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SPECIAL FOCUS

Tweetstakes Law: Too Many Tweets for Twitter

Moonfruit, a. U.K. based online building tech company, recently launched a 10 day sweepstakes in which participants received an entry each time they sent a twitter containing the hashtag "#Moonfruit." MacBook Pro computers were awarded as prizes and no limits were placed on how often Hashtag Twitter messages could be sent. Viral buzz was over the top, but Twitter pulled the plug on the seventh day after Moonfruit reached the top of the Twitter Trends list. This week we asked Manatt partner Linda Goldstein what prompted Twitter's action and what message does it send to other marketers who might find Twitter an effective vehicle to increase consumer awareness.

Editors: What exactly did Moonfruit do that so annoyed Twitter?

Goldstein: Twitter never explained, but user comments suggest that many – far too many – received multiple tweets and re-tweets until some thought they were victims of something akin to user generated spam. And Twitter apparently thought that the highly commercialized use of Twitter must be addressed when the viral activity it spawned threatened to replace most other topics of Twitter traffic. So it removed the Moonfruit tag from its Trends list and the search box that aids Twitter users to hunt for topics of interest.

Editors: How did Moonfruit respond?

Goldstein: Surprisingly well. It expressed surprise that its campaign was so

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successful and that it had no intention to dominate Twitter for 10 days or move aside important subjects like Iran from the agenda. In a candid reply by its marketing director, she admitted that the "campaign could set a dangerous precedent" and could lead to an "abuse by marketers." She was, however, disappointed Twitter had summarily suppressed the Moonfruit tag without notice. Moonfruit would have gladly worked with Twitter to limit the promotion.

Editors: Since the campaign was so successful, up to a point, do you think other marketers will follow suit?

Goldstein: Maybe. Although Twitter could also respond to other commercial campaigns that "abused" the Twitter social network, a marketer could, at least for a while, get a massive viral response to a simple sweepstakes if the prizes were attractive enough. The Mac laptops cost, say $10,000, and for that Moonfruit reaped an astonishing 300 tweets per minute. That's quite a viral response for comparatively little cost. I expect, however, that Twitter, will soon establish some checks to prevent any comparable highly commercial reoccurrence.

Editors: What's your takeaway from all this?

Goldstein: Twitter certainly has the right to edit hashtags to prevent smut and control user spam. After all, it's a social network and not an advertising forum. And where, as in the Moonfruit game, unlimited entry translated into an abuse that transcended the sometime unspoken etiquette inherent in social communities, Twitter had to act to prevent marketers from "gaming" its system. On the other hand, it's the Twitter users who actually propelled the campaign forward, so it's not the total responsibility of the marketer. I suspect that most established brands, however, will act cautiously and not risk a widespread user backlash by consumers who view Twitter as primarily a channel for social networking. In the meantime, Twitter might establish a policy that either embraces viral marketing campaigns or sets forth some guidelines as to what kind of marketing will be permissible going forward.

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Proposed Agency Would Take On Some FTC Functions

A new agency proposed by President Barack Obama to protect customers of financial services would take on several functions currently performed by the Federal Trade Commission.

The Consumer Financial Protection Agency (CFPA) would have the authority to promulgate regulations governing the financial services industry, educate financial services consumers, and conduct research on disclosures, fees, and

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other financial issues.

All of these functions are currently carried out by the FTC, which is authorized to enforce federal laws prohibiting unfair and deceptive practices, explained FTC Chairman Jon Leibowitz in a July 8 hearing before the House Energy and Commerce Subcommittee on Commerce, Trade, and Consumer Protection. Although Leibowitz expressed broad support for the proposal, he said he disagreed with certain provisions.

"Obviously, as with any proposal, some lines may need to be redrawn and some issues fleshed out, but we expect that any ambiguity in the proposal will be worked out in the legislative process," Leibowitz says.

The Obama administration issued legislative language last month to start the process of creating the CFPA. House Financial Services Chairman Barney Frank, D-Mass., plans to move his version of the bill through his committee this month. It is not certain whether the Energy and Commerce Committee, which oversees the FTC, will draft part of the bill.

In prepared remarks before the subcommittee, Treasury Assistant Secretary Michael Barr contended that the creation of the CFPA would end regulatory arbitrage, or institutions opting for oversight by the least obtrusive regulator. He said it would also create oversight for previously unregulated areas of the financial market.

Barr says the agency would be funded by appropriations from Congress and fee assessments, presumably on the industry. "The CFPA will have the sole mission of protecting consumers; it will be the agency that sees the world through their eyes," Barr says.

The banking industry is adamantly against the creation of the agency, arguing that it will weaken the financial system by subjecting financial institutions to an additional layer of regulation that would come with added costs.

Why it matters: Every economic crisis inevitably gives rise to government initiatives to create greater oversight of the industry and/or institutions generating the crisis. The Securities and Exchange Commission was created in response to the Great Depression. Enron and other corporate scandals produced the Sarbanes-Oxley Act. The CFPA is being proposed as a response to the subprime mortgage crisis, and criticism of insufficient government oversight of the practices complained about.

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31st Annual Promotion Marketing Law Conference

Topic: "Sweepstakes & Contests: Lend Me Your Ear and I'll Sing You a Song..."

Speaker: Linda Goldstein

Fairmont Hotel

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FTC Announces Sweeping Anti-Scam Campaign

The Federal Trade Commission has announced a series of civil and criminal charges against alleged scammers preying on consumers' financial fears and woes resulting from the ongoing recession.

Many of the scams require consumers to pay money up front for services ranging from credit repair and job-hunting help to get-rich-quick schemes and ways to obtain government funds to pay off bills. The promised services typically are worthless or fall far short of consumer expectations. In other cases, consumers are charged on an ongoing basis for materials or services they never requested.

"To con artists, today's challenging economy presents an opportunity to exploit consumers' fears and bilk them out of money," said David Vladeck, director of the FTC's Bureau of Consumer Protection in a statement released on July 1 announcing the campaign.

Vladeck said that more than 100 cases have been filed so far this year as part of Operation Short Change, a task force comprised of the FTC, the Justice Department, and officials in 13 states and the District of Columbia. The number of cases includes eight complaints filed by the FTC on the day of the announcement.

One of the new cases alleges that five California companies bilked hundreds of thousands of consumers nationally out of about $300 million by offering fraudulent programs related to real estate or online businesses. The companies – John Beck's Amazing Profits, John Alexander LLC, Jeff Paul LLC, Mentoring of America, and Family Products – and five people who founded or ran them were charged with violations of federal laws governing telemarketing and consumer fraud.

The FTC accuses the companies of making "false and unsubstantiated claims about potential earnings" that people could make by following advice given in books, DVDs, and CDs titled "John Beck's Free & Clear Real Estate System," "John Alexander's Real Estate Riches in 14 Days," and "Jeff Paul's Shortcuts to Internet Millions," which sold for $39.95 each. Purchasers of the programs were also signed up for additional monthly charges of $39.95 without their knowledge.

In another case, the FTC has charged Job Safety USA, its owner, Walter Ramos Borges, and five other companies linked to him, with unfair and deceptive practices. The agency alleges that the defendants placed help wanted ads for cleaning and other types of positions. Respondents were referred to Job Safety USA, which sold certificates allowing the handling of

Chicago, IL

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hazardous materials for $98. The certificates, the FTC alleges, are fakes.

Another case involves Google Money Tree, which advertised low-cost kits that promised consumers they could earn $100,000 in six months. But Google Money Tree isn't affiliated with Google, the FTC said, and consumers were unlikely to earn a substantial income. Instead, they were charged – often without their authorization or knowledge – a $72.21 monthly fee for participating.

More than 20,000 complaints were filed with the FTC last year over work-at-home offers and other business opportunities, which is almost double the number filed the previous year. In the first half of this year, the credit counseling and debt management category accounted for 3,600 complaints, compared with 1,300 complaints filed in the same period last year.

Why it matters: In the recessionary economy, scam artists flourish by taking advantage of people's financial problems and worries. The FTC is sending a warning shot to con artists that they are on its radar. The Obama administration's renewed emphasis on enforcement and consumer protection may mean that the agency will seek harsher punishments of those it pursues.

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Cosmetic Surgery Outfit Fined for Fake Reviews

Cosmetic surgery company Lifestyle Lift has agreed to pay $300,000 to settle charges by New York Attorney General Andrew Cuomo that fake customer reviews posted by company employees on review Web sites amounted to deceptive commercial practices, false advertising, and fraudulent conduct. The company has also pledged to stop posting anonymous, positive reviews.

According to Cuomo, to counteract bad reviews posted by customers at sites like InfomercialScams.com and RealSelf.com, the company posted positive reviews by supposed patients, who were actually employees paid to praise Lifestyle Lift. One such review, posted online by Cuomo's office, states: "After my first consultation, I went online and read horror stories about Lifestyle Lift. I realized quickly that most of that stuff was made up."

In a statement, Lifestyle Lift president Gordon Quick said that Cuomo's complaints "stem from a period prior to the present management team's leadership" and that all current online content satisfies acceptable business standards. The company also described some of the reviews as "representative of patient testimonials and comments rather than actual verbatim comments."

This isn't the first time Lifestyle Lift has been charged with posting fake reviews. In March 2008, after Lifestyle Lift sued RealSelf.com for trademark infringement, RealSelf.com filed counterclaims for breach of contract and computer fraud against Lifestyle Lift for allegedly directing its agents to pose as patients and post positive reviews on the site. The case ultimately settled.

Why it matters: Fake, online consumer reviews have been a problem for a long time, but there is no single doctrine that addresses the legality of such reviews. The Federal Trade Commission is currently considering an update to its guidelines concerning consumer testimonials that would require bloggers and online commenters to disclose any connections to marketers, including whether they received free products or other incentives to post reviews.

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Initial Revenue Bill Lacks DTC Ad Deduction

After comments by House Ways and Means Committee Chairman Charles Rangel, D-N.Y., set off alarm bells throughout the drug ad industry, a proposed provision eliminating the deductibility of direct-to-consumer prescription drug ads was itself eliminated from the funding bill released by the committee on July 14.

Advertising deductibility had been on the list of options for raising revenue for healthcare reform being weighed by the committee. In June, Representative Rangel made comments to reporters endorsing the idea of eliminating the deduction. Members of the ad industry acted quickly to call and send emails to the offices of committee members who opposed the reduction or elimination of the deduction, pointing to the economic benefits and jobs supported by advertising.

Industry officials argue that differential taxes on companies violate the First Amendment. Advertising is typically fully tax-deductible as a necessary business expense. Getting rid of the tax deduction for prescription drugs would make it more expensive and burdensome to market this product category versus other product categories, industry contends.

Why it matters: Although industry won the initial battle, the issue may yet return to the table as a funding source for healthcare reform. The revenue option selected by the committee, a surtax on high-income earners, is quite unpopular and if it fails, all options will be up for reconsideration.

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