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Manatt Partners Ivan Wasserman and Christopher Cole to Discuss Key Enforcement Concerns for Food and Dietary Supplement Companies

On August 26, 2010, Manatt partners Ivan Wasserman and Christopher Cole will lead a discussion focused on the most significant risk factors facing food and dietary supplement companies and how to prepare for an expected uptick in enforcement activity in the coming months.

In a 90-minute Thompson audio conference, Mr. Wasserman and Mr. Cole will shed light on recent litigation and FDA, FTC, NAD and State AG enforcement activity, as well as steps to take to protect your company from becoming a target.

For further details or to register for this event, click [here](#).

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Pepsi's Blog Yanked After Backlash

After a backlash from members of the scientific community, a science blog aggregator site pulled a Pepsi-sponsored food nutrition blog.

The Food Frontiers blog, developed and written by Pepsi, was part of ScienceBlogs, a science blog aggregator site, for less than a week after it received criticism for masquerading advertising as content. The blog



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was intended to address nutrition, science, and global health policy, including a video series looking at the role the food industry plays in health issues. But the day it was launched, ScienceBlogs members and the scientific community protested, calling the blog “deceptive” and a “spectacularly foolish decision.” Others expressed concern about the potential for conflict of interest, and the blurring of editorial and advertising content, and said the blog should be clearly labeled as advertising.

At first, the site tried to “increase transparency” about the blog, noting that it had hosted sponsored blogs before. The blog’s profile information was changed to read: “This blog is sponsored by PepsiCo. All editorial content is written by PepsiCo’s scientists or scientists invited by PepsiCo and/or ScienceBlogs. All posts carry a byline above the fold indicating the scientist’s affiliation and conflicts of interest.” The site also updated the Food Frontiers banner to “advertorial.”

Despite the changes, criticism continued, and ScienceBlogs then pulled the site entirely. Adam Bly, the site’s editor, posted an apology, saying that although “we (and many of you) believe strongly in the need to engage industry in pursuit of science-driven social change, this was clearly not the right way.”

Pepsi said that it supported the decision to pull the blog but plans to continue to run it separately from the ScienceBlogs site. “In hearing the community’s feedback, we agree with this decision and feel that the best approach is to take a step back and first examine the role industry scientists, such as myself, can play in the discussions about nutrition science within the larger scientific community,” Pepsi’s chief scientific officer, Mehmood Khan, blogged.

To read the post taking down Food Frontiers, click [here](#).

Why it matters: This isn’t the first time Pepsi has faced controversy over its use of social media. In January, the company decided to forgo advertising during the Super Bowl and focus on its Refresh Project, where consumers vote for various causes or projects with the winner receiving a grant from the company. The Refresh Project relied exclusively upon social media platforms, including a Web site, blog, and a Facebook page. But Pepsi faced technological problems and complaints from consumers about privacy concerns. Consumers who tried to submit projects to be voted on found their personal information – such as their name and e-mail address – attached to other people’s submissions, and received error messages from the site, making it unclear whether or not their ideas had actually been submitted. While Pepsi has been enthusiastic about the use of social media, the company’s experiences provide examples of the myriad of problems companies can face in Web 2.0. From technological considerations to privacy concerns to claims of deceptive advertising, companies must weigh the risks of social media with its rewards.

UPCOMING EVENTS

July 29, August 3 and August 5, 2010

WOMMA, BBB and NARC Webinar Series

Topic: “Compliant and Successful: Aligning Marketing and Legal Around Word of Mouth and Social Media”

Speaker: [Tony DiResta](#)
[for more information](#)

August 15-17, 2010

Affiliate Summit East

Topic: “How to Avoid Becoming a Regulatory Target”

Speaker: [Linda Goldstein](#)
New York, NY
[for more information](#)

August 26, 2010

Thompson Audio Conference

Topic: “Dietary Supplements and Functional Foods: What You Need to Know About 2010 Enforcement”

Speakers: [Ivan Wasserman](#) and [Christopher Cole](#)
[for more information](#)

September 21-23, 2010

2010 ERA D2C Convention

Topic: “Best Practices in Advance-Consent Marketing”

Speaker: [Linda Goldstein](#)
Las Vegas, NV
[for more information](#)

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FDA Seeks Comment on Labeling Requirements

The Food and Drug Administration is seeking comment on proposed rules for menu labels that would require restaurants and other retail food establishments with at least 20 or more locations to provide "clear and conspicuous" calorie information to consumers.

The proposed rules were drafted by the FDA pursuant to the Patient Protection and Affordable Health Care Act.

Under the Act, chain restaurants with 20 or more locations doing business under the same name and offering substantially the same menu items are subject to new labeling requirements, which apply to menus and menu boards, including drive-through menu boards and self-service food, such as vending machines or salad bars.

Under the law, food retailers must declare the number of calories each standard menu item provides as it is typically prepared, and present the required calorie information in terms of suggested caloric intake in the context of an overall diet. The information must also be in written form, available upon consumer request, and include nutrition information currently required on packaged food labels, such as the number of calories, total fat, saturated fat, sugars, cholesterol, fiber, and protein, on a per-serving basis.

The FDA is now seeking comment on issues relating to chain retail food establishments and vending machine operations, such as current practices within the industry with respect to the format and manner of nutrient content disclosures, methods related to the presentation of nutrient content that come in different flavors, varieties, or combinations listed as a single menu item, and considerations such as space and availability on menu boards. In addition, the FDA is requesting information about the determination of calorie content of foods offered by chain retail food establishments as well as implementation and enforcement issues, such as inspection.

The public comment period is open until September 7.

For more information or to comment on the proposed rules, click [here](#).

Why it matters: The law as passed left some food retailers scratching their heads, seeking clarification on the breadth of its coverage as well as how to calculate nutrient information. The public comment period is the first step in the process of specific regulations being issued by the FDA.

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September 24, 2010

ACI Conference

Topic: "Sweepstakes, Contests, and Promotions"

Speaker: [Linda Goldstein](#)

New York, NY

[for more information](#)

November 18-19, 2010

32nd Annual Promotion

Marketing Law Conference

Topic/Speaker: "To Tweet or Not to Tweet: How to Stay Current as Technology Changes the Game,"

[Linda Goldstein](#)

Topic/Speaker: "Negative Option/Advance Consent/Affiliate Upsells," [Marc Roth](#)

Topic/Speaker: "Children's Marketing," [Christopher Cole](#)
Chicago, IL

[for more information](#)

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Our Practice

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FCC's Indecent Speech Rules Struck Down

The Second Circuit ruled that the Federal Communications Commission's rules on indecent speech are "unconstitutionally vague, creating a chilling effect that goes far beyond the fleeting expletives at issue here" in a decision that could have widespread ramifications for the entire television industry.

All the major broadcast networks as well as local affiliates challenged the blanket ban on all use of certain expletives on television after the FCC increased enforcement following incidents involving Cher and Bono during the live broadcast of awards programs.

The court had previously struck down the rules as an overextension of the Commission's rulemaking authority, but the U.S. Supreme Court reversed. This time, the court considered constitutional arguments and determined that the FCC's lack of guidance violated the First Amendment.

The FCC argued that it needed a "flexible standard" because new offensive and indecent words are invented every day, and it needed the ability to adapt. But the court said that broadcasters need greater clarity. "If the FCC cannot anticipate what will be considered indecent under its policy, then it can hardly expect broadcasters to do so," the court said.

Even the FCC's presumptive policy on certain words as indecent contained exceptions, the court said, but provided "little rhyme or reason" to broadcasters, who were forced to guess whether an expletive would meet the exceptions.

The court acknowledged that context is always relevant, but said the FCC "must still have discernible standards by which individual contexts are judged." Using examples like a Vermont station that refused to air a political debate because a local politician had previously used expletives on-air and CBS affiliates' decision not to air a Peabody Award-winning "9/11" documentary which contained audio footage that included expletives, the court said there was "ample evidence" that the FCC's indecency policy had chilled protected speech.

"[T]he absence of reliable guidance in the FCC's standards chills a vast amount of protected speech dealing with some of the most important and universal themes in art and literature. Sex and the magnetic power of sexual attraction are surely among the most predominant themes in the study of humanity since the Trojan War. The digestive system and excretion are also important areas of human attention. By prohibiting all 'patently offensive' references to sex, sexual organs, and excretion without giving adequate guidance as to what 'patently offensive' means, the FCC effectively chills speech, because broadcasters have no

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way of knowing what the FCC will find offensive. To place any discussion of these vast topics at the broadcaster's peril has the effect of promoting wide self-censorship of valuable material which should be completely protected under the First Amendment," the court said.

To read the decision in *Fox v. FCC*, click [here](#).

Why it matters: The court said that "millions of dollars" as well as constitutional liberties were at stake in the case, noting that the FCC had dramatically stepped up enforcement in recent years, from \$440,000 in fines imposed in 2003 to \$8 million in fines imposed just one year later. In a statement, FCC Chairman Julius Genachowski said the Commission was reviewing the court's decision. It could appeal the ruling to the U.S. Supreme Court for a second time, or begin work on a new policy, which the court said was possible as long as it was specific and allowed less discretion to the FCC.

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Senate Passes Bill to Delay Gift Card Rules

The Senate passed a bill on July 15 that would delay the effective date for gift card disclosure requirements under the 2009 Credit Card Accountability Responsibility and Disclosure Act. H.R. 5502, which had already passed the House, was passed by the Senate by voice vote, and now goes to President Obama for his signature.

The CARD Act imposes restrictions on expiration dates, which must be at least five years after the date a gift card or certificate was issued or the date funds were last loaded. Fees for replacing an expired card are prohibited.

In addition, the CARD Act imposes restrictions on dormancy, inactivity, and service fees, requiring that such fees can only be assessed under the following circumstances: if at least one year of inactivity on the gift card or certificate has passed; if no more than one such fee is charged per month; and if the consumer was given clear and conspicuous disclosures about the fees. The rules on fees apply to monthly maintenance or service fees, balance inquiry fees, and transaction-based fees, like point-of-sale fees, ATM fees, and reload fees.

Under the act, the new rules – which apply to gift certificates, store gift cards, or general use prepaid cards – were set to take effect on August 22, 2010. The proposed legislation would extend the effective date for disclosure requirement until January 31, 2011, for cards issued prior to April 1, 2010.

To read H.R. 5502, click [here](#).

Why it matters: The delay of the new rules for disclosure requirements would be a boon for companies that utilize gift cards, particularly over the coming holiday season. However, issuers should be prepared for the new federal rules to take effect, and remember that it does not preempt existing state laws on gift cards that are more protective of consumers. Issuers should be aware that some states go above and beyond the federal rule, and any cards that are marketed nationally must comply with the patchwork of laws across the country.

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NAD: Modify, Discontinue Fruit₂O Advertising

In response to a challenge by rival Campbell Soup Company, the National Advertising Division recommended that Sunny Delight modify or discontinue certain advertising claims for its Fruit₂O essentials beverages.

The NAD reviewed claims like “Fortified with nutrients equal to 2 servings of fruit” and “The wonders of fruit. The refreshment of water,” which it said sent an implied message that the nutrient-enhanced water beverages were nutritionally equivalent to actual servings of fruit.

Although Sunny Delight argued that its product provided a legitimate nutritional benefit because there is a nutritional benefit to drinking water with nutrients as opposed to plain water, the NAD disagreed. “[I]t is incumbent on advertisers making claims of nutritional benefits to avoid exaggerating the health and/or nutritional benefit of their products,” the NAD said.

It also expressed concern that the specific claims drew direct nutritional comparisons to servings of fruit, which “overstate the nutritional benefits of the product and/or conveyed implied messages that were inaccurate.” The NAD said consumers might reasonably believe Fruit₂O to contain certain nutrients in the same quantities as fruit, a message which was not supported.

The challenger also argued that Fruit₂O’s “wonders of fruit” tagline misled consumers because it does not provide the benefits of fruit and is simply purified water that has been fortified. Sunny Delight contended that the “wonders of fruit” was puffery, because it was a “vague and immeasurable description” that could mean different things to reasonable consumers.

Standing alone, the tagline might be puffery, the NAD said, but “juxtaposed with claims that call out a nutritional equivalency between the water product and two servings of fruit,” it becomes an implied claim.

“NAD appreciates the advertiser’s efforts to provide a refreshment

beverage enhanced with nutrients and does not dispute the notion that as a nutrient-enhanced water product, it offers real benefits that non-enhanced water products do not. But the advertising does not compare Fruit₂O essentials to other waters, it, rather, compares the nutritional benefits of the product with servings of fruit,” the opinion said.

To read a press release from the NAD about the decision, click [here](#).

Why it matters: Companies making claims of nutritional benefits should avoid exaggerating the health or nutritional benefits of their products, and should remember that they are responsible not only for the express claims but for all messages reasonably conveyed to consumers.

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FTC Mailbox: Privacy Issues and a Request for Investigation

The Federal Trade Commission has had a full mailbox recently. It received a request to investigate caffeine-infused malt beverages and a request for a new privacy law. And the FTC sent a cautionary letter to a magazine addressing privacy issues in a consumer bankruptcy.

Investigation Into Malt Beverages. In a letter to the FTC, New York Senator Chuck Schumer asked the Commission to launch an investigation into caffeine-infused flavored malt beverages, saying the packaging could be encouraging underage drinking. Sen. Schumer expressed concern that drinks like “Joose” and “Four Loko” look “nearly identical” to nonalcoholic energy drinks, making it difficult for parents to distinguish between the styles.

“The style and promotion of these products is extremely troubling. Frankly, it looks to me as if manufacturers are trying to mislead adults and business owners who sell these products, while at the same time actively courting underage drinkers. This type of marketing is, at minimum, grossly irresponsible, and I ask that the FTC review the marketing of these products to determine whether manufacturers are engaging in deceptive practices or are otherwise in violation of any of the laws enforced by the Commission,” Sen. Schumer wrote.

Groups Seek New Privacy Law. A coalition of advocacy groups including the ACLU, Center for Digital Democracy, and the Electronic Frontier Foundation recently requested that the FTC propose a new privacy law. “Existing laws don’t adequately address new business practices,” the groups said in a letter.

The groups asked the Commission to “propose a comprehensive privacy law that would give consumers meaningful safeguards,” and to identify specific new business practices – like location-based targeting

and digital signage – that raise possible privacy concerns, and propose possible solutions.

In addition, the groups told the FTC that they are looking for “specific regulations for the collection of information by the online advertising industry to help ensure that consumers have some meaningful control over their personal information.”

Privacy Concerns in Consumer Bankruptcy. David Vladeck, Director of the FTC’s Bureau of Consumer Protection, sent a letter to the founder of XY, a magazine that catered to gay teens.

After the magazine and Web site folded, Peter Ian Cummings filed for personal bankruptcy and listed editorial content and users’ personal information (including e-mail addresses, names and street addresses, personal photos, and online profiles) as part of his assets. When two creditors expressed interest in purchasing the information, the FTC sent a letter warning that the sale, transfer, or use of the information could violate federal law.

XY’s privacy policy stated: “Please note our amazing privacy policy. We never give your info to anybody.”

“[A]ny sale or transfer of the data to a new company, new owner, or other third party would directly contravene the privacy representations and could constitute a deceptive practice by the original company or its principals. Such practice also could be unfair. In addition, the receipt of such data by a third party, knowing that such receipt violated the privacy policy, could be unfair,” Vladeck wrote.

Given the sensitive nature of the information, it should be destroyed, the letter said.

To read Sen. Schumer’s letter, click [here](#).

To read the letter seeking a new privacy law, click [here](#).

To read the FTC’s letter in the XY.com matter, click [here](#).

Why it matters: The FTC’s focus on privacy continues with its letter addressing user information to the XY.com founder. The advocacy groups’ letter notes that the Commission recently held three roundtable discussions about privacy and urged the FTC to take action, decrying “the guise of ‘self-regulation’ [where] companies routinely revise privacy policies so that they can do essentially whatever they wish with the data they collect.”

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