Advertising Law @ manatt

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## IAB To Produce Standards For Tablet Ads

**A task force of the Interactive Advertising Bureau has launched a program to produce recommendations on standards and to establish best practices for tablet and e-reader display ads. The group hopes to achieve results similar to the IAB specifications for display advertising on the Internet, which are the industry standard.**

Tablets and e-readers have become increasingly popular over the last few years, in large part because of the release of Apple's iPad, which the task force said it intends to focus on. The Tablet Task Force is comprised of a group of senior publishing and interactive industry executives whose preliminary objectives are "to explore and define comprehensive best practices in the area, build an infrastructure for ongoing growth and provide guidance on the development of ad standards that enhance the lush consumer experiences [the] devices promise."

"The ad market is developing for tablets and e-readers as the excitement builds for those devices," Bob Carrigan, CEO of IDG Communications, Inc., and co-chair of the Tablet Task Force, said in a statement. "Their growth will create new revenue for media companies, agencies and technology companies and new

experiences for users."

For more information about the Tablet Task Force, click here.

**Why it matters:** Substantial growth is forecast for advertising on tablets and e-readers. As a preview of its focus, the Tablet Task Force recommends an opinion piece, "tabadvertising – iPad and other tablets: the advertising and marketing opportunities," by Jack Wallington, the Head of Industry Programmes for the U.K. IAB.

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## Judge Freezes Assets, Stops Operations of Telemarketing Company

**After the Federal Trade Commission alleged a telemarketing company was delivering millions of illegal "robocalls" that pitched extended auto warranties and credit card interest rate-reduction programs, a federal court blocked the company from operation and froze its assets.**

California-based SBN Peripherals, Inc., made more than 370 million calls to consumers over the last year, which resulted in tens of thousands of complaints to the agency and the "blatant violation" of telemarketing laws, according to the FTC. The FTC alleged that the robocalls – allegedly more than 2.4 million calls in a single day – violated the Do Not Call Registry rules because the company did not have prior, written permission from recipients.

The company used vague caller ID information (such as a generic "Sales Dept.") or numbers registered to an offshore company in Asia, the complaint alleged. One of the offshore accounts generated more complaints to the FTC over the last year than any other robocall number, the FTC said.

Other violations of the rules included that the robocalls falsely claimed that the caller had urgent information about the recipient's auto warranty or credit card interest rate, and when recipients sought more information, they were transferred to a live telemarketer who used fraudulent practices to sell "inferior extended auto service contracts" or "worthless debt-reduction services," according to the complaint.

The FTC also alleged that the company made robocalls to telephone

**UPCOMING EVENTS**

June 30, 2010
**Location-Based Digital Marketing Forum**
**Topic:** "With location-based technology growing exponentially, how do you build or adapt marketing strategies?"
**Speaker:** Tony DiResta
Santa Monica, CA
for more information

September 24, 2010
**ACI Conference**
**Topic:** "Sweepstakes, Contests, and Promotions"
**Speaker:** Linda Goldstein
New York, NY
for more information

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numbers on the National Do Not Call Registry, repeatedly called consumers who had requested to be put on the company-specific do-not-call list, and "abandoned" prerecorded calls at a rate higher than the rules allow.

A U.S. District Court in the District of Illinois issued a temporary restraining order stopping the company from making calls, freezing its assets, and appointing a receiver to take control of operations.

The FTC is seeking an order permanently barring the allegedly illegal conduct.

To read the court order, click here.

**Why it matters:** Telemarketing companies must remember to have recipients' consent up front and in writing before making robocalls. The FTC has increased its enforcement of Do Not Call Registry violations, especially after new rules went into effect in September 2009 regulating robocalls.

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## Suit Against Craigslist For Fake Ads Can Proceed

**A man who was harassed after fake ads about him were placed on Craigslist can sue, a California state court judge has ruled.**

Despite the protections of the federal Communications Decency Act, which provides immunity from liability for companies like Craigslist for material created by third-party users, Judge Peter Busch ruled that the company opened itself up to liability by promising to remove the harassing posts.

A California man filed suit against Craigslist in 2009, alleging that a series of ads were placed on the "casual encounters" section pretending to be him looking for gay sex. After the man (who filed suit anonymously) complained several times to Craigslist, the ads were removed and he was told that they would "take care of it," and on one occasion the representative told him that the company would take steps to stop the fake posts. Months later, however, new posts appeared that gave the man's name, phone number, and home address and "invited people to go to [his] home with friends to pick up large, heavy furniture and items for free or at very low prices," according to the complaint. Between 50 and 60 people visited his house and demanded the free property as

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advertised, he claimed.

The man sued his former employer and coworkers, who the police determined had posted the fake ads, as well as Craigslist.

Relying on the CDA, Craigslist sought to have the suit dismissed, arguing that its representative did not make a specific promise, but followed the company's policy and practices of responding to complaints. But at a hearing, Judge Busch disagreed. Because the man complained to Craigslist after he was the repeated victim of fake posts, the court determined that the company opened itself up to suit by allegedly promising to remove the harassing posts. "The plaintiff has sufficiently pleaded promissory estoppel by virtue of the substance of the conversations the plaintiff alleges specific to his circumstances," the judge said.

To read the complaint in *Scott P. v. Craigslist*, click here.

To read the transcript of the hearing, click here.

**Why it matters:** Companies that host third-party content should pay close attention to the case because the judge allowed the suit to proceed despite the immunity protections of §230 of the CDA. However, Judge Busch was careful to explain that the allegations were specific to the facts of the case and that a Craigslist representative allegedly made promises to the plaintiff. Customer service representatives should be trained to use caution when discussing remedial measures with users to avoid making legally enforceable promises. At the hearing, Craigslist asked for and was granted a stay of discovery in order to seek expedited appellate review. We will continue to follow the case.

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## Federal Reserve Board Issues Final Rule

**The Federal Reserve Board issued its final rule implementing the Credit Card Accountability Responsibility and Disclosure Act on June 15, which covers penalty fees or charges imposed in connection with a credit card agreement, as well as requirements to reconsider a cardholder's APR.**

The final rule requires that penalty fees be "reasonable and proportional" to the violation of the cardholder's account terms. Under the rule, a creditor may not charge a cardholder more than $25 for a late payment or other violation of the account terms unless one of two conditions is met: one of the cardholder's last six

payments was late (in which case the fee can be up to $35) or the creditor can show that a higher fee "represents a reasonable proportion of the costs it incurs as a result of violations." The rule also requires that penalty fees cannot exceed the dollar amount of the cardholder's violation. For example, if a customer's minimum payment is $20, the penalty cannot be more than $20 – despite the $25 fee limit – and if a customer exceeds the credit limit by $5, the maximum fee charged for the over-limit violation is $5.

Inactivity fees are banned under the new rule, and a creditor may charge only a single penalty fee per payment. So if a cardholder makes a late payment and has an over-limit charge, the creditor may charge only for one violation of account terms.

Creditors must also reconsider a customer's APR on accounts where it increased the rate since January 1, 2009, and evaluate the account for possible reductions at least every six months. Considerations should be both general – market conditions as a whole – as well as specific – analyzing the individual cardholder's creditworthiness, and notices of rate increases must disclose the primary reasons for the increase.

The rule takes effect August 22.

To read the final rule, click here.

To read the CARD Act, click here.

**Why it matters:** The rule is the last that the Federal Reserve is required to issue under the CARD Act. Earlier rules addressed credit and gift card disclosures as well as notification requirements. As with the earlier rules, the changes will add to creditors' administrative burdens, especially with regard to provisions addressing reevaluation of a cardholder's APR on a six-month basis. Creditors will also face a loss of income with the limits on fees. In the preamble to the rule, the Federal Reserve noted that late fees and over-limit fees have been averaging roughly $39, above the fee limits set in the rule.

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# FDA Violated First Amendment With Refusal To Grant Health Claims

**A federal court has ruled that the Food and Drug Administration's refusal to grant several health claims characterizing the disease-prevention benefits of selenium to reduce the risk of certain cancers violated the First Amendment standards for commercial speech.**

The Alliance for Natural Health and other plaintiffs filed suit after the FDA denied four health claims submitted for selenium dietary supplements:

- Selenium may reduce the risk of certain cancers.
- Selenium may produce anticarcinogenic effects in the body.
- Selenium may reduce the risk of lung and respiratory tract cancers.
- Selenium may reduce the risk of colon and digestive tract cancers.

Each claim included a second line as a disclaimer that read, "Scientific evidence supporting this claim is convincing but not yet conclusive." The agency also modified a claim that "selenium may reduce the risk of prostate cancer" by adding several disclaimers.

The FDA argued that consumers would be confused about the "certain cancers" and "anticarcinogenic effects" claims because the claims didn't reveal the particular types of cancer that selenium might have an effect on. But D.C. District Court Judge Ellen Segal Huvelle ruled that the FDA violated the First Amendment because it did not provide any empirical or anecdotal evidence that consumers would be misled. The agency could remedy "any potential misleadingness by the disclosure of additional information. The FDA's position is particularly troubling in light of its admission that plaintiffs' certain cancers claim 'is literally true,'" she wrote.

She remanded the case for the FDA to either provide empirical evidence that a disclaimer would fail to correct the alleged misleadingness of the claims or to draft a disclaimer to accompany the claims, including the colon and digestive tract claim. The court suggested that instead of completely denying the lung and respiratory tract claim, the agency should determine an appropriate disclaimer based on a study that supported the plaintiffs' claim. Addressing the prostate cancer claim, the court suggested that the FDA should reconsider the scientific literature and draft a "short,

succinct, and accurate" disclaimer in light of that review.

To read the decision in *Alliance for Natural Health v. Sebelius*, click here.

**Why it matters:** The decision makes it clear that food and dietary supplement manufacturers have a First Amendment right to make claims on the science behind a product as long as the science is represented accurately. If the FDA imposes a restriction on a health claim, it must meet First Amendment standards for commercial speech.

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