



KEEPING YOUR TERMS OF SERVICE UP TO SPEED

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Whether a company calls them “Terms of Use or Service” or “Conditions of Use,” keeping those terms up to speed is important. The U.S. Food and Drug Administration (FDA) and Federal Trade Commission (FTC) continue to be active in ensuring the accuracy of information and claims presented to consumers in advertisements. Part of keeping up with the evolving landscape is a company’s Terms of Service. Users are pulled into a company’s e-commerce platform from so many sources that ensure the way they click in and click through is critical for the consumer experience, and to be sure you are giving all the necessary statements and disclosures. Here are some tips on what to cover in your Terms of Use and a few basics on how to format them.

Be sure the Terms of Use are reason-

ably conspicuous to the user and require the user to clearly agree to them. Because reasonably conspicuous may mean different things depending on the platform—whether a website or on mobile devices or through apps—it is a good idea to go through these routinely to ensure they are formatted clearly.

A user should have to scroll and click through the terms agreeing to them before proceeding through with any significant purchasing or consumer activities. Browse wrap formats are still usually insufficient. A click wrap format or quasi click wrap may work. With this format, a user has to actively click on a button to register where underneath the screen states, “By creating an account, you agree to the ...” terms of use. Those terms of use are also then hyperlinked so the user can access

them in their entirety. Terms that are available via a scroll down box or hyperlink are acceptable so long as they are located close enough to any buttons a user must click through before completing any purchases. A check box is essential in this case. If a user does not check the box agreeing to the Terms of Use, the user should not be able to go through the remainder of the site for any transactions.

The terms may include an introductory statement that describes which services or subsidiaries are covered or excluded from the Terms. For nutritional supplements and other products, particular disclaimers may be required per the FDA, such as a statement has not been evaluated by FDA and that the product is not intended to diagnose, treat, cure or prevent any disease. While putting these statements

on a home page is a best practice, a company may also want to include these disclaimers in the Terms of Use.

Similarly, if the company has many affiliates or independent contractors, it may want to specify that the particular e-platform only has to do with that part of its business and no other branches. This section may also include a provision as to whether the website terms or other terms on separate profiles or gift cards control in the event there is an inconsistency.

Privacy, Intellectual Property

Because of the crucial nature of privacy notices or policies, these should be separately highlighted and hyperlinked for a user. The e-platform should list the categories of any personal identifiable information that is collected, any third parties with whom the company may share the information, the process whereby a user can review and change the information, the process for giving notice to the user if the privacy policy changes, and the effective date of the privacy policy. A business's e-platform may also need to disclose how it

responds to Do Not Track signals from web browsers. Given the complexities and heightened importance of privacy, a Privacy Policy should stand apart from the "Terms of Use." Lastly, if apps are used in connection with the company's e-platform, they may need to include a statement of what permissions the users are granting regarding their devices.

If there are any considerations for intellectual property such as a user having no rights to copyright, licensing, or trademarks for content included on the site, this should be disclosed in a section of the "Terms of Use." This same section, if applicable, can include how any such complaints about copyright or trademark, etc., can be asserted. For licensing in particular, a company may need to evaluate whether it needs to have a grant of right by the user to the company for any content the user submits as well.

Where a profile or personal account is required for log in, the "Terms of Use" should include a confidentiality statement directed at outlining users' duties in keeping their information con-

fidential. The user should be responsible for maintaining the confidentiality of any account, profile and password information as well as restricting access to the account as appropriate. This section may also include or specify if the use of the e-platform has any age restrictions, such as only those persons 18 and older may purchase from it, or any other age appropriate limitations on use. The company may also wish to evaluate whether it is appropriate to include a statement that it reserves the right to refuse service, terminate accounts, terminate any user

rights in the service or cancel orders.

For those websites that allow posting of user reviews, comments or other content, special consideration should be given to what "Terms of Use" need to say. Negative comments cannot necessarily be taken down automatically. A company should have statements that are tailored and specified as to what it will do regarding product reviews or other posted information. Such statements could include limitations or prohibitions on any potentially obscene or illegal content.

Clear and conspicuous sales terms are important. While some sales terms may appear on individual product pages, other terms may also appear in the Terms of Use. Such items would include how the company is going to handle all the tricky issues of risk of loss, delivery, shipping, returns and refunds. A company should keep all that information and any other special terms clear and obvious.

Terms of Use represents an important interaction with the consumer for a company. If a company anticipates and addresses the terms clearly, the consumer experience may be vastly better and the risks of issues developing with the company lower. That risk may be lower where terms are obvious to the user from the outset and require the user to affirmatively accept them before the user moves through the site and makes any purchases. If a company lets a user enter without this gate keeping function in place, it can find itself in hot water. By keeping the terms up to speed with these tips and a common sense approach that is tailored to the information a consumer needs for your company's nutritional product purchase, the company should be able to keep its focus in the direction of its business and hopefully not on issues raised in customer disputes or the regulatory authorities. **NIE**



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