and, when appropriate, backed by scientific evidence.”

As an advertiser, make sure you, your team and your ad partners all know these laws backward and forward.

## **Educational advertising lawsuits**

Before we get into the regulations themselves, let’s discuss the serious consequences if they’re broken. It’s crucial to remember that in the eyes of the FTC, your partners’ actions represent you. Therefore, both names will appear on their lawsuits. Lawsuits do happen and have been occurring on a stepped-up basis in the last few years.

Here are a few costly examples that involved both advertisers and their affiliates.

- In 2016, the FTC filed a [\\$200,000 lawsuit against LearningRx](#), a maker of “brain training” programs.
- In 2011, the FTC filed a [\\$250,000 lawsuit against Legacy Learning](#), a provider of educational guitar programs.

## **Unproven performance claims**

The FTC is concerned with educational advertisers who claim their product or service delivers a benefit that has not been backed by data. Let’s look at two examples that have caught the FTC’s eye in recent years.

## **Your Baby Can**

Your Baby Can was a company offering programs to help babies as young as nine months old learn to read. [The FTC filed an official complaint](#) with the company in 2012 that they used ads on websites including YouTube, Facebook and Twitter to make deceptive claims about their program’s effectiveness.

The complaint alleged that Your Baby Can failed to provide “competent and reliable scientific evidence” to back their claims.

My advice for you and your ad partners is pretty clear: It is illegal to misrepresent the benefits, performance or efficacy of a product or service, and to misrepresent any scientific evidence.

The FTC explained that competent evidence “means tests, analysis, research, or other studies that have been conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield accurate and reliable results.”

## **DeVry**

Another example concerns DeVry, a well-known for-profit educational institution founded in 1931. The FTC [filed a lawsuit against DeVry](#) in January 2016 for making performance claims about their graduates’ success — the percentage landing jobs after

graduation and their average income — that were backed up by faulty calculations and inaccurate data.

As part of the suit, the FTC chairwoman stated that “educational institutions like DeVry owe prospective students the truth about their graduates’ success finding employment in their field of study and the income they can earn.”

The DeVry lawsuit shows that the FTC now cares about future performance claims made by educational institutions. Make sure your claims are backed up by sound data, and then ensure that any ad partners using these claims do not alter them in any manner to generate more traffic or commissions.

Will they be tempted to do so? Yes, and [The Search Monitor’s](#) ad-monitoring platform has seen it from every type of ad partner.

### **Deceptive endorsements**

The second hot button for the FTC concerning educational ads is deceptive product endorsements. The FTC created a [Guide Concerning Use of Endorsements and Testimonials In Advertising](#) that I suggest you review.

The most important lesson is that your ad partners must clearly disclose if any of their endorsers are being compensated for their reviews; otherwise, they risk deceiving consumers.

Here are a few more items about endorsements to keep in mind:

- The endorsement must be truthful and not misleading.
- Connections between endorser and advertiser must be disclosed.
- Compensation between endorser and advertiser must be disclosed.
- Endorsement disclosures must appear in a “clear and conspicuous” manner, before the review, and use language that a reasonable consumer would understand.
- Small spaces (i.e., social media) are no excuse for skipping disclosures.

### **Luminosity**

A great example of an endorsement-gone-wrong, according to the FTC, is Luminosity, which sells brain-training programs to help improve consumers’ cognitive abilities. In 2016, the FTC took issue with how [Luminosity solicited consumer endorsements](#) using contests offering prizes and failed to disclose this to consumers. Prizes were significant, including a free iPad, a lifetime Luminosity subscription and a round-trip to San Francisco.

The company then used these endorsements to discuss how their product could help improve certain health conditions such as memory loss, dementia and Alzheimer’s. The endorsements appeared across all major ad channels,

including websites, Google AdWords, emails, blogs and social media.

To be FTC-compliant, make sure you and your ad partners disclose any paid endorsements in a clear and conspicuous manner, no matter how the endorsers are compensated. It's that simple.

### Next steps for education advertisers

This guide isn't intended to scare education advertisers away from using partners. It's meant to show you how to operate safely in a highly scrutinized industry. Here's your study sheet:

- 1 | **Train your affiliates.** Here's your chance to be a teacher. Share this article and its links, and follow up with training. Get confirmation the rules are understood.
- 2 | **Monitor your bloggers.** While not every student needs to be closely monitored, many do. Use ad-monitoring technology to

alert you if your affiliates' ads don't include required disclosures or are making unsubstantiated claims. Let the technology do the heavy lifting, as it's impossible to do a thorough job manually. Also, require your affiliates to monitor their own ads as a backup.

- 3 | **Enforce FTC rules.** Don't stand for repeat violations. Terminate contracts with any partner who breaks your rules.

The FTC has put educational advertisers on notice that they will be subject to more stringent rules for both themselves and their partners. No more overhyped and unproven health and scientific claims!

The answer is increased education, closer monitoring and stricter enforcement. Educational advertisers should not let a few bad apples ruin their whole class of successful ad partners. ■

## Managing Ad Partners in the Pharmaceutical Industry

At [The Search Monitor](#), we have access to thousands of ads run on millions of keywords. The data has shown that affiliates will knowingly (or unknowingly) break their advertisers' rules. It happens, so the best response is to be prepared.

This section will focus on pharmaceuticals. In the mid-1980s, drug companies began direct-to-consumer (DTC) advertising, which required a new set of federal advertising guidelines.

## The Food & Drug Administration (FDA)

In past sections, we've focused exclusively on the Federal Trade Commission as the government watchdog in control. While the FTC still governs over-the-counter drugs, the FDA has oversight on prescription drug advertising.

The FDA has a Center for Drug Evaluation and Research (CDER) whose mission is to "ensure that companies that sell prescription drugs also provide information that is truthful, balanced and accurately described." The CDER uses its Office of Prescription Drug Promotion (OPDP) to conduct research on DTC ads, including telephone surveys of consumers and doctors, to help decide if the ads are truthful.

Like the FTC, the FDA provides pharmaceutical advertisers with specific ad guidelines and breaks them into three main examples:

**1 | Product claim ad:** This ad type is used for performance claims and must not be false or misleading. It must include three mandatory elements: drug name (brand and generic), the FDA-approved use of the drug, and the most significant risks. A big regulatory issue here is off-label promotion, or promoting benefits not approved by the FDA. GlaxoSmithKline was hit with a \$3 billion lawsuit in 2012, for example, which included charges of off-label promotion for its Paxil and Wellbutrin drugs. Read more

about this ad type, and see this example of an approved ad.

**2 | Reminder ad:** This summarized ad type is meant for audiences who are already familiar with the drug. As such, it does not discuss the drug's uses and has fewer mandatory elements. Read more about this ad type.

**3 | Help seeking ad:** This ad type introduces a series of symptoms to consumers and encourages them to see a doctor to learn more. While it doesn't recommend a specific drug as a solution, it does list the sponsor's logo. Read more about this ad type.

In addition to these ad types, the OPDP released guidelines in 2014 on how to include mandatory FDA language when communicating in character-limited ads, such as with Facebook or Twitter. In short, if advertisers cannot include the mandatory info (i.e., its intended usage, benefits, and significant risk) and be accurate and honest, they should consider not using the platform. Learn more by checking out the OPDP's social media guidance document.

While I've just spoken about a few of the FDA's rules so far, there are definitely nuances. Start by reviewing the FDA's very detailed list of ad violations with your team and your ad partners, and then don't be shy about seeking their advice when questions arise.

## FDA enforcement

Drug companies must submit ads to the FDA as they're released to public, but they are not required to seek prior review. If the FDA believes an ad violates the law, it has several responses.

Its first response is to send a warning letter to the company asking it to halt the ad. This warning letter will also be published on the FDA website. In some cases, the FDA will require the advertiser or its partner to run a corrective ad.

In extreme cases, the FDA will seize drug supplies, ban specific promotional activities, or even bring criminal charges against the company.

## Don't forget HIPAA

In addition to knowing FDA regulations backwards and forwards, pharma advertisers must also get comfortable with the Health Insurance Portability and Accountability Act (HIPAA). In particular, advertisers must focus on HIPAA's "Standards for Privacy of Individually Identifiable Health Information," known as the Privacy Rule.

Here are four Privacy Rule elements for you and your ad partners to understand:

**1 | Marketing communications:** First, HIPAA defines what constitutes marketing communications, since pharma companies have many reasons to share personal data

(e.g., between doctors). They say: "So as not to interfere with core health care functions, the [Privacy] Rule distinguishes marketing communications from those communications about goods and services that are essential for quality health care."

[Learn more about this distinction](#), since your communications might not be governed by the rules that follow.

**2 | Authorizations:** Advertisers must obtain authorization from consumers to disclose their personal health data for marketing purposes, with specific details on how the data can be used. Authorizations must also state if remuneration is involved. [Learn more](#) (Scroll down to Marketing Authorizations).

**3 | Minimum necessary:** Advertisers can only request and disclose the "minimum necessary" personal consumer data. A patient does not need to provide their whole file, for example, if an advertiser wants to use them for an endorsement. [Learn more](#) about this requirement.

**4 | Business associates:** HIPAA also governs sharing personal data between companies. The Privacy Rule requires that covered entities "obtain satisfactory assurances that the business associate will use the information only for the purposes for which it was engaged by the covered entity, will safeguard the information from misuse, and

will help the covered entity comply with some of the covered entity's duties under the Privacy Rule." In addition, these covered entities as HIPAA calls them (Read: advertisers) may not sell protected information to a third party for that party's own interest. [Learn more](#).

## Recent FDA actions

The FDA's Office of Prescription Drug Promotion publicly posts every Warning Letter it sends to pharma advertisers. [Take a look](#).

They start in 1998 and provide helpful examples of what not to do. A common theme is a false and misleading ad that fails to disclose full risks associated with a drug.

I'll call your attention to a few interesting Warning Letters to pharmaceutical manufacturers:

- **Pfizer:** [A YouTube Video was deemed misleading](#) for omitting risks and material facts about intended drug uses.
- **Duchesnay:** [A Kim Kardashian Instagram post was deemed misleading](#) for the same reasons as above. [This Forbes article](#) provides a helpful review of the incident. In this case, the FDA required that a corrective ad "should be distributed using the same media, and generally for the same duration of time and with the same frequency that the violative promotional material was disseminated."

## Don't forget the engines

The government isn't the only organization trying to protect consumers. Search engines and other advertising networks may have their own rules to protect themselves from consumer lawsuits, so check with each one before you sign up to advertise.

Google, for example, has a detailed and complex list of pharma ad requirements. For example:

- Rules differ based on prescription drugs vs. over-the-counter medicines.
- Rules may only apply to the country you're advertising in. For example, pharma manufacturers may only promote prescription drugs on Google in the United States, Canada and New Zealand.
- Google restricts the promotion of online pharmacies. They are only available in some countries, and biddable keywords are restricted as well.
- Both pharma manufacturers and online pharmacies must be certified by Google to even advertise.
- Google has a list of unapproved substances for advertising and prohibits false or misleading health claims.
- [Read more from Google here](#). And don't forget to check with the other engines you or your partners use. [Bing has its own rules](#), for example.

## Tips for pharma advertisers

Since The Search Monitor has been monitoring advertisers since 2008, I've seen more and more pharma companies embrace automated crawling technology to keep an eye on ad partners and avoid regulatory issues. My advice to these advertisers is fairly straightforward, but effective:

- 1 Educate your team and partners:** Share this article and its links, and follow up with training. Get confirmation the rules are understood.
- 2 Monitor actively:** Use the latest ad-monitoring technology to alert you if your affiliates' ads do not contain required disclosures or are making unsubstantiated

claims. Let the technology do the heavy lifting since it's impossible to do a thorough job manually. Also, require your affiliates to monitor their own ads as a backup.

- 3 Enforce rules & remove violators:** Don't stand for repeat violations. Terminate contracts with any partner who breaks your rules!
- 4 Check in with the FDA:** If you have questions, try to seek advice from the FDA before you post. While they don't require an ad review, their site mentions that some drug companies seek advice before running an ad. ■

## Final Thoughts On Managing Ad Regulations

The goal of this guide was to show advertisers that a thorough understanding of ad regulations in their industry will let them embrace, not fear, the complexities of government regulations.

We've discussed important regulatory concepts related to product claims, paid endorsements, character-limited ads, native ads and your affiliates' sub-affiliates.

Know these ad regulations backward and forward, and understand how to quickly catch any violations. A little work upfront will make you better equipped than any of your competitors to avoid costly lawsuits, protect your brand, optimize your ad partners and improve your own ad performance. Here's to keeping the government out of your business! ■

# About The Authors

## About The Search Monitor®

Hundreds of agencies, search marketers, and affiliate managers use The Search Monitor® to drive greater revenue from online advertising campaigns. The Search Monitor platform provides real-time advertising intelligence to monitor brand and trademark use, affiliate compliance, and competitive advertisers on SEM, SEO, local search, display, mobile, PLAs, and shopping engines worldwide.

The platform helps advertisers with compliance issues related to trademarks, affiliate programs, offers, minimum advertised pricing (MAP), content monitoring, and hotel price parity.

The Search Monitor platform also provides competitive insights such as SERP visibility, keyword reach, ad rank, ad copy, popular offers, landing pages, and click and spend data.

The Search Monitor data is the most precise available through high-frequency crawling and advanced geo-targeting from thousands of global IP addresses. All data is available through easy-to-use web-based reports, APIs, and automatic alerts that are customizable for 1,200+ verticals.

Learn more at [TheSearchMonitor.com](http://TheSearchMonitor.com).

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