

# Advertising & Marketing

*Contributing editor*  
**Rick Kurnit**



**2018**

GETTING THE  
DEAL THROUGH

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# Advertising & Marketing 2018

*Contributing editor*

**Rick Kurnit**

**Frankfurt Kurnit Klein & Selz, PC**

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# Preface

## Advertising & Marketing 2018

Fifth edition

**Getting the Deal Through** is delighted to publish the fifth edition of *Advertising & Marketing*, which is available in print, as an e-book and online at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

**Getting the Deal Through** provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Hong Kong and Russia.

**Getting the Deal Through** titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

**Getting the Deal Through** gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Rick Kurnit of Frankfurt Kurnit Klein & Selz, PC, for his continued assistance with this volume.

GETTING THE  
DEAL THROUGH 

London  
April 2018

# Brazil

**Luiz Werneck and Talita Sabatini Garcia**

**Inglez, Werneck, Ramos, Cury & Françolin Advogados**

## Legislation and regulation

### 1 What are the principal statutes regulating advertising generally?

The principal statutes regulating advertising in Brazil are: the Brazilian Federal Constitution, the Consumer Protection Code, the Brazilian Advertising Self-Regulation Code (CBAP) and Federal Law No. 5768/71 that regulates promotions and sweepstakes.

### 2 Which bodies are primarily responsible for issuing advertising regulations and enforcing rules on advertising? How is the issue of concurrent jurisdiction among regulators with responsibility for advertising handled?

The bodies responsible for issuing advertising regulations in Brazil are the National Advertising Self-Regulation Council (CONAR) and the government itself, represented by the House of Representatives and the Senate.

CONAR is a self-regulatory agency formed by the associations that represent the advertisers, broadcasters, advertising agencies and other professionals that participate in advertising. Since CONAR is a self-regulatory body, it has a limited authority and must base its decisions only on its code.

Some consumer protection agencies, as well as the Public Prosecutor, also have the authority to enforce the advertising rules through an administrative or judicial procedure.

The judiciary is the ultimate body responsible for enforcing the advertising rules. Although the other bodies have the authority to enforce these rules, the judiciary has a broader authority, and can, therefore, review the others bodies' decisions.

### 3 What powers do the regulators have?

Since CONAR is a self-regulatory agency, it does not have the authority to impose fines or determine the payment of any indemnifications. Based on its code, CONAR's penalties are:

- a warning;
- a recommendation to modify or correct the advertisement;
- a recommendation to the media to suspend the broadcasting of the advertisement; and
- the disclosure, to the media, of CONAR's position with regard to the advertiser, the agency and the media for non-compliance, with the steps and measures determined by the entity.

Any dispute regarding advertising may be submitted to the judiciary. Even decisions issued by CONAR may be challenged before the judiciary. The judiciary has a broader authority and it can determine payment of indemnifications and fines, as well as review, and even revoke, CONAR's decisions.

### 4 What are the current major concerns of regulators?

The current main concerns of the Brazilian regulators are advertising aimed at children, advertising of gambling and alcoholic beverages and the impact of YouTubers and influencers on society.

### 5 Give brief details of any issued industry codes of practice. What are the consequences for non-compliance?

The CBAP and the applicable legislation have specific regulations for different categories of product or people, such as:

- advertising campaigns for alcoholic beverages:
  - cannot exploit sexuality;
  - must use actors who appear to be more than 25 years old; and
  - cannot contain scenes or images of actors ingesting the alcoholic beverage;
- influencers should make it clear that the content of their publication is sponsored; and
- children's advertising should not induce the consumption of the advertised product or exploit the child's innocence.

Non-compliance with regulations may result in the suspension of advertising by CONAR and in the application of fines and penalties by the consumer protection agencies, as well as judicial claims that can be filed by interested parties.

### 6 Must advertisers register or obtain a licence?

Only agencies have an obligation to obtain a licence in Brazil. Advertisers have no obligation in this regard.

### 7 May advertisers seek advisory opinions from the regulator? Must certain advertising receive clearance before publication or broadcast?

It is possible to seek CONAR's opinion before publication. It is also possible to file a procedure to seek judiciary approval before publication; however, these practices are not common in Brazil owing to the time and investment related to them.

## Private enforcement (litigation and administrative procedures)

### 8 What avenues are available for competitors to challenge advertising? What are the advantages and disadvantages of the different avenues for challenging competitors' advertising?

A competitor can challenge advertising through CONAR or the judiciary. Claims with CONAR are faster and competitors, as a rule, comply with CONAR's decisions. The disadvantages of using CONAR is that it is not possible to seek indemnification through this body and its decisions can be reviewed by the judiciary.

The judiciary route is more time-consuming and costly. However, through this body it is possible to seek indemnification and a definitive decision.

### 9 How may members of the public or consumer associations challenge advertising? Who has standing to bring a civil action or start a regulatory proceeding? On what grounds?

Public prosecutors and members of other consumer protection bodies, such as PROCON, may challenge advertising through administrative and judicial procedures.

The procedures are initiated when there is a need to investigate the occurrence of abusive or misleading advertising. Depending on the case, a criminal action may also be filed.

**10 Which party bears the burden of proof?**

The burden of proof lies with the advertiser, which must prove that its publicity is regular and substantiated.

On the other hand, if the case is filed by a competitor seeking damages, although the advertiser has to prove that its advertising is regular, the competitor that files the claim has to prove its damages.

**11 What remedies may the courts or other adjudicators grant?**

The most common remedy granted by the courts or by CONAR is an injunction to immediately suspend the advertising campaign.

Regarding the Brazilian judiciary, it is possible to seek others remedies, such as damages, an injunction to do or not to do something or an injunction to anticipate the production of evidence, among others. For instance, a company may request an injunction to immediately suspend a comparative campaign that denigrates the company's image, as well as request losses and damages.

**12 How long do proceedings normally take from start to conclusion?**

There is no precise time frame for a decision from CONAR. Based on previous experience, a first decision can be granted by CONAR within one or two months, and a final decision can be issued within approximately six months.

Regarding the judiciary, first decisions can be granted within one or two years, and a final decision can be issued within six to eight years, depending on the complexity of the case.

**13 How much do such proceedings typically cost? Are costs and legal fees recoverable?**

There is no average market value for such proceedings. The costs will depend on the complexity of the case, the need to carry out a procedure to collect evidence, the expenses involved, and so on.

At CONAR, the legal fees are not recoverable. In the judiciary, the party that wins the lawsuit may claim a reimbursement for the expenses and legal fees related to the lawsuit from the other party.

**14 What appeals are available from the decision of a court or other adjudicating body?**

Through CONAR and the judiciary, there are three instances to be covered. At CONAR, after the initial decision, there is an appeal to the appellate chamber and a second appeal to the plenary if the appellate chamber decision is not unanimous.

The judiciary also have a second level and a special level circuit to address appeals. The last decision may be issued by the Supreme Court, depending on the circumstances.

**Misleading advertising****15 How is editorial content differentiated from advertising?**

Editorial content has a journalistic format, with the sole purpose of transmitting to society a fact or an event, even if it is the coverage of the launch of a new product. In principle, the editorial is created with no influence of the advertiser.

Advertising is intended to promote a product or service, with the purpose of encouraging consumers to acquire them. If advertisers influence the editorial in any way, as in the case of influencers, there is a need to indicate that the editorial is advertising.

**16 How does your law distinguish between 'puffery' and advertising claims that require support?**

In the Brazilian laws and regulations, there are no provisions related to puffery, therefore, there is no basis to distinguish, with precision, puffery from claims that require support.

However, CONAR has already recognised in a few cases that some claims can be considered as puffery. According to such decisions, puffery is configured in the cases of using exaggerated or even playful expressions that, do not mislead the consumer by any means.

**17 What are the general rules regarding misleading advertising? Must all material information be disclosed? Are disclaimers and footnotes permissible?**

Any advertisement that, even through omission, is entirely or partially false or is in any way capable of inducing the consumer to make a mistake regarding any characteristic of the product or service advertised is considered misleading advertising.

Abusive advertising includes adverts that:

- have a discriminatory nature;
- incite violence or exploit fear or superstition;
- take advantage of a child's lack of judgement or experience;
- disrespect environmental values; or
- may cause the consumer to behave in a way that will bring harm to his or her health or safety.

Disclaimers and footnotes are permissible in Brazil; however, some precautions have to be taken to make such tools valid, for instance, disclaimers must be implemented in a horizontal position; be readable to the average person; contain all the information necessary to support and clarify the claim; among other things.

**18 Must an advertiser have proof of the claims it makes in advertising before publishing? Are there recognised standards for the type of proof necessary to substantiate claims?**

The advertiser must have proof of a claim's content if and when requested by the authorities, consumers or competitors.

There is no standard for the type of proof required to substantiate the claims. However, the proof must be substantiated or be issued by a third party with recognised expertise.

**19 Are there specific requirements for advertising claims based on the results of surveys?**

There are no specific requirements for advertising claims based on the results of surveys. However, the claims must be substantiated in real results, and preferably validated by a third party with recognised expertise and know-how.

**20 What are the rules for comparisons with competitors? Is it permissible to identify a competitor by name?**

Comparative advertising is accepted in Brazil. According to the applicable legislation, the primary purpose shall be the clarification or the consumer's protection. Therefore, among other requirements, the comparative advertisement shall be objective and supported by evidence; shall not make any confusion between the products and the competitor's brands; there shall be no unfair competition or denigration of the image or another company's products.

Based on the dispositions of the Industrial Property Law, there is a constant debate related to the right to use a competitor's brand or products in comparative publicity.

The Supreme Court recently issued two important decisions in which the right to use a competitor's brand and products in comparative advertising, restrictively in cases where the publicity brings relevant information to the consumer, was recognised.

The Supreme Court decisions are positive and will allow companies to compare their products with others, with evidence, and will, above all, provide consumers with important information to help them decide which product best fits their demands and needs.

**21 Do claims suggesting tests and studies prove a product's superiority require higher or special degrees or types of proof?**

There are no provisions in the applicable regulation relating to special types of proof. However, since competitors may challenge the proof or the substantiation presented by advertisers, it is necessary to support a claim with strong data, preferably issued by a third party with unquestionable competence and reputation.



## 22 Are there special rules for advertising depicting or demonstrating product performance?

There is no specific provision in the applicable regulations to demonstrate a product's performance. However, it is necessary to observe other obligations applicable to advertisers. For example, when demonstrating a product's performance, the advertiser should properly demonstrate results that are achievable by the product. Also, since this kind of advertising is often an indirect form of comparative advertising, the advertiser must also have tests that prove the viability of performance announced, in order to be able to defend the advertising in the event of the authorities, competitors or consumers challenging the result announced.

## 23 Are there special rules for endorsements or testimonials by third parties, including statements of opinions, belief, or experience?

CONAR's code specifies special rules for endorsements or testimonial by third parties. According to such regulation, there are different categories of testimonials: specialist; famous person; and common person. For each category, there are specific rules and conditions to comply with.

In all cases, if the third party is contracted or in any way motivated by the advertiser to carry out an endorsement or statement, the third party should inform the consumers that the endorsement or the statement is publicity, sponsored by the advertiser.

## 24 Are there special rules for advertising guarantees?

Brazilian law establishes a mandatory guarantee to protect consumers' rights. Consequently, if an advertiser is offering a complementary guarantee and decides to detail such benefit in its advertising, the advertiser must include the terms and conditions of the complementary guarantee in its advertisement, in order to avoid any complaints related to misleading advertising.

This information may be briefly included in the legal notice, provided that it is made available to the consumer in the owner's manual, contract or on the advertiser's website, depending on the case.

## 25 Are there special rules for claims about a product's impact on the environment?

The claim should always respect all the requirements and obligations provided by the law and regulations so as not to constitute a misleading or abusive advertisement.

On the other hand, according to the applicable regulation, claims regarding sustainability must respect some especial rules, such as, among others:

- they must correspond to actual practices adopted by the advertiser;
- the broadcast information must be true, verifiable and possible of being corroborated;
- the claim must be accurate and precise; and
- the claim shall be provided with supporting data and an external source endorsement.

## 26 Are there special rules for describing something as free and for pricing or savings claims?

There are special laws and regulations to rules advertising price or payment in instalments.

The main obligation is that the advertiser must inform consumers of the conditions of the price offered, if there are any, as well the terms of payment (eg, number of instalments; spot price; interest rate; final price; etc). A number of provisions related to the design of advertising, such as font size, colours and the disposition of the information, must also be respected by the advertiser.

## 27 Are there special rules for claiming a product is new or improved?

There is no specific rule for claiming a product is new or improved. Notwithstanding this, the claim should always respect all the requirements and obligations provided by the law and regulations so as not to constitute a misleading or abusive advertisement, especially if there is any relevant difference between the old and the new product that the consumer must be informed of.

## Prohibited and controlled advertising

### 28 What products and services may not be advertised?

There are unique categories of advertisements based on their economic or social importance or public or societal repercussions, and certain categories of advertisements that are subject to special care and specific rules, for instance:

- alcoholic beverages;
- education: courses and teaching;
- real property: sale and lease;
- investments: loans and securities market;
- food: soft drinks, juice and similar beverages;
- over-the-counter (OTC) pharmaceutical products;
- tobacco products;
- firearms; and
- children's advertising, among others.

In this sense, Brazilian law and regulations allow the advertising of any products and services, except illicit products and services, as well as gambling (see question 29).

### 29 Are certain advertising methods prohibited?

Yes, such as subliminal advertising and ambush marketing.

Ambush marketing is considered as undue and unlawful methods that apply any trick or artifice, without the support of a regular agreement entered into by the lawful parties providing for a lawful object, without the previous agreement of the communication medium or holders of the involved rights.

With regard to the methods applied to children's advertising, there are several prohibited methods, which must be analysed on a case-by-case basis.

### 30 What are the rules for advertising as regards minors and their protection?

Brazilian advertising has specific laws and regulations to regulate the advertising of services and products targeted at minors, in order to restrict advertising abuse directed at children (up to 12 years of age) and teenagers (between 12 and 18 years of age).

Several laws regulate this matter and the most relevant are the Consumer Defence Code and the CBAP, with specific provisions in articles 33 and 37 and Annexes H and P of the CBAP.

Despite all the controversy surrounding this issue, as well as the increasingly protective and restrictive tutelage defended by associations and some authorities, it is a fact that children's advertising is permitted. There are also several favourable precedents both in the judicial sphere and in the decisions issued by CONAR.

### 31 Are there special rules for advertising credit or financial products?

All advertisements of investments, loans and the securities market shall comply with several specific provisions, especially regarding investor education and orientation. In this sense, the main rules are summarised as follows:

- advertising shall emphasise the informative and educational content of the message; and
- advertising must avoid assertions that may give ambiguous information or create confusion among investors.

Additionally, the companies that are part of the National Financial System shall comply with the rules applicable to advertising issued by their institutional representation bodies if, and when, specific campaigns recommend common procedure and uniformity in the communication process to benefit investors with better orientation and information.

### 32 Are there special rules for claims made about therapeutic goods and services?

OTC pharmaceutical products are permitted to be advertised by law and the advertisements must, inter alia:

- not contain any assertion as to the action of the product other than based on clinical or scientific evidence;

- not be made so as to suggest healing or prevention of any disease that requires medical supervised treatment;
- not be made in a manner such as to result in different use of the therapeutic action contained in the report submitted to the competent Health Authority;
- not offer any award, participation in contests or similar methods so as to induce the consumer to unnecessary use of medication;
- not be made so as to induce the use of products by children without parental guidance, to whom the message shall be exclusively addressed;
- be careful and true as to the use of the written or spoken word as well as to visual effects. The choice of words shall not only be in conformity with the definition contained in updated dictionaries but shall also take into account the meaning generally understood by the public; and
- not contain affirmations or dramatisations that may induce the reader or spectator to fear or distress that he or she has or may have, without treatment, any serious disease.

### 33 Are there special rules for claims about foodstuffs regarding health and nutrition, and weight control?

Specific rules are provided to regulate the commercial advertising of food, soft drinks, juice, chocolate beverages, non-carbonated beverages and similar non-alcoholic beverages.

The following main specific rules for claims related to health, nutrition and weight control provide that advertisements must:

- contain terminology consistent with the official licensing, either to designate qualities such as 'diet', 'light', 'it does not contain sugar' and 'it does not contain gluten', or to describe any other distinctive characteristics that may guide consumer choices;
- valorise and stimulate, whenever possible, the practice of physical exercises and similar activities;
- abstain from stimulating or encouraging excessive consumption or presenting situations that may stimulate exaggerated consumption or be in conflict with this recommendation;
- refrain from denigrating the importance of a healthy, varied and balanced diet;
- refrain from presenting any product as a replacement for basic meals (breakfast, lunch and dinner), unless such indication is based on a responsible medical or nutritional opinion, recognised by the competent authorities;
- restrict the technical assertions relating to benefits to health and nutrition to those compatible with the official licensing and supported by a responsible medical or nutritional opinion; and
- refrain from using children with low or high weight according to the commonly accepted biometric standards, and avoid offending such children and others. When the product is aimed at children, the advertisement shall not have any stimulation of consumption, especially if presented by a family, school, medical or sports institution or cultural or public authority, or is of an institutional nature, promoting healthy eating habits.

### 34 What are the rules for advertising alcoholic beverages?

For the purposes of advertising, alcoholic beverage is the beverage classified as such according to the official rules and regulations to which its licensing is subject. However, the CBAP establishes a distinction between three categories of alcoholic beverages:

- those usually taken during meals, and thus called meal beverages (eg, beer and wine);
- other alcoholic beverages, either fermented, distilled, rectified, pre-mixed beverages or cocktails (usually served in doses); and
- the ready-to-drink category, in which the alcoholic beverage is presented in a mixture with water, juice or soft drink.

Each category has different and specific rules for broadcast and non-broadcast advertising, including, but not limited to, the warning clause. All advertisements must be analysed on a case-by-case basis by a local lawyer.

### 35 What are the rules for advertising tobacco products?

A tobacco product advertisement shall observe the following rules:

- it shall not suggest that the products have relaxing or stimulating properties, reduce fatigue, tension or produce any similar effect;

- it shall not associate the product with ideas or images suggesting success in terms of sexuality, or insinuate an increase in smokers' virility or femininity;
- it shall not suggest or promote exaggerated or irresponsible consumption, associate consumption with welfare or health or show consumption in illegal or dangerous places;
- it shall not associate the use of the product with practice of Olympic sports or use Olympic sports clothing to promote its marks;
- it shall make no appeal specifically addressed to children below 18 years of age; and any person who appears in an advertisement subject to these rules, either smoking or not smoking, shall look and be older than 25 years of age;
- it shall not use imperative forms that may directly encourage consumption; and
- media planning shall be careful concerning the target public.

The advertisement shall not be inserted in any publication, programme or website basically addressed to minors. The sales outlet materials shall reflect similar care.

### 36 Are there special rules for advertising gambling?

Gambling and betting activities are generally prohibited in Brazil (with some exceptions as provided by law, namely the state-run lottery and horse races conducted at duly authorised race courses).

The Brazilian Federal Union is exclusively competent to legislate on bingos and lotteries.

Gambling is a criminal contravention and is defined as a game where the result depends exclusively or mainly on chance, or any betting on horse races outside authorised race courses.

There are many bills of law aimed at either creating additional restrictions or legalising gambling in Brazil.

### 37 What are the rules for advertising lotteries?

The Federal Union is exclusively competent to legislate on lotteries, including eventual advertising.

### 38 What are the requirements for advertising and offering promotional contests?

In terms of promotions, it is mandatory to include the following legal text in all broadcast and non-broadcast advertising of such:

- the term 'promotional contest' with the title of the contest and the authorising entity (usually the CAIXA bank or the Superintendence of Private Insurance);
- a certificate authorisation number; and
- the promoter's website address.

Moreover, the promotion may only be advertised once a certificate authorisation is obtained.

### 39 Are there any restrictions on indirect marketing, such as commercial sponsorship of programmes and product placement?

Indirect advertising or 'merchandising' is permitted; however, it must be authentic and be identified as advertising.

In addition, indirect merchandising or advertising that depicts children, also uses elements of the infant universe or other artifices with the deliberate purpose of capturing the attention of this audience, whatever the vehicle used may be, is prohibited.

### 40 Briefly give details of any other notable special advertising regimes.

The following are specific rules from the CBAP that must be adhered to in general advertising:

- no advertisement shall encourage or stimulate any type of offence or racial, social, political, religious or national discrimination;
- any advertisement that disrespects religious belief and other susceptibilities of persons who descend from or relate to deceased persons whose image or reference appears in the advertisement is prohibited;
- with regard to advertisements to be broadcast by radio and television, advertisers, agencies and media shall ensure the good pronunciation of the Portuguese language and avoid aggravating



prosodic vices that have already so much contributed to disfigure the legacy that we received from our ancestors;

- the advertisement shall be created within the scope of the Brazilian social and cultural context, the use or adoption of foreign cultural context being restricted as much as possible;
- advertisements shall not use bad words;
- any technical description of the product that may be included in the advertisement shall be based on the official nomenclature of the relevant segment and whenever possible it shall follow the rules and directives of the Brazilian Association of Technical Rules and the National Institute of Metrology, Rules and Industrial Quality;
- the advertisement shall contain nothing that may induce to violence; and
- no advertisement may contain visual or audio presentations that may offend the decency standards of the audience it intends to reach or offensive comparisons with competitors.

#### **Social media**

##### **41 Are there any rules particular to your jurisdiction pertaining to the use of social media for advertising?**

There is no particular rule pertaining to the use of social media for advertising in Brazil. Such activity must comply with all the requirements and conditions required for any advertisement.

##### **42 Have there been notable instances of advertisers being criticised for their use of social media?**

The majority of the criticisms for the use of social media by advertisers is related to influencers, especially if it is not indicated that the content is publicity or advertising.

##### **43 Are there regulations governing privacy concerns when using social media?**

Law No. 12,965/14 provides the only principles to be followed in the treatment and collection of personal data over the internet or social media. There is also a specific bill in place to regulate the collection and treatment of databases on the internet.

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