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ADVERTISING LAW

NEWSLETTER OF THE ADVERTISING, MARKETING & MEDIA PRACTICE GROUP OF MANATT, PHELPS & PHILLIPS, LLP

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FTC Tells Kid Food Marketers to Shape Up

In recent congressional testimony, the Federal Trade Commission has told food and beverage marketers that they should "adopt and adhere to meaningful nutrition-based standards for marketing their products to children under 12."

Commissioner Jon Leibowitz made the statements before the Senate Subcommittee on Financial Services and General Government and Subcommittee on Labor, Health and Human Services, Education, and Related Agencies, in the context of an FTC study released in July on kid food marketing. The report can be accessed online at <http://www.ftc.gov/opa/2008/07/foodmkting.shtm>.

"Significantly, the study analyzes data from 2006—a year just before, or very early in the inception of, industry self-regulatory activities," Leibowitz testified. "The Commission believes that this Report will provide an important benchmark for measuring the future progress of self-regulatory initiatives. In addition to describing the state of food marketing to children and adolescents in 2006 and analyzing industry initiatives to date, the Report also sets forth a number of recommendations. After allowing a reasonable time for response to these recommendations, the Commission will issue a follow-up Report assessing the extent to which the

UPCOMING EVENTS

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ACI: Sports Sponsorship Advertising and IP

Topic:
"When Retired Players Sue: From Coscarart v. Major League Baseball to Parrish v. NFLPA"

Ronald S. Katz

"Morality and an Agreement's Mortality—Taking Appropriate Measures to Avoid the Termination of an Endorsement Deal"

Linda Goldstein

The Carlton Hotel
New York, NY

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D.C. Bar CLE Seminar

Topic:
"Copyright Law and Litigation"

Kenneth M. Kaufman

D.C. Bar Conference Center
Washington, D.C.

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November 20-21, 2008
PMA's 30th Annual Promotion Marketing Law Conference

Topic:
"Navigating the Potholes: The Evolving Landscape for

recommendations have been implemented and identifying what, if any, additional measures may be warranted.”

In its testimony, the Commission outlined five recommended steps for marketers, as follows:

“A useful first step would be to join the CBBB [Council of Better Business Bureaus] Initiative. In other words, all companies should take measures to limit their food and beverage promotions directed to children to those for healthier products.

“Second, given the integrated nature of most marketing campaigns, the Commission also recommends that these nutrition-based standards be extended beyond television, radio, print, and Internet advertising, to cover the full spectrum of marketing activities to children, including product packaging, advertising displays at the retail site, premium distribution, celebrity endorsements, and other promotional activities.

“Third, the Commission also recommends that all companies stop in-school promotion of foods and beverages that do not meet meaningful nutrition-based standards. In addition, all companies that sell ‘competitive’ food or beverage products in schools (outside of the school meal program) should join the Alliance for a Healthier Generation or otherwise adopt and adhere to meaningful nutrition-based standards for foods and beverages sold in schools, such as those recommended by the Institute of Medicine.

“Fourth, the Report contains many other specific recommendations for the food industry, which address the nutritional profile of product offerings, nutrition labeling, healthy messages, and marketing in schools.

“Finally, in light of the character licensing and extensive cross promotion of foods with films and children’s television programs, the Report also recommends actions by media and entertainment companies. Included among these is a recommendation that media and entertainment companies should consider instituting their own self-regulatory initiative and working with the CBBB in this endeavor.”

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FDA Cites Five Drug Companies for ADHD Ads

Sweepstakes, Games & Contests”

Linda Goldstein

Topic:

"Consumer Product Safety: Hear from the Regulators How the New Laws Affect Your Promotion"

Kerrie L. Campbell

Marriott Downtown Magnificent Mile
Chicago, IL

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December 4-5, 2008 Film & Television Law

Topic:

"Product and Music Placement, Branded Entertainment: Issues and Litigation"

Linda Goldstein

Topic:

"The Value of Fame: Understanding the Right of Publicity"

Mark S. Lee

Century Plaza Hyatt Regency
Los Angeles, CA

[For more information](#)

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The Food and Drug Administration has sent warning letters to five pharmaceutical companies over online ads and other marketing materials for drugs to treat attention deficit hyperactivity disorder.

An agency spokesperson said that the FDA sent the letters, which are posted on the agency's Web site, after a review of promotional materials for the class of prescription hyperactivity drugs found a number of violations. The drugs included Johnson & Johnson's Concerta, Shire Ltd.'s Adderall XR, Eli Lilly & Co.'s Strattera, Novartis's Focalin XR, and Mallinckrodt Inc.'s Methylin.

A YouTube video featuring Ty Pennington from ABC's "Extreme Makeover: Home Edition," and a Web ad were cited in the warning letter to Shire for overstating efficacy and omitting "important safety information" regarding Adderall. A Shire spokesperson said the Web ad "was made in error" and the company is "committed to complying with both the letter and the spirit" of the agency's regulations. He said the YouTube video, which was taken down last year, was not supposed to have gone up on the Web site without additional information on dosing and use.

Eli Lilly, which said it "will work with the FDA to address their concerns," was cited for marketing materials used by salespeople that allegedly overstated the effectiveness and minimized risks of Strattera.

The agency cited J&J for ad panels used at conventions, as well as a consumer site, saying the materials overstated the effectiveness of Concerta. A spokesperson said the company "will work closely with the FDA to address the issues raised in its letter."

A Mallinckrodt spokesperson said the company is "preparing a response to address the FDA's concerns" that a patient brochure for Methylin overstated effectiveness and omitted risk information.

The agency's letter to Novartis complained that material for Focalin, including a company Web page and a "professional slide deck," overstated effectiveness. A company spokesperson said Novartis would review the letter and respond to the FDA.

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EU Gambling Companies Betting on WTO

Case Against U.S.

A European trade group for the online gambling industry is predicting that the European Union will file a complaint with the World Trade Organization over U.S. enforcement actions against EU-based betting firms.

“It looks very much as if this matter will . . . be sent to the WTO at the end of the commission’s investigation,” a lawyer for the Remote Gambling Association told reporters while EU officials met with various U.S. federal agencies over the dispute. An EU trade official separately told reporters he anticipated that the European Commission would determine whether to file a lawsuit with the WTO by the end of the year.

A complaint could ultimately result in European sanctions against the United States, although it may take years for a case to wend its way through the WTO litigation process.

In March, the European Commission began a probe into whether the United States was unfairly discriminating against EU companies in its enforcement actions. As part of the investigation, EU officials met last week with the U.S. Trade Representative’s office, the Justice Department, and other agencies. It is expected to publicly report its recommendations in November.

After Congress passed the 2006 Unlawful Internet Gambling Enforcement Act, making it illegal for banks and credit card companies to process payments to Internet betting sites, many EU-based gambling sites withdrew from the United States, losing billions of euros in revenue and market value.

The WTO dispute originated when the Caribbean countries of Antigua and Barbuda challenged a U.S. ban on online betting as violating commitments made by Washington under the 1994 Uruguay Round world trade pact. At first, Washington argued it never meant to permit Internet gambling under that agreement. After it lost that argument, it announced it would exercise its rights under WTO rules to change its commitments. It subsequently struck a deal with the EU to compensate for withdrawing from its WTO obligations with respect to gambling. But the United States continues to pursue criminal charges brought against some online gambling executives prior to withdrawing from its commitments.

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Chicago's Olympic Bid Team Battles for Domain Name

As Chicago vies to be selected as the host city for the 2016 Olympics, it's also fighting to get control over the domain name of Chicago2016.com.

The address currently belongs to Stephen Frayne, Jr., a 29-year-old MBA student at Northwestern University's Kellogg School of Management, who registered it in 2004, two years before Chicago threw its hat into the Olympic rings. It's one of about 40 online addresses combining a city name and year, including Tokyo2016.com, that Frayne has laid claim to in recent years.

Chicago, Tokyo, Madrid, and Rio de Janeiro are in a four-way contest to host the 2016 Olympics.

Chicago uses Chicago2016.org as its official Web site and has the trademark for Chicago 2016. It has filed a complaint with an arbitration organization pursuant to the rules of the Uniform Domain Name Resolution Policy to gain the rights to Chicago2016.com.

Last week Frayne filed a complaint in federal court in Chicago against Chicago 2016, the U.S. Olympic Committee, and the Japanese company Domain Trade Inc., seeking damages and injunctive relief staying the arbitration and protecting his claims to Chicago2016.com and Tokyo2016.com.

Late last month, Frayne launched Chicago2016.com as a forum for discussing Chicago's bid, and he says that he plans to shortly launch Tokyo2016.com as well.

Frayne's complaint states that his aim is to encourage public discussion over whether the Olympic bid is the best use of officials' time, taxpayers' money, and local citizens' money, and about how the Olympics would affect the city. "This case represents an important battle for First Amendment rights and the use of the Internet as a forum to foster debate over a topic that deserves to be discussed," his lawsuit states. His site includes a prominent disclaimer across the top of every page that states it is not the official Chicago 2016 site, with a link directly below to the official site.

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Dream On: Aerosmith's Steven Tyler Sues Imposter Bloggers

Steven Tyler, the lead singer for Aerosmith, has sued anonymous bloggers for impersonating him online, blogging about his mother's death and other "intimate details."

In a complaint filed in Los Angeles, the Aerosmith front man said he had not yet identified the bloggers posing as him and girlfriend Erin Brady, but he believes it is the same people who put up similar posts last year. At that time, Google took down the posts at Tyler's request.

The latest impersonator blogs, showing photos of Tyler, 60, appeared on Blogspot.com, according to the complaint. One blog had 31 posts this year, and another written by "Brady" had 7 posts in recent months.

The complaint charges the unknown defendants with public disclosure of private facts, making false statements, and misappropriation of likeness. It seeks injunctive relief barring the defendants from impersonating Tyler on the Internet or elsewhere.

The complained-of blog posts have since been taken down, replaced by a notice stating, "This blog is under review due to possible blogger terms of service violations."

Aerosmith, which formed in 1970 in Boston, is known for hard-rock classics like "Dream On," "Walk This Way," and "Sweet Emotion."

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FTC Proposes to Streamline Administrative Actions

The Federal Trade Commission is seeking public comment on a set of proposed rules designed to improve enforcement proceedings before administrative law judges.

The recommended revisions are to Part 3 and portions of Part 4 of the Commission's rules of practice addressing administrative proceedings. The agency pursues enforcement actions in both federal district court and administrative proceedings. In the latter instance, an ALJ issues a decision that may be appealed to the full Commission.

The FTC says the Part 3 process "has long been criticized" as too drawn out and resulting in three unwelcome outcomes: (1) parties calling off deals in merger cases before the merits can be adjudicated; (2) substantially increased litigation costs

for both the FTC and private parties; and (3) decisions that are no more just or fair as a result of the protracted process.

According to the agency, the rulemaking addresses these concerns by seeking to streamline and improve the Part 3 process while keeping in mind: (1) the public interest in a high-quality decision-making process; (2) the interests of justice in an expeditious review of litigated matters; and (3) the interest of the parties in litigating matters economically without unnecessary expense.

The proposed rules encompass shorter time limits, a more efficient discovery and motion practice, streamlined evidentiary hearings, and changes to the process for initial ALJ decisions and Commission review.

For instance, motions would be subject to word count limits; the scope of discovery would be limited; waivers resulting from the inadvertent disclosure of privileged materials would be limited; and the ALJ would be required to issue a standard protective order aimed at reducing delays and ensuring the consistent treatment of privileged or confidential information.

Other changes include the admission of hearsay evidence—including prior testimony—if considered sufficiently reliable; required advance video recording of witness testimony; and deadlines for the simultaneous filing of proposed findings, conclusions, and supporting briefs after the hearing.

Under the proposed rules, initial decisions must be issued within 70 days of the last proposed findings. The lengths of principal briefs on appeal to the Commission would be limited to 14,000 words, and reply briefs to 7,000 words, unless otherwise permitted by the Commission.

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