

Legal Alerts

# Addressing a Competitor's Unsubstantiated Product Claims in the Food & Beverage and Beauty Industries

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In a crowded marketplace where label claims often serve as a key point of differentiation, brands frequently push the boundaries of what may or may not be permissible under applicable regulations. This dynamic can create tension when a company rolls out a marketing or label claim about its product that appears non-compliant and that competitors recognize as such. In some cases, a non-compliant claim may confer a competitive advantage, placing compliant brands at a disadvantage and raising the question of whether action is warranted.

When confronted with this situation, brands face a familiar set of considerations and must decide whether to do nothing, confront the competitor directly, pursue informal resolution or take more formal action. While understanding FDA enforcement mechanisms can certainly be helpful, regulatory enforcement may not align with commercial timelines. As a result, brands may consider alternative, more immediate, strategies to address potentially non-compliant competitor claims and protect their position in the marketplace.

1. **Approaching the Competitor Directly:** Brands may choose to reach out directly or through legal counsel with a friendly notice along the lines of "We believe this claim may not comply with FDA and/or state regulations and may raise risk for both your business and the category..." This approach is typically framed as a compliance notice rather than a demand and typically does not involve threats or monetary claims. In practice, this can be effective where the competitor is unaware of the issue, particularly in the context of implied or technical labeling claims. In some cases, the prospect of regulatory scrutiny may prompt voluntary correction, with the understanding that unresolved issues may lead to escalation through other channels.
2. **Engaging Industry Groups:** In some circumstances, brands may engage relevant industry groups and trade associations to encourage category-wide alignment on compliant claim substantiation. This approach can be beneficial where a challenged claim reflects a broader marketplace shift. Industry groups can help facilitate dialogue between parties, encourage and circulate best practices or support standard setting that will help to reduce confusion and promote consistent compliance.
3. **Contacting Retailers:** Many retailers will review complaints that a product is mislabeled or non-compliant, and some retailers may require the competitor to pull or revise packaging. While retailers are often sensitive to regulatory risk, this approach can carry legal exposure, as competitors may assert

claims for tortious interference with existing business or contractual relationships if the complaint is perceived as commercially motivated rather than compliance driven. Retailer responses may also vary significantly based on the strength of the compliance issue and the retailer's own risk tolerance.

- i. **Challenging through the National Advertising Division:** The National Advertising Division (NAD) is a self-regulatory body that allows one brand to challenge another brand's claims in advertising and labeling. NAD can offer a faster and less adversarial alternative to court, is generally more cost-effective than litigation and is highly respected by courts, media, retailers and other agencies. NAD can recommend claim removal, claim modification or substantiation requirements. NAD proceedings also create a formal compliance record, with which competitors frequently comply.
- ii. **Submitting a Complaint to Regulatory Agencies:** Another option is submitting a complaint to the FDA, to the state Attorneys General or to other state agencies that may have regulatory authority. This option may be appropriate where a potentially non-compliant claim is ongoing. Complaints can often be made anonymously or through legal counsel without identifying the complaining party, reducing the risk of retaliation. However, regulatory reviews can often involve extended timelines, and more immediate action may be warranted or desired.
- iii. **Asserting False Advertising or Unfair Competition Claims:** Formal litigation represents the most aggressive option and is generally pursued when a claim is blatantly false, materially misleading, causes competitive harm and is not voluntarily corrected. This path is typically resource-intensive, public and time-consuming and may also result in heightened scrutiny of a complaining company's own labeling or marketing practices. It may also set precedent for the category and draw broader regulatory or industry attention to the challenged claim.

Potentially non-compliant competitor label claims can create both regulatory and competitive challenges, particularly where labeling materially influences consumer decision-making. While FDA and state-agency enforcement provides an important regulatory framework, brands are not limited to agency action and may consider a range of strategic responses depending on the nature of the claim and the resulting competitive impact. These options span informal engagement, regulatory processes, commercial channels and litigation. Each approach presents different timing, cost and risk considerations, and no single response is appropriate in every situation.

For additional information regarding these issues, please contact Foster Garvey's [Consumer Brands](#) team.

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