

## Legal memo

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### Product labeling and advertising: top 5 mistakes by companies

**Advertising is an indispensable tool for publicizing and promoting the marketing of goods and services offered to the consumer public. However, in the attempt to position them in the market, marketers may end up affecting the interests of consumers. What is the reason?**

#### 1. Unawareness and lack of compliance with labeling regulations.

In Mexico, there are several provisions ruling the information that product labeling must contain, in order to enable consumers to make an informed purchase decision.

The Federal Consumer Protection Law is the main law that regulates the conduct that shall be observed by suppliers in the offering and promotion of any type of product.

There are also other provisions that are specifically applicable to products of a certain industry or sector, such as clothing, leather footwear, household appliances, etc. These provisions are mostly Mexican Official Standards, which establish, among other matters, the minimum information requirements that product labeling shall contain; for example: composition, instructions for use, precautionary legends, and recommendations.

In the case of products with health impact, the guidelines of the General Health Law and the Regulations of the General Health Law on Advertising must also be observed. This would be the case of food, beverages, beauty products, medicines, herbal remedies, toiletries, among others.

#### 2. Inclusion of promotional claims on labeling.

In many cases, suppliers include advertising messages in their product labeling to encourage potential consumers to buy. However, some of these messages may be misleading or confusing and may be considered misleading or abusive to consumers.

The regulations oblige marketers to ensure that the advertising they disseminate by any means about their products is **truthful, verifiable, clear, and free of any information that induces or could induce error or confusion to consumers**, due to the inaccurate, false, exaggerated, partial, contrived or biased manner in which it is presented.



In order to determine whether or not advertising can be classified as misleading or abusive, it is necessary to analyze both its **objective and subjective elements**. The objective element stands for describing the product and the subjective comprises estimative judgments that exalt the product's properties.

**The requirement of truthfulness and verification is only applicable to the objective elements of the advertising message** since they are measurable. The subjective elements are not verifiable because they are only intended to attract the consumer's attention.

### **3. Lack or insufficiency of technical-scientific support.**

The lack or insufficiency of technical-scientific support that accredits the veracity of the objective elements of the advertising message may result in the claims made therein being considered false or inaccurate.

It is very common for suppliers to make categorical promises of efficacy for their products, placing the product at a one hundred percent standard, with no laboratory tests to back it up, or those that are available show a lower percentage.

For example, a claim stating that a product "eliminates germs and bacteria" implies a standard of one hundred percent efficacy, whereas there is a margin of efficacy in every product. **Therefore, some suppliers have chosen to include claims such as "eliminates 99.9% of germs and bacteria".**

### **4. Inclusion of inaccurate, biased, contrived, or tendentious claims.**

The problem arises when the advertising message includes objective elements that, even if true, induce or may induce consumers to make an erroneous purchase decision, due to **the inaccurate, partial, contrived, or biased manner in which they are presented**.

Advertising is considered inaccurate or partial when it omits information that is decisive for the consumer to make the decision to purchase the advertised product. To comply with the accuracy requirement, Mexican law establishes the minimum information that must be disclosed in advance to consumers.

A very illustrative example that we see nowadays are **the warnings that health regulations require to be included in the labeling of beverages and foods regarding their high sugar, fat, and sodium content**, since it is considered essential for consumers to know this information in order to make a purchasing decision.

Since subjective elements lack verifiable informative content, they are not usually considered as "suitable" to deceive consumers. However, sometimes the persuasiveness of the message is so disguised that it may appear objective to some degree. In the latter case, it generates expectations in consumers that do not correspond to reality.

**Marketers must identify the consumer segment to which their advertising is directed and determine the meaning the latter can attribute to both the objective and subjective**



**elements** of their advertising. To the extent that these consumers are unable to distinguish metaphor or commercial persuasion, the advertisement will be classified as exaggerated, contrived, or biased.

In quality studies on laundry detergents conducted by the Mexican Federal Consumer Protection Agency (PROFECO), promotional that may generate false expectations in consumers claims have been identified, such as: "**champion against stains**", "**stain removal power**", "**explosive cleaning**", "**perfect whites**", among others.

### 5. Lack of internal label compliance program.

In most cases, marketers are able to anticipate if their advertising may be misleading to consumers from its creation process. However, in other cases this is not so obvious to detect. Therefore, it is advisable that marketers carry out a multidisciplinary analysis of their advertising, to verify its compliance with the requirements of truthfulness, verification and clarity referred to in the regulation.

As a result, it is important for suppliers to integrate internal review processes, applying the following exercise:

- Identify the addressee of the advertisement.
- Identify the objective elements of the advertisement and the technical-scientific support evidencing them.
- Identify the subjective elements of the advertisement and determine the meaning attributed to them by the consumer.
- Determine whether the advertisement is truthful or whether it may mislead the consumer from a technical, scientific, and legal point of view.
- Conduct the labeling or advertisement analysis proceedings with PROFECO and/or obtain the advertising authorization of the Federal Commission for Protection against Sanitary Risks (COFEPRIS), as applicable.

### Potential risks and contingencies

PROFECO is the authority in charge of overseeing that commercial advertising complies with the requirements established in Mexico's consumer protection legislation. In the case of advertising of products regulated by health laws, COFEPRIS has the power to verify and sanction such advertising from a public health perspective, without prejudice to PROFECO's powers regarding consumer relations.

In the event that PROFECO presumes that the advertising of a certain product may be misleading to consumers, it may order the suspension of the advertising (if it is disseminated by any means of communication), the immobilization or seizure of the products (in case it is shown in containers, packaging or labels), the suspension of the commercialization of the product or even the total or partial closure of the commercial establishment.



If after the corresponding administrative procedure, **PROFECO concludes that the advertising is indeed misleading for consumers, it may order its correction and apply the corresponding sanctions** to prevent the merchant from incurring again in this type of practices.

**Misleading advertising is considered a particularly serious infraction**, punishable by a fine of up to \$5'237,237.18 M.N. (~ USD \$261,200); or 10% of the gross income obtained from the commercialization of the product contained in the advertising.

Affected consumers, for their part, have the right to claim **reimbursement**, as well as a bonus that may not be less than **20% of the price paid for the acquisition of the good** or service.

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