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FDA Seeks Comment on Front-of-Package Food Labeling

As part of an effort to improve the usefulness of nutrition information provided to consumers at the point-of-purchase, the Food and Drug Administration is seeking public comment on issues relating to front-of-package food labeling.

Addressing both front-of-package labeling and shelf tags for food products in retail stores, the agency is seeking research data and other information on four specific topics:

- The extent to which consumers notice, use, and understand nutrition symbols on front-of-package labeling or shelf tags at the point of sale;
- Research assessing and comparing the effectiveness of various possible approaches to front-of-package labeling;
- Graphic design, marketing, and advertising data and information that can inform and guide the development of better point-of-purchase nutrition information; and
- The extent to which point-of-purchase nutrition information may affect decisions by food manufacturers to reformulate products.

In its request for comment, the FDA said it "believes that information in front-of-pack labeling can be useful to supplement the information in the Nutrition Facts box," as part of its stated goal to maximize the number of consumers who "readily notice, understand, and use point-of-purchase information to make more nutritious choices for themselves and their families."

While the FDA said it has conducted and reviewed some research on how consumers interpret nutrition information and the symbols used in food labeling, it said its own evaluation is limited because the agency

does not have access to proprietary research conducted by private companies.

"FDA believes the food industry has acquired extensive market experience with consumer reaction to nutrition symbols since 2005, when the voluntary use of nutrition symbols in food labeling began to proliferate in the U.S. market. FDA also is aware that many foreign governments, industry groups, food manufacturers, consumer advocacy groups, and academic researchers have conducted or are conducting consumer research on nutrition symbols. Although some of this research is publicly available, most of it remains unpublished and unavailable to the agency. Because there are limitations to the currently available published literature, we are particularly interested in obtaining access to unpublished research. For example, we are interested in research on a much wider range of nutrition symbol schemes than has been examined in the literature. In addition, studies seldom compare consumer responses to different symbol schemes," the notice said.

The public comment period ends July 28, 2010.

Why it matters: The request for comment makes clear that the FDA will be taking action on the issue of front-of-package food labeling. "In addition to developing the scientific foundation for agency decision-making with respect to nutrition symbols and other front-of-pack labeling information, FDA is considering a number of other efforts to help guide food manufacturers in their use of front-of-pack labeling, such as issuance of a draft guidance on voluntary calorie declarations and a draft guidance and/or a proposed rule on dietary guidance statements," the notice said. The current Commissioner of Food and Drugs, Margaret A. Hamburg, has indicated her support for an enhanced Nutrition Facts box and ready access to information on calorie and nutrient content. The FDA's notice said it was "possible that information disclosed in front-of-pack labeling may foster industry reformulation of products" because consumers might select their food product based on the information.

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FCC: Radio Station Should Be Fined for Breaking Its Own Rule

In an order, the Federal Communications Commission affirmed a court's decision that radio station Saga Communications violated the FCC's rules regarding broadcasts by not following its own contest rules.

A local radio station in Springfield, Massachusetts conducted a broadcast contest that included a sports memorabilia prize. Although the station's own contest rules required delivery of the prize within

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Natural MarketPlace 2010
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June 10-12, 2010
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Topic: "Let's Get Digital"
Speaker: Linda Goldstein
Orlando, FL
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Topic: "Truth in Advertising: Can You Handle It?"
Speaker: Jeff Edelstein
Orlando, FL
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June 15-16, 2010
American Conference Institute Litigating and Resolving Advertising Disputes
Topic: "The Realities of Bringing and Defending a Lanham Act case in Federal Court Part 2: Litigating and Proving the Case"
Speaker: Tom Morrison
New York, NY

thirty days, the recipient did not receive his prize until approximately seven months after the contest was held, and only after he complained to the FCC.

The FCC's Enforcement Bureau issued a forfeiture order against Saga Communications, the licensor of the station, for $4,000, but the station appealed.

It argued that the FCC's rules do not explicitly require that prizes be awarded promptly. But the Commission disagreed. The rules are not exhaustive of every element that is material to a contest, it said, and the Commission is allowed to properly interpret its own rules.

Further, the station's own contest rules created an obligation to award prizes within thirty days, the FCC determined.

Although the station argued that the time period was intended to "persuade" winners to claim their prizes, not to impose an obligation on the station, "Saga's own contest rule creates a reasonable expectation on the part of winners that prizes would be awarded within thirty days because winners are explicitly given thirty days in which to claim prizes, and a prize must be awarded in order to be claimed. Moreover, accepting Saga's interpretation of its own contest rule would render it harmless from liability for ever failing to award a contest prize, effectively allowing it to claim that fulfillment would occur at some unspecified future time of its own choosing," the FCC said.

Finally, the Commission said that because the station didn't award the prize for several months, it made a "repeated" act under the rules that constituted a repeated violation, warranting a fine.

Why it matters: Contests or sweepstakes conducted under the purview of the FCC should be in compliance with the Commission's rules as well as those of the sponsor conducting the game. The official rules form the contract between a sponsor and a participant when the material terms for the contest are set forth, so sponsors should avoid ambiguities when drafting their rules.

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FTC, Florida File Suit Against Company that Sold a Cure for Alcoholism

In conjunction with the Attorney General of Florida, the Federal Trade Commission is suing a company that touted a phony cure for alcoholism and threatened to reveal the customers' drinking problems if they canceled their membership to the service.

The company, Alcoholism Cure Corporation, also did business as the Alcoholism Cure Foundation, and sold its product online beginning in 2005, the FTC alleges.

The Helmsley Park Lane Hotel

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June 15-16, 2010

American Conference Institute

Litigating and Resolving Advertising Disputes

Topic: "Pushing the Envelope: Case Studies Examining Advertising that has been the Focus of Recent Adversarial Proceedings"

Speaker: Linda Goldstein

New York, NY

The Helmsley Park Lane Hotel

for more information

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According to the complaint, the company used several different Web sites to advertise its "Permanent Cure" program, which "cures alcoholism while allowing alcoholics to drink socially" and "is scientifically proven to cure alcoholism," when it was really a combination of various dietary supplements such as St. John's wort, niacin, folic acid, and vitamin C.

In addition to false claims made about the program, the FTC alleged that the company also falsely represented the professional qualifications of the company's owner and other doctors involved.

The complaint alleged that advertisements for the product referred to the company's owner, Robert Douglas Krotzer, who is not a medically licensed doctor, as "Dr. Doug," and claimed that the company had a "team of doctors" with expertise in addictive disease who would create customized cures for customers. The complaint also alleged that the company offered two different monthly subscriptions for the program: the Heavy Drinker ($59.96 for the first month and $179.96 each month thereafter) or the Very Heavy Drinker ($99.96 for the first month and $269.96 each month thereafter).

Customers who tried to cancel were faced with an "inconspicuous hyperlink" to the company's terms and conditions page, a document the complaint described as "indecipherable and internally inconsistent." And, according to the complaint, when consumers contacted the company to cancel, it refused unless they submitted "Proofs of Continued Drinking," such as a hair or blood sample, laboratory test results, or liquor receipts. Some consumers were also sent dunning letters and e-mails when they continued their attempt to cancel.

The FTC also claimed that the company falsely represented that it would keep its consumers' personal and health information private, confidential and anonymous. In reality, the complaint alleged, the company filed 11 cases in small claims court seeking payment from customers and failed to file the court pleadings in a nonpublic manner—revealing the customers' personal and health information, including their addiction to alcohol.

The complaint, filed in federal court in Florida, seeks injunctive relief, restitution and/or refunds for consumers, and the disgorgement of profits.

Why it matters: Advertisers should take care not to make overbroad claims about their products or services. In this case, the complaint details several areas where the company allegedly made false and misleading statements, from claims about the product to the qualifications of the medical professionals involved to misrepresentations of privacy protection for customers.

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USDA Launches Program Encouraging "Healthy Kids"

The United States Department of Agriculture Center for Nutrition Policy and Promotion is seeking educational games and apps as part of its new campaign, "Innovations for Healthy Kids Challenge," which is encouraging kids to eat more fruits and vegetables and decrease their consumption of foods with saturated fats and added sugars.

With childhood obesity continuing to rise in the United States, the Apps for Healthy Kids Challenge aims to "motivate the creation of innovative, fun, and engaging applications or games that encourage children, especially 'tweens,' to eat more healthfully and be more physically active."

Developers, programmers, gamers, and the general public are all invited to develop educational games and apps based on the USDA's Food Nutrition and Consumer Services Dataset. (The dataset contains pre-calculated portion sizes for simpler calculations.)

Specifically, submissions must incorporate at least one concept of the challenge, such as teaching kids to eat more whole grain; increasing fruit and vegetable consumption; consuming more low- or non-fat milk; choosing lean sources of protein (including beans); decreasing choices of food with saturated fats, added sugars, and excess sodium; being more physically active; and identifying and consuming proper food portion sizes.

The public comment period is open until June 28, 2010.

For information on how to comment or submit a game, click here.

To submit an entry to the challenge, click here.

Why it matters: Similar to the recent launch of other federally funded online youth education programs, such as the FTC's advertising education program aimed at tweens, AdMongo, the USDA's program is focused on combating childhood obesity in the United States. The Apps for Healthy Kids competition is the first step of the program, which will also include a challenge to produce motivating public service announcements and a recipe challenge, centered around creating healthful recipes used in schools.

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Plaintiff Wins $7,000 Against Spammer

In what is believed to be the first trial and verdict under California's anti-spam law, a state court judge awarded a plaintiff $7,000 against a spammer.

Daniel Balsam filed suit against Trancos Inc., a Redwood City, California advertising company, after he received a number of unwanted e-mails in 2007. Balsam, an attorney, is a known anti-spam advocate who has filed dozens of suits against spammers on behalf of himself or other consumers.

The "from" line in the eight e-mail messages used a nonexistent source – such as "Paid Survey" or "Your Promotion" – and none of them named Trancos, which actually sent all of the messages. Of the eight messages, seven were sent from senders that did not exist or were otherwise misrepresented. In addition, none of the e-mails provided a toll-free number to opt out and seven of them did not provide the ability to send an "unsubscribe" e-mail to the advertiser.

After a bench trial, San Mateo County Superior Court Judge Marie Weiner ruled that the e-mails violated California's anti-spam law, which prohibits the sending of an uninvited commercial e-mail from California or to a state resident that misrepresents either the source or the subject of the message.

Unlike the federal CAN-SPAM law, California's law allows private suits and recovery even if a plaintiff didn't actually lose money or accept any of the offers.

Judge Weiner found that the plaintiff demonstrated that the defendant violated multiple sections of the state law but was only entitled to damages under one of the provisions, choosing to award the lesser amount of $7,000.

The lawyers who tried the case said that while some suits had been brought in small claims court under the state law, Balsam's suit was the first by a consumer plaintiff to go to trial.

A lawyer representing Trancos described the defendant as "a successful, ethical Internet advertising business," and said his client planned to appeal the ruling. He plans to argue that CAN-SPAM preempts California's law and that it should be used only by consumers who are actually injured by the e-mails, unlike Balsam.

Judge Weiner held that the California statute is not preempted by CAN-SPAM and that "Congressional legislative history reflects that 'a State law prohibiting fraudulent or descriptive headers, subject line, or content in commercial e-mail would not be preempted.'" Because the plaintiff "prove[d] that defendant Trancos intentionally undertook efforts to impair a recipient's ability to identify, locate, or respond to it as the initiator of the e-mail, and that it intended to hide itself from identification by recipients as the sender," it could be liable.

Further, Trancos failed to establish that it deserved protection under the statute's mitigation clause, which will shelter a defendant who establishes and implements, with due care, practices and procedures

reasonably designed to effectively prevent spam. "[T]he evidence reflects that Trancos intentionally and affirmatively established practices and procedures to avoid all human contact, avoid the ability of members of the public to contact Trancos directly to stop the sending of e-mails, and avoid members of the public even *knowing* who actually sent the e-mails," Judge Weiner wrote.

Why it matters: The verdict is an important reminder for companies that they could be financially liable to private plaintiffs under California's anti-spam statute at $1,000 per violation for sending e-mails to recipients without consent that misrepresent either the source or the subject of the message. Advertisers or marketers sending e-mails to California residents should be careful to follow the federal CAN-SPAM Act as well as the requirements of the state statute.

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