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FDA Reveals Graphic Proposed Warning Labels for Cigarettes

The Food and Drug Administration unveiled 36 proposed warning labels for cigarette packs, pursuant to the Family Smoking Prevention and Tobacco Control Act, that gives the agency the power to regulate tobacco products for the first time and to promulgate warning labels.

Some of the labels – which are meant to cover half the surface area of a package or carton and 20 percent of the space of an advertisement – are fairly graphic, including images of a toe tag on a body in a morgue, a man exhaling cigarette smoke through a hole in his neck, a mother exhaling smoke in her baby’s face, and healthy lungs side by side with diseased lungs.

The labels feature larger and more noticeable textual warning statements as well as graphic color images depicting the negative health consequences of smoking.

Accompanying text includes phrases like “Cigarettes are addictive” and “Smoking can kill you.”

The 36 proposed images will be whittled down to nine after a public comment period that ends Jan. 9, 2011.

The FDA said it will survey 18,000 smokers in order to determine which labels are the most effective in preventing adolescents from starting to smoke and getting smokers to quit.

Once the rule is final, tobacco companies will be required to use all nine of the different warnings as equally as possible on each brand of cigarette and to distribute the labels randomly in all areas of the U.S. where the product is marketed in each 12-month period. Warning statements in advertisements will be rotated quarterly in an alternative sequence for each cigarette brand, and all advertisements must display the warnings, whether on coupons, point-of-sale displays, billboards, magazine and newspaper ads, and Internet advertising, including banner ads.

The new labels will appear beginning Oct. 22, 2012.

To see the FDA's proposed warning labels, click [here](#).

Why it matters: The FDA defended the graphic images, which it argues will serve as a deterrent to cigarette and tobacco use. "The inclusion of larger and more noticeable graphic health warnings on packages and in advertisements would provide a critical opportunity to educate consumers about the health risks of cigarettes, which would help encourage current smokers to quit, and discourage nonsmokers, including youth, from starting to use cigarettes," the FDA said in a statement. But cigarette manufacturers have vowed to fight the label requirements as a violation of their First Amendment rights. "Whatever people feel about tobacco use, that does not allow all the protections of the First Amendment to be thrown out," said Dan Jaffe, executive vice president of the Association of National Advertisers, which filed an amicus brief along with the American Association of Advertising Agencies and the American Advertising Federation.

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Detox Foot Pad Marketers Settled With FTC

The Federal Trade Commission settled with Xacta 3000, Inc., and its owner over marketing of the company's Kinoki "Detox" Foot Pads, which it claimed could remove toxins from the body through a user's feet.

The defendants – who advertised that they had scientific proof about the power of the foot pads to remove chemicals, heavy metals, and other toxins from the body as well as help with depression, fatigue, insomnia, diabetes, and headaches – are now banned from promoting or selling any dietary supplement, food, drug or medical device, and were ordered to pay \$14.5 million.

The complaint, filed in New Jersey federal court in January 2009, alleged that the company used deceptive television and Internet ads in which it claimed that the "ancient Japanese secret to perfect health" was used to treat a multitude of medical conditions. A two-week supply of the foot pads cost \$19.95, plus \$9.95 for shipping and handling.

Under the terms of the stipulated final order issued by U.S. District Court Judge Joel A. Pisano, the defendants agreed to a judgment of \$14.5 million, the total revenues from the sale of the foot pads. The judgment has been suspended based on the defendants' inability to pay, but it will become due if they are found to have misrepresented their financial status.

To read the order against Xacta, click [here](#).

To read the FTC complaint, click [here](#).

Why it matters: The settlement is another chapter in the FTC's crackdown on the advertising and marketing of dietary supplements and other products making unsubstantiated health claims. Companies should ensure that their claims have adequate support.

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Twitter Issues New Guidelines on Using its Mark

Tweet this: Twitter has issued new guidelines for those who use the company's name, trademark, and other intellectual property.

According to the guidelines, if another company wants to promote its Twitter page, it can do so only in an approved manner, using one of two formats: "Follow us on Twitter" or "Follow us on [approved Twitter logo]." Companies may not manipulate the logo unless necessary due to color restrictions (i.e., black and white), use the Twitter bird to carry a logo or messaging, create original click-through buttons or marks using the Twitter logo, or imply any kind of sponsorship, endorsement, or false association with Twitter.

The new guidelines allow users to use screenshots of their own Twitter profile and Tweets, but not screenshots of a third party's Twitter page unless permission from that party has been obtained.

When using the Twitter marks in an ad campaign, the guidelines require that companies use the current Twitter logo or bird mark, and that if the term "Tweet" is used, it should include a direct reference to Twitter ("Tweet with Twitter" to enter a promotion, for example).

The guidelines also emphasize that the Twitter name, logo, Twitter "T," Tweet, and the Twitter bird are all trademarks of the company, and that the "T" in both Twitter and Tweet must be capitalized.

Twitter will not allow the use of the Twitter name, logos, or Tweet marks on any apparel, product, or merchandise without permission. Exceptions are granted on a case-by-case basis.

To read Twitter's new guidelines on using its intellectual property, click [here](#).

Why it matters: Companies that use the Twitter mark in connection with their own products or plan to use it as part of a product promotion should familiarize themselves with the new guidelines.

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Myspace Faces Class Action over Privacy Violations

A Myspace user has filed a federal class action suit against the site, alleging that the company leaked the names of users to its advertisers in violation of Myspace's privacy policy and federal wiretap laws.

California resident Mitchell Leong filed a putative class action on behalf of all United States Myspace users – estimated at 70 million people as of June 2010 – over the company's "intentional and knowing transmission of data to outside advertising companies that could be used to identify [users], without the users' knowledge or consent."

Each Myspace user has a unique ID that the company sent to third-party advertisers and Internet tracking companies, which provided them with a profile page full of personal information, the plaintiffs claim.

After *The Wall Street Journal* ran an article claiming that Myspace had revealed personal information to outside advertisers without users' knowledge or consent, the company admitted the violation, and "sought to minimize its importance," according to the complaint.

The complaint also alleges that the data transfer continued until October 2010, despite the company announcing that it had halted the practice.

The plaintiffs argue that by sharing user information, Myspace violated the Stored Communications Act, entitling them to \$1,000 in statutory damages per violation. They argue that because the violation was intentional, the class is also entitled to punitive damages.

In addition, the plaintiffs claim the Myspace privacy policy promises that the company will not share users' personally identifiable information with "third parties unless [the user has] given Myspace permission to do so."

Accordingly, Myspace defendants allegedly breached the terms of its contract with users as well as violated California state law.

To read the complaint in *Leong v. MySpace*, click [here](#).

Why it matters: The suit joins another recently filed complaint in which plaintiffs claimed that app developer Zynga improperly shared personal information. The plaintiffs hope to replicate the success of a suit against Google over allegations that its social network Buzz revealed user information. The parties recently settled for \$8.5 million.

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Amazon v. New York Tax Challenge to Continue

A New York appeals court ruled that a trial court incorrectly dismissed a lawsuit brought by Amazon and Overstock challenging on constitutional grounds a state law that requires online retailers to pay sales tax on purchases by New York state residents.

The trial court had dismissed the suit, which was brought by the online retailers in 2008 after New York amended its tax law.

The new tax law required companies like Overstock and Amazon to collect sales tax on items shipped to New York addresses even when the retailer has no offices or employees in the state.

Both companies use New York-based “affiliates” or “associates” that receive a commission for sales made by referrals.

The companies argue that the presence of these individuals in New York does not meet the constitutional requirement that a retailer must have a “physical presence” in the state before the collection of sales tax is required.

On its face, the law survived the constitutional challenges, the court said.

But as applied to Amazon and Overstock, the court said it was unable to conclude that the plaintiffs’ “in-state representatives are engaged in sufficiently meaningful activity so as to implicate the state’s taxing powers, and thus should be given the opportunity to develop a record which establishes...whether their in-state representatives are soliciting business or merely advertising on their behalf.”

It remanded the case to the trial court, where Amazon and Overstock must establish whether their New York-based affiliates and associates are merely passive advertisers not subject to the tax law, or whether they engage in activity that “goes beyond mere advertising and actually amounts to solicitation.”

To read the court’s decision in *Amazon v. New York State Department of Taxation and Finance*, click [here](#).

Why it matters: The court’s decision was a mixed bag for online retailers. While the court revived part of the suit, it declined to invalidate the law itself. Amazon and Overstock must still establish that they are “passive” advertisers, which would make the law unconstitutional as applied to them. Given the examples provided by the appellate court as to what constitutes direct solicitation on the part of the companies – “distributing flyers, coupons, newsletters, and other printed promotional materials, or electronic equivalents” – it could be an uphill battle for Amazon and Overstock. If they lose the case again, the companies could choose to end their affiliate relationships in the state of New York. Amazon has already stopped working with affiliates in North Carolina and Rhode Island, which enacted similar tax laws.