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Advertising Law

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FTC Seeks Additional Comments on COPPA

In the process of amending its Rule regarding the implementation of the Children's Online Privacy Protection Act, the Federal Trade Commission has requested additional comments on newly proposed modifications.

Last September the agency announced proposed revisions to the COPPA Rule in five areas: definitions, parental notice, parental control mechanisms, confidentiality and security of children's personal information, and safe harbor programs. Since then, the FTC has received 350 comments.

In response to those comments and "informed by its experience in enforcing and administering the Rule," the FTC proposed additional modifications to three definitions of terms under the Rule: "operator," "website or online service directed to children," and "personal information."

The agency seeks to include third parties – like advertising networks or plug-ins that collect personal information – in the definitions of both "operator" and "website or online services directed to children." Under the new proposal, the definition of "operator" would include personal information "collected or maintained on behalf of" an operator where it is collected in the interest of, or by a representative of, or for the benefit of, the operator.

"This change would make clear that an operator of a child-directed site or service that chooses to integrate the services of others that collect personal information from its visitors should itself be considered a covered 'operator' under the Rule," the FTC said in its announcement.

Similarly, the definition of "website or online service directed to children" would also cover a plug-in or ad network "when it knows or has reason to know that it is collecting personal information through a child-directed website or online service." This proposal would reflect the reality that some Web sites have a mixed audience appealing to adults and children under 13.

Sites with mixed audiences would be allowed to age-screen visitors and be required to follow the COPPA Rule with respect to only those under age 13. However, sites that knowingly target children under 13 as their primary audience, or whose overall content is likely to attract those under 13 as their primary audience, would still have to treat all visitors as children.

The FTC also said it plans to update the definition of "personal information." Under the proposed revision, the term would include a

persistent identifier "where it can be used to recognize a user over time, or across different sites or services, where it is used for purposes other than support for internal operations." The agency also clarified the phrase "support for internal operations" is intended to include the maintenance and analysis of sites, the performing of network communications, the use of persistent identifiers to authenticate users, the maintenance of user preferences, and devices and techniques used to protect against fraud and theft. Serving contextual advertisements also qualifies as support for internal services "so long as the information collected is not used or disclosed to contact a specific individual, including through the use of behaviorally-targeted advertising, or for any other purpose."

Public comment on the FTC's supplemental notice of proposed rulemaking will be accepted until Sept. 10.

To read the FTC's supplemental notice of proposed rulemaking and request for comment, click here.

Why it matters: Each of the proposed amendments could have a significant impact on Web sites and other online services geared toward children under 13 years of age. In particular, the definition of an "operator" would greatly expand the entities covered by the COPPA Rule, to include advertising networks and third parties offering social plug-ins. "The Commission now believes that the most effective way to implement the intent of Congress is to hold both the child-directed site or service *and* the information-collecting site or service responsible as covered co-operators," the FTC said in its proposal. Advertisers should continue to monitor the FTC's proposed changes to the COPPA Rule as the revision process continues.

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Nestlé Gets False Ad Suit Dismissed, Despite FTC Settlement

A federal court judge granted summary judgment to Nestlé in a class action brought by parents claiming that the company made false and misleading ad claims about its BOOST children's drink supplement – even though the company recently settled similar charges with the Federal Trade Commission.

In February 2011, the FTC reached a consent agreement with the company over charges of deceptive advertising.

Nestlé agreed to stop making claims that BOOST will reduce the risk of colds, flu and other upper respiratory tract infections, unless such claims were approved by the Food and Drug Administration; to stop asserting that BOOST will reduce children's sick-day absences and the duration of acute diarrhea in children up to age 13, unless the claims are true and backed by at least two well-designed human clinical studies; and to discontinue any claims about the health benefits, performance or efficacy of any probiotic or nutritionally complete drinks, unless the claims are true and backed by competent and reliable scientific evidence. Nestlé did not admit wrongdoing.

Soon after, multiple class actions were filed against the company alleging false advertising.

In granting summary judgment to Nestlé, U.S. District Court Judge Faith S. Hochberg said that the plaintiffs' core allegations of fraud were grounded in a prior substantiation theory of liability and that the plaintiffs failed to provide sufficient evidence for their false or misleading statement claims.

When alleging a false and misleading statement, the burden is on the plaintiff to plead and prove that a defendant lacked clinical support for the health benefits attributed to the product, the court said. But the plaintiffs merely criticized the strength of Nestlé's scientific support – not its existence or validity.

Nestlé produced over 40 scientific articles and studies in support of its "clinically shown" advertising claims.

"Plaintiffs' experts and its other facts all boil down to a claim that Nestlé's scientific support underlying its claim of 'clinically shown' health benefits is not as strong as it should be and do not substantiate those claims," Judge Hochberg wrote. "While plaintiffs' experts take issue with the strength and significance of these studies, their criticisms do not satisfy plaintiffs' burden of demonstrating that the 'clinically shown' advertising claims are false or misleading." As the plaintiffs' argument that the substantiation for the "clinically shown" claims should have been stronger was legally insufficient, she granted summary judgment

for Nestlé on all the consumer protection claims.

To read the court's opinion in *Scheuerman v. Nestlé*, click here.

Why it matters: Companies often face a class action on the heels of, or contemporaneous with, an FTC complaint. The court's decision makes clear that companies will not necessarily be on the losing end of a class action lawsuit when they enter into a consent agreement with the agency. Judge Hochberg emphasized that although the plaintiffs recited the allegations from the FTC's complaint for support, "the FTC does not come to any actual conclusions in a complaint. Plaintiffs' attempts to characterize the FTC's allegations as conclusions is an effort to bootstrap this action," a fact which plaintiffs conceded.

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Bag it: NAD Examines Claims About Bag Seal Strength

After reviewing a quantified superior performance claim made by Reynolds Consumer Products for its Hefty Slider storage bags, the National Advertising Division said the company should discontinue the "2X STRONGER" quantifier and stick with a straightforward superior performance claim in comparison to competitor Ziploc's bags.

To substantiate its claims, Reynolds relied upon an industry test (ASTM F88) as well as its own testing of the bag's performance when shaken, dropped, and stacked.

But the NAD determined that the evidence did not support the "2X STRONGER" claim.

The methodology used in the industry testing was designed to measure the force required to separate a test strip of material containing the seal – not to comparatively rank the seal strengths of competing resealable bags, the NAD said. Further, the NAD questioned the consumer relevance of the ASTM testing, which did not correlate with the actual performance of the seal with regard to the advertising claims at issue.

And while the NAD found that the shake, drop, and stacking tests were reliable and well-conducted, the tests themselves did not relate to the claim at issue. Although the tests demonstrated the Hefty seal has superior strength to Ziploc, the tests focused on situations that put unusually high amounts of stress on the closure mechanism.

Therefore, while the specific Reynolds' "2X STRONGER" superior performance claim should be discontinued, the NAD said the advertiser provided sufficient evidence to assert a superior performance claim without reference to the "2X STRONGER" claim.

Based on the test results, the NAD recommended the advertiser make a "stronger seal than Ziploc bags" claim as it relates to particularly demanding situations identified in the advertising at issue – when the bags are shaken, dropped, or stacked.

The modified claim should "more closely reflect the substantiation for a superior performance, but not a quantified superior performance claim," the NAD said. The "stronger seal" claim should also include either a qualification (for example, "stronger seal when shaken, dropped or stacked") as part of the claim itself, or a clear and conspicuous disclaimer placed in close proximity to the performance claim it modifies.

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

Why it matters: The NAD also examined Ziploc's argument that even if the Slider bags did have a seal two times stronger, it provided no meaningful consumer benefit. The NAD disagreed and concluded that even small product improvements encourage positive competition and can provide benefits to consumers. A stronger seal, in the NAD's view, is relevant consumer information. "NAD has consistently recognized an advertiser's right to tout product innovations that are beneficial to consumers," it said.

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Running the Gamut: An Update on Toning Shoe Litigation

After a wave of regulatory activity and class action litigation against the makers of "toning shoes," the suits are reaching resolution.

Over the last two years, suits were brought across the country against companies including New Balance, Skechers and Target alleging that the companies made false and deceptive ad claims about the health benefits of the shoes. Reebok faced a challenge with the National Advertising Division as well as civil suits before reaching a $25 million settlement with the Federal Trade Commission.

The suits are now in various states of litigation from pre-trial motions to potential settlements.

In Minnesota, a federal judge recently declined to dismiss the class action against Target. The shoebox for the company's TrimStep shoes contained statements that the shoes could provide various health benefits to the user, including claims that the shoes could help promote muscle toning in the legs, help improve the user's posture, and help relieve stress on the user's feet and joints.

Target argued that the claims were puffery and also included "disclaiming" and "noncommittal" language such that no reasonable person would rely on the statements that the shoes provide any physical benefits. For example, the shoebox had language like "Every person's body is different, and may experience more or less benefit to different muscle groups than others."

But the court said the TrimStep shoebox had claims that the footwear provides specific health benefits claims such as increased muscle toning in the legs and reduced stress in the feet and joints. "Even in context, these statements are descriptions of characteristics of the product that are specific and measurable claims, 'capable of being proved false,'" U.S. District Court Judge Joan N. Ericksen wrote.

In denying Target's motion to dismiss, the court gave no credence to Target's puffery assertions. Because the statements are not "exaggerated statements of bluster or boast upon which no reasonable consumer would rely" nor "vague or highly subjective claims of product superiority," Target could not argue they were puffery.

Meanwhile, New Balance has reached a settlement in the class action suit alleging it made false and deceptive claims about its Truebalance toning shoes, for a total of $3.75 million.

Under the settlement, which still must be approved by the court, class members could receive up to $100 for each pair of shoes, which "represents slightly more than the full purchase price class members likely paid for these products," according to the parties' joint motion for settlement.

New Balance would pay $2.3 million to create a fund for class members, $500,000 for notice and administration costs, and an amount not to exceed $950,000 for counsel fees.

The company also agreed to modify its claims. New Balance would be permanently enjoined from making claims that any of its shoes are effective in strengthening muscles or that wearing such shoes will result in a quantified percentage of muscle toning or strengthening absent at least one clinical study. With respect to its toning shoes, any New Balance health or fitness benefit claims must be non-misleading and based upon competent and reliable scientific evidence. And the company could not misrepresent the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research relating to its footwear.

To read the court's order denying Target's motion to dismiss in *Laughlin v. Target*, click here.

To read the proposed settlement in *Carey v. New Balance*, click here.

Why it matters: Advertisers should be careful to use claims that are substantiated and that studies used in support produce accurate, verifiable results. As the companies swept up in the big business of toning shoes can attest – retail sales hit $145 million in 2009 –failure to do so can result in regulatory action and class actions with the potential for monetary damages.

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Judge: TCPA Doesn't Require Economic Injury

Even though a plaintiff was not charged extra for receiving allegedly unwanted text messages, he still suffered sufficient injury to bring suit under the Telephone Consumer Protection Act, a federal court in California recently ruled.

Neil Smith brought a class action against Microsoft after he allegedly received a text message promoting the defendant's Xbox.

Although some members of the putative class reportedly suffered actual damages by having to pay their respective wireless carriers a fee for the receipt of the unwanted text messages, Smith did not state he suffered such damages in the complaint.

Microsoft argued that because Smith failed to establish a cognizable injury, he could not state a claim under the TCPA.

But U.S. District Court Judge Janis L. Sammartino disagreed.

"The TCPA, by its unambiguous terms, does not limit protection to instances in which a plaintiff is charged individually, or even incrementally, for each text message," she wrote, relying upon both the "legislative history and purpose" of the Act.

Judge Sammartino looked to court decisions that have interpreted standing under the TCPA in different contexts and other federal statutes aimed at curbing invasions of individual privacy. She determined that "the statute is intended to grant relief [without] relation to monetary harm."

"Even absent any economic harm," she wrote, the plaintiff "has established a particularized injury in satisfaction of Article III premised on the invasion of his privacy."

To read the opinion in *Smith v. Microsoft*, click here.

Why it matters: Judge Sammartino noted that only a handful of courts have faced a similar issue of statutory interpretation but reached similar decisions. Marketers facing the potential of up to $1,500 in damages per violation of the TCPA should use care to ensure they have prior, express consent to send text messages.

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