November 20, 2009

In This Issue

Countdown to New FTC Endorsement and Testimonial Guides

As we reported last month, the FTC's new rules governing the use of endorsements and testimonials go into effect on December 1, and we are participating in the following upcoming programs designed to help you understand how to comply.

Electronic Retailing Association's "Spotlight Sessions: Endorsements and Testimonials"
On December 7, 14 and and 17, Manatt partner Linda Goldstein joins a panel which includes representatives from the Federal Trade Commission and Electronic Retailing Self-Regulation Program in regional educational sessions and an online webinar. For details, click here.

Bureau of National Affairs, Inc. (BNA): It is No Longer Business As Usual For Brands And Bloggers

On December 8, Manatt's Tony DiResta teams with Paul Rand, President of the Zócalo Group and the Word of Mouth Marketing Association and Jim Dudukovich, Marketing Counsel, Coca-Cola North America, in an audioconference. Questions may be submitted to the speakers prior to the audioconference by e-mail to rgarfield@bna.com. For more information, click here.

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Kellogg Discontinues Antioxidant Claim for Cereals

In a sign of how difficult it has become to make health claims for food products, Kellogg Co. announced on November 4 that it would stop touting Rice Krispies and Cocoa Krispies cereals as products that could strengthen a kid's immune system. Kellogg made the move despite the absence of significant adverse publicity over, or regulatory scrutiny of, the claim.

In a statement, the company said that it began adding antioxidants to the cereals last year. "While science shows that these antioxidants help support the immune system, given the public attention on H1N1, the company decided to make this change," the statement read. "We will, however, continue to provide the increased amounts of vitamins A, B, C and E that the cereal offers."

Although the company said that it was responding to parental concerns that advertising and packaging were preying on fears of the H1N1 virus, cereal boxes bearing such claims will continue to appear on shelves during the height of the cold and flu season, since it will take several months for current stocks to flow through the supply chain.

Last month, in an apparent response to a controversial industry initiative called Smart Choices, the FDA announced that it would develop its own standardized labeling program for the front of food packages. The industry quickly ended the Smart Choices program, but not in time to stave off government involvement. In the meantime, food makers are treading cautiously in this area, as evidenced by Kellogg's recent announcement.

Why it matters: The FDA has been cracking down on food marketers with

UPCOMING EVENTS

November 18-20, 2009
4th Annual Word of Mouth Marketing Association Summit

Topic: "FTC Developments"

Speaker: Anthony DiResta

Paris Hotel
Las Vegas, NV
for more information

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November 24, 2009
2:30 - 4:00 pm (EST)

Topic: "Damages in Lanham Act False Advertising Cases: Theory and Practice"

Moderator: Chris Cole

The ABA Section of Antitrust Law Private Advertising Litigation Committee and the Economics Trial Practice Committee Teleconference
for more information

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December 3, 2009
Fast Forward 2011: PMA's Second Annual Digital Summit

Topic: "What the Recent FTC Guidelines Mean for Advertising and Marketing"

Speakers: Linda Goldstein, Manatt Phelps & Phillips and Randall Rothenberg, President, Interactive Advertising Bureau

Google Headquarters
New York, NY
for more information

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increasing frequency. Kellogg's decision to discontinue the antioxidant claims on the cereals suggests that it is taking the initiative to remove any potentially problematic health claims before it attracts unwanted attention from the agency.

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Facebook Awarded $711 Million Fine Against Spam King

Another massive, yet uncollectible, court fine has been levied against spam king Sanford Wallace. Facebook announced that a California court has awarded the social networking Web site $711 million in damages against the ever-elusive, ever-defiant online marketer.

Facebook sued Wallace for accessing accounts without user permission and sending them fake posts and messages. In a post on its blog, Facebook said that the court referred Wallace to the U.S. Attorney's office for prosecution for criminal contempt, meaning he could face jail time – if anyone can find him.

In the 1990s, Wallace ran a business that sent as many as 30 million junk e-mails a day, earning him millions of dollars and the nicknames "Spam King" and "Spamford."

The award to Facebook is the latest in a series of massive fines and awards against Wallace, most of which have gone uncollected. Last year, social networking Web site MySpace won a $230 million judgment against Wallace and his partner, Walter Rines, in a case brought under the federal CAN-SPAM law. In 2006, Wallace was fined $4 million after the Federal Trade Commission accused him of running an operation that infected computers with software called adware that caused pop-up ads to flood users' computers.

"While we don't expect to receive the vast majority of the award, we hope that this will act as a continued deterrent against these criminals," said Sam O'Rourke, associate general counsel for Facebook, in a blog post. "This is another important victory in our fight against spam."

Facebook said the judgment is the second-largest anti-spam award in history. A year ago, Facebook won an $873 million judgment against Adam Guerbuez

December 7, 2009
ERA Spotlight Session

Topic: "Endorsements and Testimonials"

Speakers: Linda Goldstein of Manatt Phelps & Phillips, Rich Cleland of the FTC and Julie Coons of the Electronic Retailing Association as moderator

Digital Sandbox Networking Event Center
New York, NY
for more information

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December 8, 2009
BNA Audioconference

Topic: "The FTC's New Endorsement and Testimonial Guides: As of December 1, It is No Longer Business as Usual for Brands and Bloggers"

Speakers: Anthony DiResta of Manatt, Phelps & Phillips, Jim Dudukovich, Coca-Cola North America, and Paul Rand, Zocalo Group

For more information

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December 14, 2009
ERA Spotlight Session

Topic: "Endorsements and Testimonials"

Speakers: Linda Goldstein of Manatt, Phelps & Phillips, Rich Cleland of the FTC, Jonathan Gelfand of Product Partners, LLC and Julie Coons of the Electronic Retailing Association as moderator and his business, Atlantis Blue Capital, which inundated users with sexually explicit spam messages.

Wallace's exact whereabouts are unknown, but he is believed to be living in Las Vegas.

Why it matters: Spammers continue to pose a serious problem for Internet service providers, social networks, and other legitimate online businesses because spammers are so difficult to track down. A multi-million dollar judgment against a spammer may make a splash in the media, but, for the most part, it is a Pyrrhic victory, since it is almost always uncollectible.

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Bill Would Require ISPs to Block Financial Scams

A House of Representatives bill that is currently wending its way through Congress would force Internet service providers to block online financial scams that violate the Securities Investor Protection Corporation (SIPC) — or face the possibility of fines and federal court injunctions.

The bill, which passed in the House Financial Services Committee earlier this month by a 41-to-28 vote, includes language stating that:

Any Internet service provider that, on or through a system or network controlled or operated by the Internet service provider, transmits, routes, provides connections for, or stores any material containing any misrepresentation (of the SIPC) shall be liable for any damages caused thereby, including damages suffered by the SIPC, if the Internet service provider is aware of facts or circumstances from which it is apparent that the material contains a misrepresentation.

ISPs are concerned that the wording is so broad it could be extended to include illegitimate scam references contained in e-mail or other transmissions like VoIP. Most ISPs simply don't have a good way to block access to any electronic "material" containing fake SIPC data, and they are worried that the requirement — and the accompanying civil penalties and injunctions — would apply even if the blocking is not technically feasible.

The SIPC is a government-linked entity that helps investors when funds are

Hilton Long Beach &
Executive Meeting Center
Long Beach, CA
for more information

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December 17, 2009
ERA Spotlight Webinar Session

Topic: "Endorsements and Testimonials"

Speakers: Linda Goldstein of Manatt Phelps & Phillips, Rich Cleland of the FTC, Jonathan Gelfand of Product Partners, LLC and Julie Coons of the Electronic Retailing Association as moderator

for more information

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December 21, 2009
National Constitution Conferences Webinar

Topic: "FTC Regulation of Advertising and Marketing"

Speaker: Jeff Edelstein

for more information

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January 21-22, 2010
6th Annual Film, TV & New Media Law Conference

Topic: "Brand Integration Deals"

Speaker: Jordan Yospe

Millennium Biltmore Hotel
Los Angeles, CA
for more information

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January 21-22, 2010
6th Annual Film, TV & New

missing from their accounts, up to a limit of $500,000 for stocks, bonds, and mutual funds. Only investor accounts opened with SIPC members qualify for protection. On occasion, Internet fraudsters have pretended to be legitimate brokerage firms that are SIPC members by using a similar name or domain name. The scam may involve charging fees in advance for a fraudulent, too-good-to-be-true offer or fraudulent checks that eventually bounce, among other schemes. Fraudulent Web sites have been a problem for the SIPC for at least six years. In 2003, the group distributed a public warning against "brokerage identity theft" and requested that the FBI look into a fake copycat SIPC site.

Why it matters: The extremely broad language in the bill understandably has ISPs concerned. However, the bill's sponsor, Rep. Paul Kanjorski (D-Penn.), is reportedly open to modifying the language of the bill to reflect industry concerns. Companies that are potentially affected by the bill might consider contacting Kanjorski's office with their concerns.

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Ad Trade Group Strengthens Behavioral Targeting Opt-Out

The Network Advertising Initiative (NAI) has unveiled a new tool that strengthens the ability of Web users to avoid behavioral targeting.

The tool allows users to permanently preserve their opt-out cookies. Currently, Web users who do not want to receive targeted ads can typically opt out of them through the use of cookies. But those cookies are notoriously short-lived, usually because users who do not want to be tracked delete all of their cookies on a regular basis, including the opt-out cookies. Once the opt-out cookies are gone, behavioral targeting companies go back to tracking users and serving them targeted ads.

The new NAI Consumer Opt-Out Protector, available as an add-on to the popular Web browser Firefox, preserves the cookies that opt out of behavioral targeting by NAI members even when consumers delete all of their cookies. The group has more than 35 members, including Advertising.com, Audience Science, Microsoft, Yahoo!, Tacoda, and BlueKai, which helped design the new tool. The NAI plans to make a comparable tool available for other browsers, including Internet Explorer. In March, when Google launched a

Media Law Conference

Topic: "Trademark Rights for the Entertainment Lawyer: Use of Trademarks in Creative Works"

Speaker: Mark Lee

Millennium Biltmore Hotel
Los Angeles, CA
for more information

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January 26-27, 2010
American Conference Institute's 23rd National Advanced Forum on Advertising Law

Speaker: Linda Goldstein

New York Marriott Downtown
New York, NY
for more information

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January 26-27, 2010
American Conference Institute's 23rd National Advanced Forum on Advertising Law

Speaker: Terri Seligman

New York Marriott Downtown
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behavioral targeting program, the company also offered a browser plug-in that preserves users' opt-outs.

NAI executive director Charles Curran describes the new add-on as one element of a broader industry effort to help ensure that users who want to avoid being subject to behavioral targeting can do so. "We think this is an important step along the path of our program for self-regulation," he says.

Earlier this year, Federal Trade Commission member Pamela Jones Harbour criticized the opt-out cookie as "fundamentally flawed," in part because it is subject to deletion. "It is unrealistic to rely on an assumption that the opt-out cookie will remain on a user's computer indefinitely. Cookies can be and are deleted (intentionally or unintentionally) by individual users, automated software (e.g., anti virus and anti spyware tools), or chance," she said in February, when the FTC issued self-regulatory principles for online behavioral advertising.

Why it matters: With its self-regulatory efforts, the online ad industry is hoping to avoid government regulation of and restrictions on behavioral tracking, and this latest effort appears to be a direct response to the concerns voiced by the FTC. However, consumer advocates continue to push for government oversight. They argue that the new tool isn't enough because new tracking technologies, such as Flash cookies, are tougher for users to delete or control.

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Advertisers Fret Over Proposal to Expand FTC Authority

A new congressional bill that would make it easier for the Federal Trade Commission to draft new rules and bring lawsuits has the advertising industry up in arms.

The Consumer Financial Protection Agency Act (H.R. 3126) cleared the House Energy and Commerce Committee earlier this month and now moves to the full House, where it is expected to pass. How the bill will fare in the Senate remains to be seen.

In addition to establishing a new federal consumer financial protection commission, the bill strengthens the FTC's authority in several key ways. It removes certain administrative obstacles to the agency's rulemaking ability, makes it easier for the agency to bring civil lawsuits, and allows it to go after ad agencies for aiding and abetting unfair practices.

These proposed powers are so significant that industry observers are already saying the bill would make FTC Chair Jon Leibowitz an "Internet czar."

Leibowitz, for his part, downplays the significance of the proposed legislation, saying that the "modest new authority" granted to the agency "will help ensure that we have the tools necessary to fight fraud and go after those who perpetrate it."

As it currently stands, the FTC can enact regulations aimed at curbing a prevalent unfair and deceptive practice. The bill would remove that restriction, permitting the agency to promulgate rules as long as a rational reason exists to believe that the rule would target an unfair and deceptive conduct. The bill also would provide for a faster rulemaking procedure and authorize the FTC to pursue civil actions without prior review by the Department of Justice and allow it to impose fines without prior rules or orders.

A provision that would allow the FTC to prosecute companies that aid or abet an unfair act could be especially damaging to marketers and intermediaries, according to the Association of National Advertisers.

A number of consumer groups and privacy advocates have come out in favor of the bill, arguing that it would help ease restrictions on the FTC that hamper its effectiveness. "We believe that the FTC must play a more proactive role addressing critical consumer concerns, including privacy, online marketing, and food advertising to young people," the groups wrote in a letter to the leaders of the House Energy and Commerce Committee earlier this month.

Why it matters: Industry observers say that the existing restrictions on rulemaking ability have informed the FTC's decision to support self-regulation of areas such as online behavioral targeting and privacy. Should the bill become law with the FTC provisions intact, it certainly creates the prospect that the agency will engage in more rulemaking governing aspects of online advertising and other types of marketing.

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