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Advertising & Marketing

Mexico

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MEXICO

Law and Practice

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1. Legal/Regulatory Framework

1.1 Source of Regulations

The most relevant legislation, regulations and guidelines that govern advertising practices are set out below.

- The Federal Consumer Protection Law (*Ley Federal de Protección al Consumidor*, or LFPC) and its Regulations (LFPC Regulations).
- The personal data protection laws in Mexico that regulate the processing of personal data of all individuals in Mexico, including for marketing and advertising purposes (the Mexican DPL), particularly:
 - (a) the Federal Law on the Protection of Personal Data Held by Private Parties (*Ley Federal de Protección de Datos Personales en Posesión de los Particulares*, or DPL Law);
 - (b) the DPL Law's Regulations (DPL Regulations); and
 - (c) the Privacy Notice Guidelines (*Lineamientos del Aviso de Privacidad*).
- In health matters the main law that governs advertising practices in the sector is the General Health Law (*Ley General de Salud*) and its Regulations in Advertising Matters (*Reglamento de La Ley General de Salud en Materia de Publicidad*), or the LGS and its Regulations.
- In intellectual property matters, including their enforcement, advertising and marketing are partially regulated by the Industrial Property Law (*Ley de la Propiedad Industrial*) (Industrial Property Law), which, on 5 November 2020, will be officially abrogated and substituted by the Federal Law for the Protection of Industrial Property (*Ley Federal de Protección a la Propiedad Industrial*, or IP Law).

Notwithstanding the foregoing, there are many other relevant laws, regulations and guidelines that relate to advertising practices in particular industries, activities, products, or services, as further described in this article.

1.2 Regulatory Authorities

The Federal Consumer Protection Agency (*Procuraduría Federal del Consumidor*, or PROFECO) is the agency responsible for enforcing the LFPC and the LFPC Regulations. The remedies in connection with advertising practices available under such legislation include administrative proceedings before PROFECO, bonification and compensation, reimbursement, product repairs and indemnification of damages and losses.

The National Institute for Transparency, Access to Information and Personal Data Protection (*Instituto Nacional de Transparencia, Acceso a la Información y Protección de Datos Personales*, or INAI) is responsible for the enforcement of the Mexican DPL. The remedies under the Mexican DPL include administrative

proceedings before INAI, but no damages can be awarded since these need to be awarded through civil courts, and criminal complaints.

In Health Matters the regulatory authority in charge of enforcing the laws and regulations is the Federal Commission for the protection against Sanitary Risks (*Comisión Federal para la Protección contra Riesgos Sanitarios*, or COFEPRIS). On these matters, COFEPRIS has two different roles: as a regulator and as a sanctioning body. As regulator, COFEPRIS is in charge of granting health advertising permits for drugs, medical devices, food supplements, food and non-alcoholic beverages, alcoholic beverages and tobacco products, among other things. As a sanctioning body, COFEPRIS is empowered to initiate administrative procedures for sanctioning conduct that contravenes legal provisions in health advertising matters. The remedies in connection with advertising practices under the LGS and its Regulations include anonymous denunciation and complaints before COFEPRIS, in the event of which the agency can order the removal of the advertisement, modification or removal of claims, and impose sanctions on those responsible for the advertising.

The Mexican Institute of Industrial Property (MIIP), is the regulatory authority in charge of enforcing the provisions in the IP Law. The remedies under the IP Law include an administrative proceeding before the MIIP, execution of preliminary injunctions, and the possibility to pursue damages and losses, through a separate civil action.

Additional regulatory authorities are empowered to enforce the laws and regulations governing particular industries, activities, products, or services, as further stated below.

1.3 Scope of Liability

Per the LFPC, the suppliers of goods, products or services incur administrative responsibility for their acts if they violate consumers' rights (including through deceptive advertising), as well as the acts of their collaborators, subordinates and all kinds of managers, consultants, guards or auxiliary personnel who provide their services, regardless of the personal responsibility incurred by the offender.

Regarding sanitary matters, the suppliers of goods, products or services incur administrative responsibility for violations of the LGS and its Regulations in advertising matters.

Additionally the IP Law states that any individual or entity using a trade mark in the comparison of goods or services, without authorisation from the owner, and without following the specific provisions for doing so, could be liable and subject to administrative sanctions imposed by the MIIP.

1.4 Self-Regulation

There are a variety of private bodies and organisations that have voluntary/self-regulatory advertising codes of practice. The Ethical and Transparency Council of the Pharmaceutical Industry (CETIFARMA) has a code of good promotion practices. The Council of Self-Regulation and Ethics in Advertising (CONAR) also has different codes that govern advertising, such as the Ethical Advertising Code, the Self-Regulatory Code for Food and Beverage Advertising Directed at Children and the Self-Regulatory Code for Non-alcoholic Beverages.

These codes are not legally mandatory; however, a number of companies in the pharmaceutical and food and beverage industry are part of CONAR and have signed the commitment to comply with these codes. As a result, if they do not comply, they are subject to private sanctions.

1.5 Private Right of Action

All consumers have the right to file a claim or complaint against a supplier before PROFECO for any inconformity regarding a consumer-supplier relationship, including complaints or claims challenging advertising practices. PROFECO then starts a conciliation procedure between the consumer and the supplier. The conciliation procedure is not mandatory per se, but if the supplier fails to attend the conciliation hearing(s), PROFECO can fine the supplier and assume that the claim or complaint filed by the consumer is true. At the end of the conciliation procedure, PROFECO can also issue a judgment which is considered an enforceable instrument (*título ejecutivo*) in favour of the consumer, which could state the quantification of the obligations owed by the supplier to the consumer and a bonification or compensation for the consumer.

Furthermore, any person can file a whistle-blower complaint which can lead to PROFECO investigating a violation of the LFPC or the LFPC Regulation and, if applicable, the imposition of fines.

1.6 Regulated Industries

Various industries, activities, products, or services are subject to additional regulations, notably the following.

- The Law for the Protection and Defence of Users of Financial Services (*Ley de Protección y Defensa al Usuario de Servicios Financieros*) and related legislation, applicable to advertising and marketing in the financial industry as overseen by the National Commission for the Protection and Defence of Users of Financial Services (*Comisión Nacional para la Protección y Defensa de los Usuarios de Servicios Financieros*, or CONDUSEF).
- The Telecommunications and Broadcasting Federal Law (*Ley Federal de Telecomunicaciones y Radiodifusión*, or

LFTR) and related legislation, applicable to certain types of advertising and marketing in radio and television as overseen by the Federal Telecommunications Institute (*Instituto Federal de Telecomunicaciones*).

- The General Electoral Institutions and Proceedings Law (*Ley General de Instituciones y Procedimientos Electorales*), the LFTR and the Radio and Television Regulations for Electoral Purposes (*Reglamento de Radio y Televisión en Materia Electoral*), applicable to political advertising and the use of media (radio and television) by pre-candidates, candidates, political parties and sympathisers, as well as individuals and corporations using such political advertising.
- The health industry (including drugs, medical devices, food supplements, food and non-alcoholic beverages, alcoholic beverages, tobacco products, among others) are subject to special regulations, such as the LGS and its Regulations; this industry is regulated by COFEPRIS (please refer to **1.2 Regulatory Authorities**).

2. Advertising Claims

2.1 General Standards

The LFPC considers that advertising claims (or any other information regarding a product or service) are deceptive or misleading (*engañoso*), if they refer to characteristics or information related to a good, product or service (real or unreal) that induce a consumer into error or confusion, due to the inaccurate, false, exaggerated, partial or contrived way they are presented.

Furthermore, all information and advertisements in connection with goods, products and services, disseminated through any means, need to be truthful, and ascertainable or verifiable (*comprobable*), clear and with no texts, dialogues, sounds, images, trade marks and other deceitful or abusive description that creates or may induce error, because they are misleading or abusive.

The LFPC and the LFPC Regulations fail to state other standards for determining whether advertising claims are deceptive or misleading, but PROFECO needs to review all advertising claims to protect consumers from misleading information or advertising per the Guidelines for the Analysis and Verification of Information and Publicity (*Lineamientos para el Análisis y Verificación de la Información y Publicidad*), which provide more information of the specific standards PROFECO may follow to verify that publicity or information regarding goods and services is not misleading, including the use of superlative or categoric terms and the objectivity and verifiability of statements.

In a non-binding resolution (*tesis aislada*) in connection to misleading advertising (*publicidad engañosa*), the Mexican Supreme

Court of Justice established certain specifications regarding comparative claims, which can be useful for advertisers.

As previously mentioned, the comparison of goods and services protected by a trade mark, is allowed, as long as that comparison is not biased, false or exaggerated.

2.2 Actionable Advertising Claims

All advertising claims are subject to regulation, since the LFPC expressly states that suppliers have the obligation to deliver their goods or services in accordance with the terms and conditions offered or implicit in the advertising or information related to them, unless otherwise agreed to by, or with consent in writing from, consumers. The LFPC and its Regulations fail to regulate how such claims should be determined or if there are any exceptions thereto.

In environmental matters, the proliferation of products that consider or advertise themselves to be environmentally-friendly can sometimes generate confusion since in the market we can find the same labels granted by official bodies or prestigious institutions, and by private organisations, or labels placed by the product manufacturers themselves, which are unreliable. Fresh legislation in this regard is required.

2.3 Claim Substantiation

Neither the LFPC, nor the LFPC Regulations require a specific type of substantiation to support advertising claims. The latter only states that suppliers may prove the veracity of the information or advertising related to goods, products or services (which includes advertising claims), through documents issued by international or national organisations of “proven scientific and technical capacity”, when there are no applicable regulations within the Mexican territory.

2.4 Testing

Neither the LFPC, nor the LFPC Regulations set forth any specific standards for testing that is to be conducted to support advertising claims.

2.5 Clinical Studies

According to the LGS, to commercialise, distribute, sell, use, and advertise any drug, a healthcare registration issued by COFEPRIS is required. To obtain the healthcare registration, the laboratories and distributors are required to perform clinical studies to demonstrate the quality, safety, and effectiveness of the drug. Also, to advertise a drug a healthcare advertising permit is required from COFEPRIS, which is responsible for evaluating and reviewing that the drug has its corresponding healthcare registration.

2.6 Regulated Claims

Suppliers are precluded from including any legend or information in their advertising that indicates that a product or service has been endorsed, approved, recommended or certified by companies or professional associations, when they lack the appropriate documentation to support, with “scientific, objective and reliable evidence”, the claimed qualities or properties of the product or service. Per the LFPC Regulations, this evidence needs to be a technical and scientific report containing the results of an investigation that supports the claims, and which needs to include the authors thereof and their technical knowledge and experience, the scientific basis for the study or research and a summary of the study, among other things. All information in the report must be linked and traceable from the origin and process to the good, product or service in question.

Suppliers who make these types of claims must also make accessible to consumers a public version of the technical and scientific report.

In intellectual property matters, according to the IP Law, a trade mark will not be eligible for registration if, considering the set of its characteristics, it is descriptive of the goods or services that are intended to be distinguished, including indicative signs that in commerce serve to designate the species, quality, quantity, composition, destination, value, place of origin or time of production of the goods or services.

Additionally, appellation of origin and geographic indications will not be considered for registration as trade marks. A declaration from the MIIP must be pursued in order to obtain the respective registration, with the understanding that the terms “gender”, “type”, “manner”, “imitation” and “elaborated or fabricated in”, are not allowed for registration and/or use, if they lead to confusion for the consumer or imply unfair competition.

The IP Law also provides a cause of action against third parties who produce, store, transport, distribute or sell identical or similar products to those that are protected by a protected appellation of origin or geographical indication, by using any type of indication or element that creates confusion in the consumer about their origin or quality, such as “gender”, “type”, “manner”, “imitation”, “produced in”, “manufactured in” or similar.

3. Comparative Advertising

3.1 General Requirements

The LFPC states that information and publicity that compares products and services may not be deceitful or abusive, as described in section 2.1 **General Standards**.

The LFPC Regulations:

- define comparative advertisement as the publicity that contrasts, confronts or compares two or more similar or identical goods, products or services with each other whether or not they are of the same brand; and
- state that suppliers of goods, products or services may use the results of PROFECO's investigations, surveys and inspection of products and services, provided that they are quoted in their entirety, and the means and date of publication is made apparent in a visible, clear and truthful manner.

The LFPC and the LFPC Regulations do not prohibit suppliers from identifying a competitor by name.

From an intellectual property perspective, there is only one exception provided in the IP Law in order to avoid being subject to a trade mark infringement, which involves the comparison of goods and services protected by a trade mark.

3.2 Comparative Advertising Standards

Neither the LFPC, nor the LFPC Regulations, set forth any additional or different standards for comparative advertising claims, but PROFECO has issued the Guidelines on Comparative Advertising or Information Regarding Prices of Goods, Products or Services (*Lineamientos de Información o Publicidad Comparativa en Materia de Precios de Bienes, Productos o Servicios*), which state specific standards for comparative advertising or information on the price of goods, products and services.

3.3 Challenging Advertising Claims

Neither the LFPC, nor the LFPC Regulations, set forth any specific standards to be applied in determining whether comparative advertising claims are truthful. Please refer to **2.1 General Standards** for discussion of the standards used to determine where advertising claims are truthful in general.

3.4 Challenging Comparative Claims

There are no specific means for an advertiser to challenge claims made by a competitor. Notwithstanding the foregoing, if the advertiser considers the competitor's claims to violate the LFPC, it can submit a whistle-blower complaint before PROFECO, as explained in **1.5 Private Right of Action**.

We are not aware of any recent trends or major cases involving comparative advertising. PROFECO's cases are not public, so information regarding cases is normally kept from the media and is generally scant.

From an intellectual property perspective, if an advertiser is a holder of a trade mark registration that is used by a third party or a competitor, it could seek an infringement declaration based

on administrative offences, which are provided in the IP Law. These include if the third party:

- tries to, or achieves, the discrediting of goods, services, industrial or commercial activity, or the establishment of another (an exception is made for the comparison of goods or services protected by trade mark for the purpose of informing the consumer, provided that said comparison is not biased, false or exaggerated in the terms of the LFPC); and
- carries out acts contrary to good practices and customs in industry, commerce and services that involve unfair competition and are related to matters that the IP Law regulates.

Where an administrative procedure is being pursued before the MIIP, in addition to the preliminary injunctions, and the possibility of pursuing damages and losses, the MIIP will, if it prevails, order the competitor to stop using the trade mark and could impose the following sanctions:

- a fine of up to approximately USD900,000;
- an additional fine of up to approximately USD4,000 for each day that the infringement persists;
- temporary closure for up to 90 days; and
- permanent closure.

4. Social/Digital Media

4.1 General Requirements

Advertising on social media is generally regulated in the same manner as any other type of advertising.

Notwithstanding the foregoing, as part of the harmonisation process in light of the entry into force of the United States-Mexico-Canada Agreement, and considering the current digital environment, on 1 July 2020, several amendments were made to the Mexican Copyright Law, involving the formalisation of the notice and takedown procedure.

The notice and takedown procedure is intended to remove content that violates copyright, especially of the film and music industry, however, there could be a lot of cases involving the advertising industry, which may require the removal of content due to copyright violations.

In health matters, to advertise some regulated products – such as drugs, medical devices, food supplements, food and beverages, alcoholic beverages, and tobacco – on digital platforms requires a healthcare advertising permit from COFEPRIS.

4.2 Key Legal Issues

Marketers must be careful in their advertising campaigns, especially if the advertisement might violate third parties' intellectual property rights. The notice and takedown procedure is a very useful tool that will expedite the process of removing allegedly illegal content and once down it will be complicated to uploaded again.

4.3 Liability

The liability of the advertiser for content posted by others on the advertiser's website or social media channels is not specifically regulated under Mexican law. Notwithstanding this, if the person who posted such content is a supplier's collaborator, subordinate, manager, consultant, guard or auxiliary personnel, that supplier could be liable for their acts as mentioned in 1.3 Scope of Liability.

4.4 Disclosure

As of today, no additional disclosure requirements are provided for social media.

4.5 Platform Requirements

There are no unique rules or regulations in connection with advertising or marketing that apply to the use of any of the major social media platforms in Mexico.

4.6 Native Advertising

There are no special rules that apply to "native advertising" (advertising that has the look and feel of editorial content) in Mexico.

5. Influencer Campaigns

5.1 Trends

There are no special rules that apply to influencer campaigns, so there are currently no legal trends to discuss.

5.2 Special Rules/Regulations on Influencer Marketing Campaigns

There are no special rules or regulations that apply to the use of influencer campaigns.

5.3 Advertiser Liability

Except as stated below, there is no law that states that advertisers be held liable for content posted by its influencers. Notwithstanding the foregoing, if the influencer is a supplier's collaborator, subordinate, manager, consultant, guard or auxiliary personnel, that supplier could be liable for their acts.

6. Privacy and Advertising

6.1 Email Marketing

There are no specific rules applicable to email marketing. Email marketing is governed by the same rules as direct marketing, which include the following that need to be complied with by suppliers.

As Controllers under the Mexican DPL

Controllers must inform data subjects of the purpose of the acquisition and processing of their personal data, including direct marketing purposes, by providing them with a privacy notice that needs to comply with specific requirements set forth in the Mexican DPL.

If the supplier will use a data subject's personal data for marketing purposes, that supplier must implement a mechanism that allows the data subject to reject the use of his or her information for such purposes, which should be described in the applicable privacy notice and be made available to data subjects as of the moment the supplier provides such notice to the data subject (opt-out mechanism).

Excluding certain exceptions, controllers must obtain consent from data subjects to process any personal data, per the terms of the privacy notice provided to them by supplier.

As Suppliers under the LFPC

If so required by consumers, suppliers must confirm the information the supplier has in its databases of such consumers.

Publicity sent to consumers by suppliers must include the name, address, telephone number, or email of the supplier and the contact data of PROFECO.

PROFECO administers the Public Consumer Registry (REPEP), where consumers who do not want to receive promotional material can register their phone number and, per a very recent legal reform to the LFPC Regulations that has yet to be implemented by PROFECO, their email. PROFECO provides suppliers access to this list. Per the LFPC, suppliers and marketing companies must not send advertising to persons that have expressed a desire not to receive promotional material and those who are registered on the REPEP.

Suppliers and companies that use consumers' information for marketing or publicity purposes are prohibited from using such information for other purposes.

Sanctions

In general terms, the administrative sanctions provided for violations of the Mexican DPL may range from a formal warning

notice to fines between approximately USD400 and USD1.2 million per violation, which may be increased in the event of repeated violations and for violations related to sensitive personal data. The foregoing is in addition to any civil or criminal liability that may be imposed by a court of law. Furthermore, there are illegal activities related to personal data (particularly in connection to the inappropriate use of personal data for profit motives) that are considered as crimes and are sanctioned with imprisonment.

In general terms, the administrative sanctions provided for violations of the LFPC and the LFPC Regulations may range from economic fines of approximately USD14–211,000 to total or partial closure, suspending publicity and prohibitions against the marketing of good or products, as well as administrative detention.

6.2 Telemarketing

There are no specific rules applicable to inbound and/or outbound telemarketing, they are governed by the same rules as direct marketing. See **6.1 Email Marketing** for further detail.

6.3 Text Messaging

There are no specific rules applicable to text messaging marketing, they are governed by the same rules as direct marketing. See **6.1 Email Marketing** for further detail.

6.4 Targeted/Interest-Based Advertising

There are no specific rules applicable to targeting or retargeting consumers per se, but any processing of personal data for targeting or retargeting needs to comply with the Mexican DPL and any applicable provisions in the LFPC or the LFPC Regulations.

Furthermore, cookies will probably be used in this type of advertising and cookies are regulated under the Mexican DPL. It states that the use of cookies and other tracking technologies needs to be

- reflected in the privacy notice made available and/or consented to by the data subject; and
- notified to data subjects through a banner or similar means in the applicable website, including information regarding the way these cookies can be disabled, unless such cookies are required for technical purposes.

6.5 Marketing to Children

Any processing of personal data (personal information) of minors, including the use of personal data for marketing or advertising purposes, is subject to their parents' or legal guardian's consent. Personal data is defined in the Mexican DPL as any information concerning an identified or identifiable individual. Minors are individuals under 18 years of age. Violations of this

prohibition are sanctioned with fines and, in the most serious cases, prison.

Furthermore, suppliers must refrain from using sales or advertising strategies in online transactions that do not provide the consumers with clear and sufficient information about the services offered, especially in the case of marketing practices directed at vulnerable populations, such as children, the elderly and the sick, incorporating mechanisms that warn when the information is not suitable for that population. Violations of this prohibition are sanctioned with fines.

Additionally, regarding food and beverages with high caloric content, there is a restriction on advertising hours for these products. These restrictions are intended to prevent children having access to these type of products, and adverts for them, considering that obesity is a long-standing problem in Mexico.

7. Sweepstakes and Other Consumer Promotions

7.1 Sweepstakes

General requirements for sweepstakes and contests are established in three different regulations:

- the Federal Law of Games and Draws (*Ley Federal de Juegos y Sorteos*);
- the LFPC; and
- the Mexican Official Standard NOM-028-SCFI-2007, "Commercial practices-information elements required for collectible promotions and/or promotions through raffles and contests" (NOM-028).

Both games of chance and contests must be previously notified to PROFECO. This notice must be filed at least three business days prior to the date and time on which the promotion starts. It must be submitted in writing and contain the description of the collectible promotions, sweepstakes and contests that are the object of this notification. It must also comply with all the requirements set forth in NOM-028.

Regarding games of chance, a permit must also be secured before the General Office of Games and Draws of the Ministry of Interior (SEGOB).

Finally, due to the lack of regulation, the criteria of SEGOB has been that raffles and promotions can be structured in specific ways, including, but not limited to, purchasing methods.

7.2 Contests of Skill

The Regulations of the Federal Law of Games and Draws defines chance (*azar*) as the casualty to which the result of a game is entrusted, which is completely independent of the player's will and no definition of "contest of skill" is legally provided. However, in common practice it is known that in order for a contest to be considered one of skill, the participants must perform certain actions that lead to the award, that is, there must be no room for chance as the decisive factor.

7.3 Regulatory Bodies

Both games of chance and contests must be previously notified to PROFECO. This notice must be made at least three business days prior to the date and time on which the promotion starts. It must be submitted in writing and contain a description of the collectible promotions, sweepstakes and contests that are the object of this notification, it must also comply with all the requirements set forth in NOM-028.

Regarding games of chance, a permit must also be secured before the General Office of Games and Draws of the Ministry of Interior (SEGOB).

There are three ways to request permission for games of chance:

- ticket sales;
- draws without ticket sales; and
- instant giveaways.

Depending on the permit requested, different requirements must be fulfilled.

7.4 Loyalty Programmes

There are no special laws or regulations that apply to loyalty programmes; however, all the terms and conditions must be in accordance with the LFPC and the processing of any personal data in loyalty programmes must comply with the Mexican DPL.

7.5 Free and Reduced-Price Offers

There any no special laws or regulations that apply to free or reduced-price offers, the general regulations to offers apply. According to the LFPC a promotion is, by definition, a commercial practice to offer goods or services that:

- encourage the purchase by offering another product or service for free;
- contain a larger quantity of the product in the promotion, free or at a discount; and/or
- encourage participation in sweepstakes, contests and other similar events.

7.6 Automatic Renewal/Continuous Service Offers

There are no special laws or regulations that apply to automatic renewal/continuous service offers, under which a marketer can continue to ship and bill for products and services on a recurring basis until the consumer cancels. All suppliers and consumers are free to agree the terms and conditions they consider pertinent, including those of renewal, shipping, and billing.

Gonzalez Calvillo has, for over 30 years, challenged the standards and rewritten the full-service firm model with a solution-oriented approach, evolving the practice of law in Mexico. The firm is driven by a commitment to doing things differently and a deep knowledge of the Mexican legal system and its interaction with today's globalised business environment. The firm's advertising and marketing practice is composed of a multi-disciplinary team that has experience in consumer protection, data protection, litigation, life sciences, health, regulatory and

IP matters. It is therefore ready to address any of its clients' related needs, including the registration of trade marks and consultancy regarding copyright violation, review of advertising and promotional campaigns and product labelling, obtaining permits and addressing and responding to regulators' or consumer's procedures and claims. The firm represents a blend of local and multinational corporations across regulated and non-regulated industries, including technology, health, retail and manufacturing.

Authors



Lucía Fernández is counsel at the firm, with over 15 years of experience in delivering legal advice to companies from a wide range of industries. This includes commercial and corporate matters, data protection, consumer protection, IT, franchising, licensing, distribution and strategic

alliances. Her experience includes providing advice to clients regarding implementation management, from both a consumer and data protection perspective, of their advertising, marketing and promotional campaigns and strategies, as well as their relationship with third-party vendors and service suppliers.



Alberto Pliego Beguerisse is counsel at the firm and has over ten years of experience as an IP attorney at the firm, providing legal counsel to domestic and foreign companies, as well as to individuals, mainly regarding trade marks, copyright, litigation, franchising, licensing,

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Enrique Muñoz Guízar is counsel at the firm and has over 15 years of experience in environmental law and regulatory matters, focusing on natural resources, healthcare, and consumer protection. He has broad experience in healthcare regarding the regulation for importation, storage,

distribution, and advertising of regulated products. He is also knowledgeable in the regulation of innovative products. His experience in advertising and marketing law includes advising clients in product promotions and obtaining publicity permits for healthcare products, food and beverages.

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meet new standards

Trends and Developments

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An Overview of Mexico's Advertising and Marketing Landscape

The underlying reason behind advertising and marketing regulation in Mexico has always been consumer protection and, in the past few years, has come to include data protection. This practice has evolved significantly as globalisation and advancements in technology have impacted the way we consume goods and services and the means through which we do so.

Over the past twenty years, we have witnessed how the coming of the digital era has shifted the day-to-day reality of every aspect of human lives; the domination of information and communication technology in the past few years has definitely shaped both marketing practices and consumer behaviour and expectations.

Without a doubt, there is a lag in regulation for advertising and marketing in Mexico. The globalisation of both consumers and commerce has made physical boundaries almost irrelevant and connectivity has become intrusive. Consumers are swamped with information and their activity is closely tracked. As the now popular phrase states, "data is the new gold". Furthermore, the values and priorities of society have evolved as the digital native generations, which were raised on the internet and social media, become adults. For instance, the meaning of data, the environment, food and nutrition, health and sustainability have evolved significantly and even the ways we "socialise" are different. Who would have imagined, in the past decades, a health issue on a global scale, such as the COVID-19 pandemic?

In this context, Mexico is addressing this evolution on several fronts, which may transform the way certain products and services are advertised and marketed in the country, over the next couple of years. Changes are being made on different scales, from the United States-Mexico-Canada Agreement (USMC), which includes an updated IP chapter and a new digital trade chapter addressing non-regulated matters – such as unsolicited marketing, and notice and takedown of illegal content – to the entry into force of the Mexican Official Standard regarding labelling (commercial and health information) for pre-packaged food and non-alcoholic beverages and legislators' outlook on advertising practices, which have resulted in various law initiatives.

It is important to bear in mind that the advertising and marketing framework in Mexico is multidisciplinary and not subject to one specific law; on the contrary, its regulation lies in several laws, regulations and norms and therefore varies depending on the nature of the product and/or service, industry or type of activity.

In view of the foregoing, please find below information about which way the wind is blowing in Mexico.

United States-Mexico-Canada Agreement (USMCA)

The USMCA entered into force on 1 July 2020, superseding the 1994 North American Free Trade Agreement (NAFTA), and is shining a light on certain non-regulated or under-regulated issues in Mexico, the USA and Canada, such as unsolicited marketing, and notice and takedown of illegal digital content in any of its forms, including social media, among other important matters.

Specifically, the USMCA, includes a new Digital Trade Chapter that regulates privacy and consumer protection in digital trade and a Competition Policy Practice Chapter that regulates consumer protection in general, among other issues. The most important provisions regarding marketing and advertising practices in these chapters refer to:

- consumer protection for fraudulent and deceptive commercial activities, including when consumers engage in online commercial activities; and
- unsolicited commercial electronic communications, which is a growing concern both in Mexico and internationally.

In connection to the latter, the parties of the USMCA have agreed to adopt or maintain measures that require:

- suppliers to facilitate the ability of recipients to prevent ongoing reception of such communications; or
- the consent of recipients to receive commercial electronic messages.

The Mexican Senate and Chamber of Deputies have issued several law initiatives to modify advertising and marketing provisions of the Federal Consumer Protection Law, in some cases evidently influenced by the entry into force of the USMCA, including those related to direct marketing, misleading adver-

tising, information consumers are allowed to request from companies, claim substantiation and sexist or discriminatory advertising.

Proposed restrictions on direct marketing

All of them are in the very early stages of the legislative process, except for one initiative in connection with unsolicited direct marketing, which was approved in October 2019 by the Mexican Senate. This initiative has been sent to the Chamber of Deputies and, if approved, will become law, unless the Executive Power uses its veto power to reject it. The most important points of this initiative are set out below.

- It is strictly prohibited for companies and suppliers to use or share any kind of information about consumers with advertising or marketing purposes; these advertising and marketing practices will be permitted only if authorised by the consumer, which authorisation may be revoked at any given moment.
- The origin of the marketing calls and messages must be fully identifiable and these can only be issued at reasonable hours of the day.
- The fines for unsolicited marketing are to be increased.

Amendments to the Mexican IP regime

Additionally, and as part of the harmonisation process in light of the entry into force of the USMCA, several amendments were made to the Mexican Copyright Law (MCL), which entered in force on 2 July 2020, although respective regulations are still under discussion, and a new Federal Law for the Protection of Industrial Property was enacted, the latter entering into force on 5 November 2020.

In this regard, one of the most significant amendments to the MCL, is the insertion of the notice and takedown procedure, which will provide an expedited process with the purpose of removing illegal digital content. The foregoing officially formalises this procedure in Mexico; the amendments focus on the provision of obligations, responsibilities and exceptions for internet service providers and internet access providers.

As of today, the only notice and take down procedures are those established within the terms of use and conditions of major social media platforms, but never provided by Mexican Law.

Even though the notice and takedown procedure is intended to remove content that violates copyright, especially in the film and music industry, we also expect advertising and marketing industry cases where it will be necessary to prove that the illegal content is infringing/violating a protected work.

It will be interesting to see how, over the coming months, the implementation of the MCL amendments and their regulations takes place. Hopefully, it will clarify certain matters related to the notice and takedown procedure, as well as other relevant matters.

Labelling for pre-packaged food and non-alcoholic beverages

Labelling is one of the most important regulatory aspects for product marketing, as lack of compliance generates significant contingencies that may lead to costs, not only regarding the design and packaging, but also concerning the claims stated.

As mentioned above, regulation evolves as new issues need to be addressed in society and food and nutrition is no exception, particularly pre-packaged food and non-alcoholic beverages regulation.

In March this year, an amendment to the Mexican Official Standard NOM-051 SCFI/SSA1-2010 Labelling for pre-packaged food and non-alcoholic beverages – commercial and health information (NOM-051) was published with the aim of allowing consumers to identify products with an excess of nutrients associated with being overweight and obesity, including sugars, saturated fats, sodium and calories. The most significant change is that a frontal labelling warning system was established, informing consumers of the content of critical nutrients and ingredients that could represent health risks if consumed in excess.

Among the most significant amendments of NOM-051, are the following.

Seals or recommendation legends

The seals or recommendation legends, or recognition by professional organisations or associations, may be displayed on the label of pre-packaged products when they provide appropriate documentation supporting scientific, objective, and reliable evidence and must not exceed one or more of the added critical nutrients, specifying the target population. To comply with this, the Federal Consumer Protection Agency (PROFECO) must issue, no later than 1 October 2020, the guidelines for the registration and recognition of professional organisations or associations that can issue seals or recommendation legends for food and non-alcoholic beverages.

Products aimed at children

Pre-packaged products which contain one or more warning labels, or the sweetener legend, shall not include on the label children's characters, animations, cartoons, celebrities, athletes or pets, interactive elements such as games or digital downloads. The foregoing under the rationale that, if those products are directed at children, they could incite, promote, or encourage

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the consumption, purchase, or choice of products with excess critical nutrients or sweeteners. Please note that this provision will be enforceable until 1 April 2021.

Product denomination

The pre-packaged product denomination must appear in bold letters within the main display surface of the label, in a line parallel to the base as the product is designed.

Products containing caffeine or sweeteners

In the event the labels on the package state “contains caffeine avoid giving to children” or “contains sweeteners – not recommended for children”, they should appear in the upper right part of the main display surface and if the pre-packaged product has seals, these should appear below such labels. The NOM 051 also states, in connection to these types of products, that:

- no health claims should be made;
- no declarations of nutritional properties should be made directly related to the seal that has been declared on the label; and
- the declarations of nutritional properties that can be made must be displayed on the information surface.

Nutritional values

Nutritional values have been established to allow reference to be made to nutritional or health statements, therefore they may refer to the value of energy, proteins, carbohydrates, fats and their derivatives, dietary fibre, sodium, vitamins and inorganic nutrients (minerals).

Implementation timetable

It is important to mention that the NOM-051 will enter into force in different stages. However, the most visible provisions which refer to the frontal labelling system will enter into force on 1 October 2020, while most of the rest of the provisions will be in force by 1 April 2021. One notable exception is the calculation and evaluation of the values and profiles referring to the complementary nutritional information, which will be implemented progressively in three different phases, the last of which will be verified as of 1 October 2025.

These new and strict regulatory requirements are definitely a governmental measure aimed at addressing obesity in Mexico, a growing national public health problem, and are one of the most rigorous labelling standards on the continent.

However, from a corporate perspective, NOM-051 impacts in several ways, not only the packaging and labelling of products, but also the formulation thereof, as well as the corporate and brand image of the commercialised products.

Trade dress

As mentioned above, advertising and marketing regulation has a multidisciplinary regulatory framework. In this regard, intellectual property rights, such as trade dress, may be affected or limited by the implementation of NOM-051. Trade dress involves the appearance and identity of a product or a service, being defined as “the plurality of operational or image elements, including, among others, size, design, colour, shape arrangement, label, packaging, decoration or any other, which, when combined, distinguish products or services in the market”.

Trade dress has a significant value for companies since consumers are able to identify, at a glance, the source of origin of a product by just looking at the packaging without even reading the respective trademark, and now labelling regulation with the aim of protecting health is interfering with this process.

It will be very interesting to see how industrial property rights, or even copyrights, could be diminished or even violated by imposing the duty to modify their own labelling designs on holders, by fixing a seal or stamp in front of one of their most valuable assets, so as to comply with regulatory norms.

Corporate social responsibility and advertising

With potential contingencies in sight with the entry into force of NOM-051, it is expected that corporate social responsibility programmes will be strengthened, partly as a mechanism for preventing legal risks and as a tool to “advertise” the nutritional benefits of commercialised products, as well as the health risks associated with the intake of certain foods. However, it will definitely also invite the food and non-alcoholic beverage industry to question their product’s formulas.

Sustainability and greenwashing

Sustainable and environmentally friendly practices, in all types of industries and activities, have gained importance as climate change and the effects thereof become more evident. Brands and companies know that understanding these issues and addressing them is important to society, which allows them to better engage with their customers, ultimately having a positive effect on their image. However, using the environment as an advertising strategy has led to an effect called “greenwashing”: when claims of sustainability and supposed environmentally friendly practices do not in fact benefit the environment or mitigate any of the adverse effects that the corporation’s processes or activities produce.

Due to the above, greenwashing should become subject to regulation and oversight by regulators, so that claims related to sustainability and environmentally friendly practices may be verified. This would offer protection to consumers and lead to responsible consumption. Although there exists comprehensive

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regulation on misleading advertising in Mexico, overseen by PROFECO, it remains insufficient. For this reason, there is currently a proposal in the Mexican Senate for an amendment to the General Law for Ecological Balance and Environmental Protection and to the Federal Consumer Protection Law to regulate greenwashing activities that will be discussed shortly and could be issued in the following weeks.

The road ahead

As mentioned above, Mexico is evolving in certain matters pertaining to advertising and marketing, such as labelling, and through the regulatory harmonisation and influence of the USMCA's entry into force, regulating digital content and other important issues that Mexican law did not previously foresee. It will be very interesting to see the implementation of these regulatory changes over the next year and how advertising and marketing regulation in Mexico transforms the way the industry markets and sells products and services in this globalised and fast-evolving society.

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Gonzalez Calvillo has, for over 30 years, challenged the standards and rewritten the full-service firm model with a solution-oriented approach, evolving the practice of law in Mexico. The firm is driven by a commitment to doing things differently and a deep knowledge of the Mexican legal system and its interaction with today's globalised business environment. The firm's advertising and marketing practice is composed of a multi-disciplinary team that has experience in consumer protection, data protection, litigation, life sciences, health, regulatory and

IP matters. It is therefore ready to address any of its clients' related needs, including the registration of trade marks and consultancy regarding copyright violation, review of advertising and promotional campaigns and product labelling, obtaining permits and addressing and responding to regulators' or consumer's procedures and claims. The firm represents a blend of local and multinational corporations across regulated and non-regulated industries, including technology, health, retail and manufacturing.

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Lucía Fernández is counsel at the firm, with over 15 years of experience in delivering legal advice to companies from a wide range of industries. This includes commercial and corporate matters, data protection, consumer protection, IT, franchising, licensing, distribution and strategic alliances. Her experience includes providing advice to clients regarding implementation management, from both a consumer and data protection perspective, of their advertising, marketing and promotional campaigns and strategies, as well as their relationship with third-party vendors and service suppliers.



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