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In This Issue

Manatt Partners to Highlight New Legal and Regulatory Challenges at ACI's National Advanced Forum on Advertising Law

As social media marketers navigate uncharted legal territory and regulators scrutinize advertising more closely than ever, it is imperative that general counsels and senior legal executives keep current on the latest issues and enforcement trends.

To this end, Manatt partners Linda Goldstein, Chris Cole and Tony DiResta will address new challenges for advertisers in three separate presentations at the

American Conference Institute's National Advanced Forum on Advertising Law on January 24-25, 2011 in New York.

NOTE: Be sure to take advantage of Manatt's friend-of-the-firm discount by using the code provided in the registration materials available here.

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Department of Commerce Issues Privacy Green Paper

On December 16, 2010, the Department of Commerce released a green paper titled "Commercial Data Privacy and Innovation in the Internet Economy: A Dynamic Policy Framework" ("Green Paper" or "Paper"). The Green Paper, created by the Department's Internet Policy Task Force, offers a privacy framework that differs from the one proposed by the Federal Trade Commission in its recently issued privacy report.

While the two proposed policies share the goal of designing a framework intended to protect privacy, transparency, and informed choice while recognizing the importance of improving customer service and encouraging continued innovation over time, the Department's Green Paper relies more heavily on cooperative industry self-regulation.

Additionally, the Green Paper proposes the creation of a Privacy Policy Office (PPO) within the Commerce Department that could coordinate the Administration's privacy policies in the United States and internationally. The PPO would be housed within the Department of Commerce rather than in the FTC, tying the office more closely with the Administration. The tone of the Green Paper appears to imply that the Department, while working cooperatively with other agencies such as the FTC, would like to be the administrator and overseer of the consumer privacy overhaul that many foresee on the horizon.

The Green Paper's proposed framework is based on four broad categories of policy recommendations:

- Enhance consumer trust online through recognition of revitalized Fair Information Practice Principles (FIPPs).
- Encourage the development of voluntary, enforceable privacy codes of conduct in specific industries through the collaborative effort of multi-stakeholder groups, the Federal Trade Commission, and the Privacy Policy Office within the Department of Commerce.
- Encourage global interoperability.
- Ensure nationally consistent security breach notification rules.

The general objectives identified above were translated into 10 policy recommendations, discussed in greater detail below. Each of the recommendations is accompanied by questions for comment. Comments are due to the Department of Commerce by January 28, 2011.

Recommendation #1, Fair Information Practice Principles: The cornerstone to the Department's privacy recommendations is the widespread adoption of comprehensive FIPPs, baseline principles that would respond to consumer concerns about the uses of personal data and help increase consumer trust by filling the gaps in current data privacy protections. The Green Paper speaks generally regarding the benefits of a framework based on FIPPs, such as increasing clarity and promoting informed consent for consumers, as well as certainty among consumers, industry, and U.S. trading partners. The Paper states that comprehensive baseline FIPPs would "maintain the flexibility for each industry sector to develop tailored implementation plans that correspond to the privacy risks posed by their services."

The Paper also cites other frameworks in which FIPPs have been successful as support for its policy recommendation, such as those adopted by the Department of Homeland Security. The Paper also noted that the FTC's recent privacy report called for the adoption of many of the same principles, albeit they did not share the FIPP structure.

The Paper notes that while there was general agreement in favor of a baseline commercial data privacy framework, there was disagreement on what role private rights of action should play in such a framework.

Recommendation #2, Focus on Transparency, Purpose Specification, Use Limitation, and Auditing: The Green Paper's second recommendation suggests that additional focus on certain principles within the greater FIPP framework will increase attention to substantive protections.

Enhancing Transparency to Better Inform Choices: The Paper notes that under the current notice-and-choice model, consumers' privacy rights depend on their ability to understand and act on each individual company's privacy policy, which are documents "generally written in legalese that is unintelligible to the average consumer." The Paper notes that "[m]erely providing general information about data practices is not effective transparency; this information must be accessible, clear, meaningful, salient, and comprehensible to its intended audience." While acknowledging the difficulties inherent in applying universal rules to a varied industry, the Department encouraged the industry to adopt and use privacy impact assessments as a manner of adding flexibility to a FIPP-based privacy framework.

Aligning Consumer Expectations and Information Practices Through Purpose Specification and Use Limitations: The Paper notes that purpose specification and use limitations should not involve externally imposed, prescriptive rules that govern how companies can use personal information. Rather, they should require companies to provide clear notice of their practices and would also prevent companies from deviating from the purposes and uses to which they commit by requiring an organization to state specific reasons or objectives for collecting personal information. Further, the use limitation principle should enforce the Internet Service Provider's (ISP's) commitment to use the personal information it collects only to fulfill these three purposes.

Evaluation and Accountability as a Means to Ensure the Effectiveness of Commercial Data Privacy Protections: Auditing and accountability play a critical role in how well organizations follow the practices to which they are bound.

Recommendation #3, Voluntary, Enforceable, FTC-Approved Codes of Conduct: The Green Paper acknowledges that incentives are necessary to spark interest in contributing to the effort to address the diverse commercial data privacy challenges of the digital economy.

The Green Paper posits several plausible options for providing these incentives, including having the proposed PPO and the FTC expend more effort to persuade industry to develop voluntary, enforceable codes of conduct; increasing the level of FTC enforcement of violations under current law; or creating a safe harbor for companies that commit and adhere to an appropriate voluntary code of conduct.

Recommendation #4, Establish a PPO: A key element in the Department's framework is the proposed establishment of a PPO, housed within the Commerce Department, to serve as a center of commercial data privacy policy expertise. The proposed PPO would have the authority to convene multi-stakeholder discussions of commercial data privacy implementation models, best practices, codes of conduct, and other areas that would benefit from bringing stakeholders together; it would work in concert with the Executive Office of the President as the Administration's lead on international outreach for commercial data privacy policy.

The recommendation emphasizes collaborative efforts between the proposed PPO, other agencies, multi-stakeholder groups, and the proposed framework. The Department also briefly mentions the "Do Not Track" mechanism as an example of a challenge that may be addressed through these collaborative efforts and provided a diagram to illustrate the role of the office.

Recommendation #5, The FTC Is Still the Enforcer: Importantly, even as the Department emphasizes the importance of creating an office for coordination of privacy initiatives, the Paper recommends that the FTC remain the federal government's primary enforcer of consumer privacy protection. The Paper noted that baseline commercial data privacy legislation could give the FTC a specific statutory basis for bringing privacy-related enforcement actions, allowing the agency to clarify the principles and to evolve through case-by-case adjudication.

Recommendation #6, Encourage Global Interoperability: The Department recommends that the United States take a leadership role in creating international data transfer frameworks, in order to reduce barriers to cross-border data flows and increase consumer privacy enforcement.

Recommendation #7, National Requirements for Security Breach Notification: The Green Paper recommends consideration of a comprehensive commercial data security breach framework for electronic records that includes notification provisions and encourages companies to implement strict data security protocols. Such a framework would not displace any existing specific breach standards (e.g., HIPAA) and would build upon concepts from existing state breach law.

Recommendation # 8, No Conflict Between a FIPPs-Based Commercial Data Privacy Framework and Existing Sector-Specific Privacy Regulation: The Department emphasized throughout the report that a baseline commercial data privacy framework should not conflict with the strong sector-specific laws and policies that already provide important protections to consumers.

Recommendation #9, Preemption of Other State Laws: The Green Paper does not make a clear recommendation regarding the issue of preemption; instead, it simply brings up the issue and requests comments.

Recommendation #10, Electronic Surveillance and Commercial Information Privacy: The Green Paper also briefly points out concerns expressed by commenters regarding the need to review the Electronic Communications Privacy Act (ECPA), with the goal of ensuring that, as technology and market conditions change, the ECPA continues to appropriately protect individuals' expectations of privacy and effectively punish unlawful access to and disclosure of consumer data.

The Green Paper presents a framework that emphasizes increased attention to consumer privacy issues as an essential element for the operation of a successful online business and proposed best practices that industry members may find useful. In addition, while voluntary codes of conduct form the core of the Green Paper's framework, the agency did not shy away from the possibility of enforcement mechanisms created through new legislation. Between the Green Paper and the FTC's privacy report, industry stakeholders have been presented with unique opportunities to voice their opinions and suggestions on an issue that has clearly captured the attention of both agencies and may be able to play a substantial role in shaping effective and workable privacy rules.

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Packing Peanuts Maker Must Omit the Word "Biodegradable," NAD Says

In a recent decision, the National Advertising Division (NAD) recommended that FP International, maker of "Biodegradable Super 8 Loosefill" packaging material, omit the word "biodegradable" from the product's name and modify or discontinue certain comparative advertising claims. However, the NAD determined that the company could support a carefully qualified "green family" claim for its packing "peanuts."

FP competitor StarchTech, Inc., the maker of loosefill packaging material made from starch, challenged biodegradable claims, comparative claims, and general environmental benefit claims made on FP's packaging, labeling, print materials, and the Internet.

Relying heavily on the Federal Trade Commission's (FTC's) Guides for the Use of Environmental Marketing Claims, or the "Green Guides," the NAD determined that while some qualified claims were supported, other specific environmental claims were not.

While FP limited "biodegradable" claims in certain portions of the Internet advertising and brochure, "the use of the term 'biodegradable' as part of the product name conveys a broad unqualified message of biodegradability," the NAD said. Because the product failed to satisfy the FTC's Guides for unqualified biodegradable claims – to break down naturally within one year and disappear completely following customary disposal – the NAD recommended that FP discontinue using the term in conjunction with the name of the product. The NAD also concluded that FP could not support a claim that its packaging material will decompose within nine to 60 months.

The NAD said FP's comparative claims lacked scientific support. On the other hand, its general environment benefit claims such as "Green Family

Environmentally Friendly Product," "Better for the Environment," and "Truly environmentally friendly packaging," could be supported, as they were qualified and included specific environmental benefit statements, such as the reusability of the product, its comparatively light weight, and its recyclability.

To read the NAD's press release about the decision, click here.

Why it matters: In its decision, the NAD emphasized that advertising claims of a product or packaging offering an environmental benefit must be supported by competent and reliable evidence. Environmental claims are particularly susceptible to regulatory review, with several recent NAD actions and the recently released proposed update to the FTC's "Green Guides," which would establish tighter rules on how marketers of environmentally friendly products can advertise to consumers.

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A Vitamin a Day Doesn't Keep the FTC Away

The Federal Trade Commission has reached a $2.1 million settlement with NBTY Inc., a vitamin producer and marketer, over claims that it made false and unproven health claims relating to vitamins marketed to children. The money will be used to provide refunds to consumers who purchased the multivitamins.

In its complaint, the FTC alleged that NBTY and two subsidiaries, NatureSmart LLC and Rexall Sundown, Inc., made deceptive claims about the amount of DHA they used in children's multivitamin gummies and tablets.

The FTC alleged that the product packaging and print ads stressed the vitamins contained 100 milligrams of DHA, an Omega-3 fatty acid, when in reality, a daily serving of the multivitamin for children ages 4 years and older contained 0.1 milligrams.

The companies further made unsupported claims that the DHA promoted healthy brain and eye development in children, the FTC alleged, because the companies failed to provide evidence to substantiate the assertion.

Under the terms of the settlement, the FTC will administer a refund program of $2.1 million to purchasers of the vitamins. The companies also agreed to halt any misrepresentations about the amount of any ingredient in their products, as well as making any health claims without competent and reliable scientific evidence.

To read the FTC's administrative complaint, click here.

To read the consent agreement, click here.

Why it matters: The FTC noted that the action was part of its ongoing efforts to stop bogus health claims. The agency has increasingly focused on manufacturers and advertisers of dietary supplements, and recently challenged a company that claimed its supplements could treat and prevent diabetes, as merely one example. The Food and Drug Administration has also zeroed in on the industry and could receive more funds for greater enforcement under legislation proposed in 2010.

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Court Grants FTC's Motion to Shut Down Sweepstakes Operation

A U.S. District Court judge granted the Federal Trade Commission's motion to stop a network of companies that were allegedly tricking consumers into paying a $20 fee to collect a fake multi million dollar sweepstakes prize.

The FTC has asked the court to order the defendants – a network of companies using multiple business names as well as individuals – to return all profits.

According to the FTC's complaint, the companies sent personalized mailers (some with fictitious government agency names and official-looking seals) to

hundreds of thousands of consumers, asking for a $20 "processing fee." Instead of a prize, consumers would then receive information about entering a sweepstakes.

The mailers included statements like, "Your identification as recipient for reported cash award entitlements totaling over $2,500,000.00 has been confirmed! We are so pleased at having the honor of informing you of this wonderful news." Some of the mailers claimed to be affiliated with government agencies, the FTC said, like the "State of Illinois Commissioners of Regulation" or the "Office of the President Official Notification." The mailers – in dozens of different versions – also included symbols and artwork to connote such offices, including a bald eagle and the phrase "In God We Trust."

Consumers who received the mailers were instructed to send a $20 processing fee by a certain deadline in order to collect the prize. The mailers included "fine-print language" that "stated vaguely" that the operation was a reporting service which provided information on various sweepstakes, the FTC said, but did not clearly inform consumers that they had not won any prize. Consumers who sent the money then received information about entering sweepstakes.

U.S. District Court Judge Phyllis J. Hamilton of the Northern District of California ordered the defendants to halt their operations and froze their assets pending a hearing.

To read the complaint in *FTC v. National Awards Service Advisory*, click here.

To read the court's TRO, click here.

Why it matters: Companies that run a sweepstakes should remember to clearly and conspicuously disclose both a free means of entry (including no charges for taxes, shipping or handling, or processing as the defendants did here) and the chances of winning, among other requirements.

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California DAs Settle Over Zicam Marketing

Five counties in California reached a $429,000 settlement with the makers of Zicam allergy and cold medicines over allegations that the company attempted to mislead consumers with its packaging.

In a complaint filed by the District Attorneys' offices in Fresno, Los Angeles, Riverside, Sacramento, and Shasta counties, the DAs alleged that Matrixx Initiatives packaged Zicam in large, oversized boxes in an attempt to fool consumers into thinking they were purchasing far more of the homeopathic remedy than what was actually inside the box.

The Arizona-based company violated California's business code by selling its nonprescription cold and flu medication in packages that contained extra space, which misled consumers as to the actual size of the medications, the DAs claimed.

The company agreed to the monetary settlement of $428,800 (which includes civil penalties as well as legal costs) and to resize its packaging, without admitting liability.

Matrixx moved quickly to settle the suit, which was filed on November 30, 2010, by reaching an agreement with the DAs within a week.

Why it matters: The settlement is not Matrixx's first brush with legal action over Zicam. In 2009, the Food and Drug Administration issued a recall of three different versions of the cold remedy and sent a warning letter to Matrixx that the products were unapproved new drugs and therefore could not be marketed. (Click here for our previous report.) In addition, the company faces hundreds of lawsuits by consumers who claim that the use of the Zicam nasal sprays and gels caused them to suffer anosmia, the temporary or permanent loss of smell, as well as consumer class actions alleging false advertising. A class action suit has been brought by Matrixx investors alleging that the company violated the Securities and Exchange Act by failing to disclose the existence of reported problems with Zicam. The suit will be heard by the U.S. Supreme Court later this term.

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Dannon Settles with FTC, AGs for $21 Million

Dannon settled with the Federal Trade Commission and 39 state attorneys general for $21 million over unsubstantiated claims about the health benefits of the company's DanActive dairy drink and Activia yogurt products.

The FTC alleged that the company exaggerated the health benefits of Activia and DanActive by claiming that the beneficial bacteria known as probiotics contained in the products helped relieve irregularity and avoid catching colds or the flu.

Dannon engaged in a nationwide advertising campaign, including Internet, print and television ads, and product packaging, asserting that it had scientific proof to back up its claims.

The TV ads featured actress Jamie Lee Curtis (spoofed on *Saturday Night Live* for the commercials) reassuring viewers that Activia can help with their irregularity, while DanActive commercials showed a young boy recovering his color and energy after drinking a bottle of the product.

Under the terms of the settlement, Dannon will pay $21 million to the 39 state attorneys general who participated in the action. In addition, the company must receive approval from the Food and Drug Administration before making any claims that its yogurt, dairy drink, or probiotic food or drink reduces the likelihood of getting a cold or the flu.

Further, the company cannot claim that Activia will relieve temporary irregularity or help with slow intestinal transit time unless it qualifies the claim with the specific number of servings that must be eaten to obtain the benefits. If Dannon relies on two well-designed human clinical studies for substantiation, however, it can claim that eating fewer than the requisite three servings will be beneficial.

In a statement, Dannon declined to explain how it will adjust its advertising, but said its campaign will continue.

"After the comprehensive review with regulators of Dannon's scientific substantiation, consistent with the FTC standards, Dannon agreed to more clearly convey that Activia's beneficial effects on irregularity and transit time are confirmed on three servings per day," the company said.

To read the complaint in *In the Matter of the Dannon Company*, click here.

To read the consent order, click here.

Why it matters: The settlement could be the end of Dannon's legal woes, after settling a false advertising consumer class action last March over similar allegations for up to $45 million and agreeing to change its labels and advertising (click here for our previous report) in what the plaintiffs' lawyers claimed was the largest settlement in a food advertising suit. But Dannon will be forced to keep the consent agreement in mind going forward, as it included a provision requiring the company to receive approval from the FDA for any claims that its yogurt, dairy drink or probiotic food or drink reduces the likelihood of getting a cold or the flu. "Although companies usually do not need FDA approval of their health claims to comply with the FTC Act, the FTC determined in this case that requiring FDA approval will give Dannon clearer guidance going forward, and help ensure that it complies with the settlement order," the FTC said.

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President Signs "Red Flags" Bill Limiting Scope; Rule Takes Effect

After years of delays, lawsuits, and a legislative amendment, the Federal Trade Commission's Identity Theft Red Flags Rule has finally taken effect.

The Red Flags rule was developed under the Fair and Accurate Credit Transactions Act and requires "creditors" and "financial institutions" that have

"covered accounts" to develop and implement written identity theft prevention programs to help identify, detect, and respond to patterns, practices, or specific activities – known as "red flags" – that could indicate identity theft.

The rule was originally scheduled to take effect on January 1, 2008, but was delayed five times over controversy surrounding the scope of covered entities. Lawsuits were brought by the American Bar Association and the American Medical Association challenging the application of the rule to members of their organizations.

In December, both the House and the Senate passed the Red Flag Program Clarification Act of 2010 that narrowed the definition of a "creditor" and specifically exempted lawyers, accountants, doctors, dentists, and other health care and service providers from the rule.

Those who "advance funds on behalf of a person for expenses incidental to a service provided by the creditor to that person" are no longer covered under the rule. Instead, the rule applies only to businesses that use consumer reports in connection with credit transactions or that furnish information to consumer reporting agencies in connection with a credit transaction or advance funds.

On December 18, 2010, President Barack Obama signed the Act into law.

To read the law, click here.

Why it matters: Enforcement of the "Red Flags" rule began December 31, 2010. In a statement, FTC Chairman Jon Leibowitz said he was pleased that Congress clarified the law, "which was clearly overbroad. Now, we can go forward with less litigating and more protecting consumers from identity theft."

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