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## Register Now and Join Us at ERA D2C

Venable is a proud sponsor of the Electronic Retailing Association's D2C Convention on September 24-26, 2013 in Las Vegas. Please join our attorneys as they host the Pre-Moxie Awards reception, honor Venable partner **Jeffrey D. Knowles**, recipient of the 2013 ERA Lifetime Achievement Award, and present two educational sessions. Venable partner **Gregory J. Sater** will present "Beauty and Fitness: Making Your Marketing Dollars Count!" on Tuesday, September 24 from 10:30 a.m. to 11:30 a.m. PT. In addition, Venable partner Jeffrey D. Knowles will moderate a panel titled "Don't Risk Revenue: Three R's Every Marketer Must Know" on Tuesday, September 24 from 3:45 p.m. to 4:45 p.m. PT.

To obtain a discounted exhibit hall pass that will allow you access to the expo as a Venable guest, [click here](#) and register using the code **EI320D26**.

If you are attending ERA D2C and are interested in scheduling a conversation with a Venable attorney, [click here](#) to send us an email.

## Analysis

### What You Think You Know Can Hurt You

In the September edition of *Electronic Retailer* magazine, Venable partner **Gregory J. Sater** tackles five of the most common misconceptions about advertising law.

[Click here](#) to learn the truth about claims, disclaimers, indemnification, testimonials, and dry testing.

### FDA Serves Seconds on Medical Food Guidance

On August 13, the Food and Drug Administration (FDA) released a second version of its draft guidance on medical foods. The draft guidance, *Frequently Asked Questions About Medical Foods; Second Edition*, amends and expands upon the original draft guidance published in 2007. Medical foods are specially formulated foods intended for the dietary management of a disease or condition that has distinctive nutritional requirements that cannot be met by a normal diet alone.

The 15 new questions and answers included in the revised document address, among other things, the scope of permissible diseases or conditions that medical foods may be labeled or marketed to manage, medical food labeling, and physician supervision. In a recent client alert, Venable attorneys **David G. Adams**, **Todd A. Harrison**, **Claudia A. Lewis**, **Ralph S. Tyler**, **Michelle C. Jackson**, **John G. Moore**, and **Erin E. Seder** provide analysis of the draft guidance.

The authors write that while the Q&As in the draft guidance shed light on the FDA's planned regulation of medical food, some of the answers are likely to engender fervent industry commentary. The FDA will accept public comments on the draft guidance until October 15, 2013.

[Click here](#) to read Venable's client alert on the draft guidance.

[Click here](#) to read the full text of the draft guidance.

## News

### Facebook Promotions? You Don't Need an App for That

On August 27, Facebook changed its rules for promotions, making it easier for businesses to run promotions on the ubiquitous social media platform.

## Honors and Awards

Top ranked in *Chambers USA* 2013



Law Firm of the Year, National Advertising, *U.S. News and World Report*, 2011-2012



Top-Tier Firm *Legal 500*



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The changes eliminate the requirement that Facebook promotions be administered through costly specially created apps. The new rules allow a company to administer a promotion via its timeline page. The new rules also allow user posts to a company's page, comments or "likes" to a post, or messages to a company page to be used as a means of entry.

The changes, which many see as a way to encourage more small and local businesses to launch Facebook promotions, specifically prohibit companies from asking users to "tag" themselves in photos in which they do not actually appear, such as a photo of a product.

[Click here](#) to download Facebook's guide to the updated promotions rules.

## Marketers Pass on NAD; NAD Passes Marketers to FTC

Earlier this [month](#), we covered the decision by the National Advertising Division of the Council of Better Business Bureaus (NAD) to refer two leading brands to the Federal Trade Commission (FTC). Since then, NAD has referred two more cases to the FTC because marketers declined to participate in the self-regulatory process.

GreenFiber, LLC a manufacturer of cellulose insulation, declined to participate in the review of "environmentally-friendly," "natural," "non-toxic," and comparative fire resistance claims in response to a competitor challenge. The challenger argued that GreenFiber's product name and pervasive green imagery, in conjunction with its "environmentally-friendly" claims, constituted a general environmental benefit claim. It further contended that GreenFiber's product was not "natural" or "non-toxic," in light of numerous chemicals added to the newsprint source material and flame retardants added to the product. The challenger also asserted that GreenFiber lacked proper testing to substantiate its claim that GreenFiber cellulose insulation products are "Proven 57% More Fire Resistant" than fiberglass insulation.

GreenFiber urged NAD not to consider the challenger's claims. It represented that it had already committed to discontinuing or making unspecified modifications to several of the challenged claims. GreenFiber also contended that the challenger's objections to its "fire resistance" claims were frivolous and argued that the fire resistance issue was of such a technical character that NAD could not conduct a meaningful analysis. Finally, the company asserted that its use of the "GreenFiber" trademark in its marketing materials was appropriate and not an unlawful general environmental claim.

NAD observed in its case report that GreenFiber had not agreed to modify or discontinue all of the challenged claims, including the use of its trademarked "GreenFiber" name, and it had also refused to modify or discontinue its fire resistance claims. On the trademark issue, NAD noted its position that registration and promotion of a trademark do not obviate the need for the advertiser to have a reasonable basis to use the trademarked expression when it appears as an advertising claim. NAD also rejected GreenFiber's claim that NAD could not conduct a meaningful analysis of its fire resistance testing. In its press release, NAD cited GreenFiber's intention to continue using two of the claims challenged in its decision to refer the matter to the FTC.

In the second matter, the Council for Responsible Nutrition (CRN) challenged claims made in Internet advertisements by a marketer of dietary supplements for its raspberry ketone drink. The CRN was especially concerned that some of the challenged claims implied that the product might be used to mitigate, treat, cure, or prevent disease. Because the marketer did not respond to NAD's inquiry, it referred the matter to the FTC.

In both cases, the marketers made claims in areas ("green" claims and dietary supplements) of tremendous interest to the FTC. Given NAD's recent willingness to refer matters to the FTC, marketers may be wise to consider whether participating in the self-regulatory process, and possibly modifying or discontinuing claims, is preferable to facing an FTC investigation and possible consent decree.

[Click here](#) to read NAD's press release in the GreenFiber matter.

[Click here](#) to read NAD's press release in the raspberry ketone matter.

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## Upcoming Events

### Teleconference: "ABA Antitrust Section Corporate Counseling Update"

September 10, 2013 | 12:00 p.m. - 1:00 p.m. ET

Join Venable attorneys at the ABA Antitrust Section Corporate Counseling Committee for its monthly Antitrust Update for In-house Counsel, a telephonic committee program. This program continues the ABA's popular monthly brown bag series in which antitrust practitioners report on the most recent developments around the world at antitrust agencies and in the courts.

[Click here](#) to learn more and register.

### **Council for Responsible Nutrition Workshop and Conference 2013 - Park City, UT**

September 18-21, 2013

The Council for Responsible Nutrition (CRN) is the leading trade association representing dietary supplement manufacturers and ingredient suppliers. During CRN's dietary supplements conference, Venable partner **Claudia A. Lewis** will join a panel to discuss "How Non-compliance with FDA Regulations Can Result in a Private Cause of Action for Consumers." Venable is also a proud sponsor of the invitation-only Board of Directors dinner.

[Click here](#) to learn more.

### **NAD/CARU/ERSP Annual Conferences - New York City**

September 30-October 2, 2013

The Advertising Self-Regulatory Council establishes the policies and procedures for advertising industry self-regulation, including the National Advertising Division (NAD), Electronic Retailing Self-Regulation Program (ERSP), and Children's Advertising Review Unit (CARU). Venable attorney **Mikhia E. Hawkins** will join a panel during the ERSP Summit titled "Direct Response: A Year in Review & What's to Come." Timely topics that will be discussed include recent developments and issues in direct response advertising and marketing, various considerations of claim substantiation, and self-regulation's role in the evolving electronic retailing industry.

[Click here](#) to learn more.

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