



U.S. Federal Trade Commission Strategic Planning for Consumer Protection

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Purpose

- Avoids expenditure of resources that do not support the mission
- Avoids ad hoc decision making
- Provides a structure for input from both internal and external stakeholders
- Provides a measure for performance
- Promotes teamwork

Priorities

- Market surveillance
 - Areas of mass lawlessness
 - Emerging product areas or media
 - Immune boosting claims
 - Infomercials or Internet
- Consumer complaints
- Consumer surveys
- Input from stakeholders
- Political considerations



Strategic Plan

- No single way to do it
- FTC process:
 - Each Division must submit a proposed plan outlining priorities in each program area.
 - Example: In the health area, our strategic priorities over the last year have been cold and flu products and cancer remedies.
 - Before making this recommendation, Division Management solicits input from staff.
- Bureau management then approves or modifies the priorities and instructs the Divisions to commence operational planning.
- Input solicited formally and informally from outside stakeholders.



Operational Planning

- The process for operational planning is similar.
- Managers in each program area have meetings with their staffs to formulate an operational plan.
- Operational plans must integrate the following elements to achieve the strategic goal:
 - Law enforcement
 - Consumer education
 - Business education
 - Business self-regulation
- Operational plans must also indicate the work years and money that would need to be spent.
- Not limited to one year

Factors to consider

- Have we used all of the tools available?
- Do the tools really fit the problem?
- Are there better ways to address the problem?
- Are the resources available to execute the plan?

Sample

1. Dietary Supplements - Other than Weight Loss (See ____ below)

FTE:

Contracts:

Travel:

Sales of dietary supplements exceeded \$19 billion in 2004. To combat fraud and deception in the advertising and sale of dietary supplements in ____, we will:

- a. Maintain strong enforcement presence by:
Completing pending litigation, including civil penalty cases.
- b. Coordinate with other state, federal, and international authorities by:
Continuing to meet regularly with enforcement staff of FDA to identify deceptive supplement marketers, share information on existing investigations, and formulate coordinated enforcement plan including joint action of FTC 13b case and FDA seizure where appropriate.
- c. Engage in industry and consumer education by
Maintaining communication channels with principal trade associations; participating in educational conferences for supplement industry; preparing written articles on FTC policies and enforcement actions for trade press.



Integrated Plans



- Weight-Loss Products
 - Multi-year integrated program
- Diabetes Products
 - Cross-border cooperation



U.S. Federal Trade Commission Conducting an Investigation

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Selecting Cases

- Effective consumer protection focuses on a nation's consumers as a whole, rather than on individual consumers. Pick cases carefully to achieve the agency's goals.

Selecting Cases

- Law enforcement cases can accomplish one or more of several goals:
 - To alert the business community that the particular practice violates the law
 - To stop a specific business from engaging in deceptive practices
 - To return money to consumers who were injured or deceived

Selecting Cases

- The FTC Complaint Database lets us identify the kinds of deceptive or fraudulent practices about which consumers are complaining.
- Most of the FTC's advertising cases come from:
 - Informal ad review
 - News media
 - Referrals from businesses, and
 - Other agencies and branches of the government



Selecting Cases

- Management decides what types of practices to investigate, based on current law enforcement needs.
 - EXAMPLE: Since October 2005, our cases have focused on the following areas:
 - deceptive credit practices
 - miscellaneous deception – employment scams, unordered merchandise, deceptive claims for products or services
 - deceptive health benefit claims for supplements or devices
 - deceptive telemarketing practices and Do Not Call Rule violations
 - business opportunity deception
 - insufficient data security or identity theft

Selecting Cases

- In the area of advertising our priorities are:
 - National advertising
 - Significant consumer injury
 - Disease treatment, cure, and prevention claims
 - Advertising directed at children or for products to be used by children
 - Misrepresentations concerning safety

Deciding Whom to Investigate

- Identifying targets for investigation:
 - Often, there are several entities engaged in a similar practice. When given a choice of targets, we try to focus on companies that likely caused the greatest amount of consumer injury from the practice.

Investigational Tools

- The most complete information is obtained by contacting the company being investigated.
- Seek information in writing or at a hearing where answers are recorded.
- Two main ways to obtain written information from a company being investigated
 - Access letter: Informal letter sent to company requesting that an entity voluntarily turn over information we request
 - Civil Investigative Demand (called a “CID”): Like a subpoena, a CID is used to compel an entity to provide information.

Investigational Tools

- **EXAMPLES of useful information:**
 - Where were ads shown
 - What instructions were given to telephone sales personnel
 - What substantiation was relied on to support advertising claims
 - Obtain samples of the products, copies of ads, and all consumer complaints that the company received.
 - How many products were sold and how much profit was made

Investigational Tools

- If the case involves fraud and the company being investigated is likely to hide assets or leave the country if it learns of the investigation, it may be better not to contact the company. In such a case, find other sources of information.



Investigational Tools

- Other sources of information include:
 - Former employees.
 - The company's bank and credit card records.
 - Consumers who submitted complaints to the FTC Complaint Database.
 - The Internet, including commercial Internet sites that contain corporate and other information about companies (in the U.S., these include Lexis/Nexis and Dun & Bradstreet).

Investigational Tools

- Shipping companies may be able to provide information.
 - **EXAMPLE:** Shipping companies like Federal Express or DHL can provide records showing all addresses to which packages were shipped from a specific address. This can help identify how many sales were made and who may be entitled to refunds.

Investigational Tools

- Make a taped call to order an advertised product.
- Have an investigator obtain a credit card under alias and order using this name, asking products to be shipped to a location away from the office. The investigator should:
 - Ask questions to elicit as much information as possible from the company's telephone sales force.
 - Sign an affidavit swearing to the accuracy of the tape recording.
 - Keep records of when the product is delivered, whether unauthorized charges are made on the credit card, and whether company promises about returns are honored.

Expert Advice

- If the company made scientific or technical claims, conduct research to evaluate the quality of the proof.
- Obtain help from experts in the relevant area -- researchers, employees of other government agencies, and members of professional societies.
- If there is a question about whether statistical analysis was done right, consult a statistician.

Evaluating the Evidence

- Once sufficient information is gathered, evaluate it to see whether law enforcement is needed.
 - We close many investigations without further action. This can occur for any number of reasons. Closing may be appropriate if consumer injury was minimal because sales were low or ads were not widely shown.
 - Closing may be appropriate if resources need to be directed to another area. In such a case, it may be appropriate to obtain a letter from the company saying that it will cease the practice at issue, and to respond with a letter stating that, as a result, the matter is closed.

Evaluating the Evidence

- In most cases, if, after review of the evidence, it appears that that law enforcement is needed, we prepare a written complaint and proposed order.



Legal Documentation

- The complaint summarizes the entity and/or individual which/who violated the law and how.
 - A complaint names the defendant(s), quotes examples of practices that are deceptive or misleading, and cites the law at issue.

Legal Documentation

- The order outlines what the defendant can and cannot do in the future.
- As a general matter, an order states that the defendant must not repeat the conduct cited in the complaint **and** also must not engage in similar practices.

Legal Documentation

- There are many other provisions that can go in an order, such as:
 - A requirement that the defendant refund money to consumers who purchased a product in the past
 - A requirement that the defendant send letters to consumers, warning that the product does not work
 - A requirement that the defendant tell the stores and other distributors that sell its products not to use the prohibited advertising anymore.

Negotiations- yes or no

- In some cases, the FTC goes into court *before* talking to the defendant.
- This approach is likely if the case involves serious fraud or we suspect the defendant will hide its assets if it learns of the case.

Negotiations

- More often, we contact the defendant before going to court, and ask it to agree to the order without litigation.
 - This allows development of a more complete record. In some cases, the defendant will provide evidence that shows that a case is not appropriate or that the order we initially prepared should be modified.

Responsibilities

- Lawyers decide what fact-finding should be conducted.
- Lawyers, economists, or college graduates with special training in investigations do the fact-finding.
- Lawyers analyze the evidence to see if it shows that a case is appropriate. These lawyers must be trained to fully understand the law *and* what kind of evidence is needed to show a violation.

Responsibilities

- Management must approve a recommendation to bring a case, based on agency goals and policy considerations.
- Lawyers prepare the complaint and order and negotiate with the defendants.



U.S. Federal Trade Commission Remedies for Deceptive Advertising

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Remedies

- FTC brings cases in one of two venues - either federal court or an administrative body within the FTC
- There are a variety of remedies FTC can pursue, but not all remedies are available both venues
- Thus, when choosing a venue, FTC must consider the most effective remedies and, at the same time, the venues in which those remedies are available

Remedies

- Cease and Desist Orders
 - The basic administrative remedy is a cease and desist order
 - The purpose is two-fold:
 - Enjoin the illegal conduct alleged in the complaint
 - Prevent future violations of the law
 - Voluntary cessation of an advertising campaign is not a defense to a Section 5 action

Remedies

- “Fencing-in”
 - “If the Commission is to attain the narrow 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. Ruberoid Co., 343 U.S. 470, 473 (1952)

Remedies

- Fencing-in (continued)
 - The U.S. Supreme Court has given the FTC wide latitude in fashioning fencing-in provisions that will not be disturbed except “where the remedy selected has no reasonable relation to the unlawful practices found to exist.”
 - Courts have upheld FTC orders encompassing all products a company markets or all products in a broad category, based on violations involving only a single product or group of products
 - Among the factors the FTC will consider in determining the appropriate remedy are the seriousness of the present violation, the violator’s past record with respect to deceptive practices, and the potential transferability of the illegal practice to other products
 - Weight given a particular factor varies. The more egregious the facts with respect to a particular element, the less important it is that another negative factor be present

Remedies

- Corrective Advertising
 - If merely prohibiting future misrepresentations will not dispel misperceptions conveyed through prior misrepresentations, the FTC may order corrective advertising
 - Listerine case – federal appeals court upheld FTC order stopping company (Warner-Lambert) from representing that Listerine mouthwash helps prevent colds and sore throats and requiring it for a specific period to state in future advertising that “Listerine will not help prevent colds or sore throats or lessen their severity.”

Remedies

- Other “Informational” Remedies
 - The FTC may require advertisers to make accurate information available through disclosures, direct notification, or consumer education
 - Example: safety and side effects warnings

Remedies

- Bans, bonds, and other remedies
 - To protect consumers in the future, district courts have banned individuals from certain industries, required them to post bonds before engaging in business, or ordered other remedies to ensure compliance
 - In addition, the Commission has upheld its authority to impose bonds

Remedies

- Trade Name Excision
 - The Commission has the authority to forbid the use of a brand name or trade name when less restrictive remedies, such as affirmative disclosures, would be insufficient to eliminate the deception conveyed by the name or would lead to a confusing contradiction in terms

Remedies

- Consumer Redress, Disgorgement, and Other Financial Remedies
 - Pursuant to its inherent equitable powers, a federal district court may order redress or disgorgement of profits under Section 13(b) of the FTC Act
 - In addition, Commission consent orders often require advertisers to pay redress or disgorge profits
 - The Commission also may seek redress under Section 19 of the FTC Act, if an advertiser has been found to have violated Section 5 and if the court finds that the challenged act or practice is “dishonest or fraudulent”

Remedies

- Civil Penalties for Violations of Commission Orders and Trade Regulation Rules
 - Section 5 of the FTC Act permits the Commission to seek civil penalties in federal court for violations of cease and desist orders
 - Section 5(m)(1) authorizes the Commission to seek civil penalties for violations of trade regulation rules
 - United States v. Bayer Corp.: \$3.2 million civil penalty for deceptive weight loss claims for One-A-Day WeightSmart, disseminated in violation of 1991 FTC order

Navigation sidebar with icons for:

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Remedies

- Civil or Criminal Contempt for Violations of District Court orders
 - Federal district court orders may be enforced through civil or criminal contempt actions filed in district court
 - In 1997, the FTC announced Project Scofflaw, a program of criminal and civil enforcement against violators of FTC-obtained district court orders
 - Since then, more than 20 defendants have been sentenced to a total of 77 years in prison