

manatt

April 20, 2009



IN THIS ISSUE

- **FDA Tells Pharma To Pull “Misleading” Search Ads**
- **Report Finds Surge in Online Fraud**
- **Google Introduces Free Downloads of Licensed Music in China**
- **House Passes Bill Giving FDA Oversight of Tobacco Industry**
- **P&G, Georgia-Pacific Settle Paper Towel Spat**

FDA Tells Pharma To Pull “Misleading” Search Ads

The Food and Drug Administration has written letters to 14 major pharmaceutical companies requesting that they pull certain "misleading" and "misbranded" search ads for branded drugs.

The FDA sent letters to nearly every leading drug manufacturer, including Bayer, Biogen Idec, Boehringer Ingelheim, Cephalon, Eli Lilly, Forest Laboratories, Genentech, GlaxoSmithKline, Johnson & Johnson, Merck, Novartis, Pfizer, Roche, and Sanofi-Aventis, as well as close to fifty drug brands. The so-called preemptive untitled letters charge that the ads did not properly link a drug's efficacy and risk information. They requested that the drug companies immediately pull the offending ads and provide a written response to the FDA by April 9. Among other changes, the agency is requesting that any information on the condition treated be removed from the search ad's headline, description, and URL name.

A spokesperson said the agency discovered the complained-of ads "through our routine monitoring of promotion done on the Internet," which includes online research and review of promotional material submissions it receives.

The FDA has yet to issue guidelines for online advertising. Its general rules for branded drug ads appearing on any media require that a drug's risk information accompany any representations or suggestions about its effectiveness. The 14



Recognized for Excellence in the areas of Advertising, Marketing and Media



Named a Top Practice Nationally for Marketing and Advertising

UPCOMING EVENTS

April 22-23, 2009

Food and Drug Law Institute 52d Annual Conference

Topic:

"Food Advertising: Campaigns and Claims"

Speaker: [Christopher A. Cole](#)

L'Enfant Plaza Hotel
Washington, DC

[for more information](#)

...

April 29, 2009

drug companies that received FDA letters typically adhered to a "one-click rule," assuming that search ads were acceptable if comprehensive drug information – including risks – was just one click away on the product Web site. That assumption, it turned out, was incorrect.

At least one drugmaker said it believed it was following the rules. In a statement, a spokesperson for Sanofi-Aventis, which makes the blood-thinner Plavix, said: "Sanofi-Aventis believes that the links were consistent with [FDA] requirements for the provision of risk information. The links went to the product-specific Web site, which contains the important risk information on the landing page and a link to the full prescribing information." Sanofi-Aventis said it will work with the FDA to change the search ads.

Report Finds Surge in Online Fraud

The Internet Fraud Complaint Center has released a report finding that Internet fraud spiked by 33 percent in 2008, and is continuing to surge as the recession drags on.

Losses from online fraud reported in the United States reached a record high of \$264.6 million in 2008, according to the report released on March 30. Moreover, the number of online scams originating worldwide is continuing to climb, with close to a 50 percent increase in March alone in complaints filed with U.S. authorities.

Last year's losses compared with \$239.1 million in losses in 2007 and a mere \$18 million in 2001. It is the first time in three years that the number of complaints has risen. In 2008, of 275,284 complaints received by the center – which is run by the FBI and the National White Collar Crime Center – 72,940 were referred to U.S. law enforcement agencies for prosecution. So far this year referrals have surged, with 40,000 in the first quarter alone.

In a telephone briefing with reporters, John Kane, who authored the report and is managing director of the National White Collar Crime Center, suggested that the number of complaints filed and the dollars involved "represent just a small tip of the iceberg." He said the center's research "suggests that as few as 15 percent of cases of cyber-fraud are being reported to crime control agencies."

Nondelivery of merchandise was the most common complaint of 2008, comprising about one-third of all complaints serious enough

American Advertising Federation Webinar

Topic:

"Budget Busters: Bongs, Blogs, and Brand Wars."

Speaker: [Jeff Edelstein](#)

...

May 19, 2009

International Trademark Association Annual Meeting

Topic:

"Recent Developments in Right of Publicity Law"

Speaker: [Jeff Edelstein](#)

Washington State Convention & Trade Center
Seattle, WA

[for more information](#)

...

June 4-6, 2009

American Advertising Federation National Conference 2009

Speaker: [Jeff Edelstein](#)

Crystal Gateway Marriott
Arlington, VA

[for more information](#)

...

June 18-19

ABA Antitrust Section's Consumer Protection Conference

Topic:

Use, Misuse, and Disregard of Evidence of Actual Confusion in

to be referred to law enforcement, driven in part by fraudulent sales on online auction and classified sites. Other significant areas included auction fraud, credit card fraud, and investment scams. The median loss was \$931 per complaint, although the median loss for check fraud was \$3,000, and that for investment scams was \$2,000.

According to the report, about three-quarters of reported scams were spread via e-mail, with most of the rest using Web sites. But Kane said criminals were increasingly employing other means of reaching victims, such as social networking sites and instant messenger services. Two out of three scammers were based in the United States. Of the rest, 11 percent came from Britain, 7.5 percent from Nigeria, 3 percent from Canada, and 1.6 percent from China.

Google Introduces Free Downloads of Licensed Music in China

Google Inc. announced March 30 that it is launching a service in China offering free, legal music downloads, while sharing ad revenue with major music labels in a market where online piracy is rampant.

Google is the worldwide leader in the online search market. In China, however, Baidu.com holds more than 60 percent of the market, more than twice Google's share. Lee Kai-Fu, president of Google in China, told reporters in a briefing that Google lagged in the search market in that country in part because it did not offer music downloads.

In the coming months the number of songs from Chinese and foreign musicians offered by the service will climb from 350,000 to 1,100,000, according to Gary Chen, chief executive of Google's partner www.Top100.cn, a Chinese music Web site cofounded by Houston Rockets' center Yao Ming. Music from artists signed by Sony Music, Warner Music, EMI, and Universal Music will be available on the service, which Google does not currently intend to expand beyond China, Lee said.

The move represents the first serious attempt to monetize the online music market in China, where more than 99 percent of distributed music is reportedly pirated. The legitimate music market in China, which amounts to a paltry \$76 million annually, accounts for less than 1 percent of global music sales. Google's service is intended to steer users away from illegal download sites

Federal and State Regulatory Proceedings

Speaker: [Christopher Cole](#)

Georgetown University Law Center
Washington, D.C.

[for more information](#)

...

June 25-26, 2009

Food and Drug Law Institute
Introduction to Drug Law and Regulation:
A Program on Understanding How the Government Regulates the Drug Industry

Speaker: [Ivan Wasserman](#)

[for more information](#)

...

NEWSLETTER EDITORS

[Jeffrey S. Edelstein](#)

Partner

jedelstein@manatt.com

212.790.4533

[Linda A. Goldstein](#)

Partner

lgoldstein@manatt.com

212.790.4544

OUR PRACTICE

Whether you're a multi-national corporation, an ad agency, a broadcast or cable company, an e-commerce business, or a retailer with Internet-driven promotional strategies, you want a law firm that understands ... [more](#)

[Practice Group Overview](#)

[Practice Group Members](#)

by offering higher-quality music and better service.

House Passes Bill Giving FDA Oversight of Tobacco Industry

The House of Representatives has voted in favor of a bill that would give the Food and Drug Administration the power to regulate the tobacco industry.

Under the Family Smoking Prevention and Tobacco Control Act, which passed the House by a 298-112 vote on April 2, the FDA would have the authority to approve – or block – new products, regulate ingredients, require larger warnings, and limit advertising and marketing. With the exception of menthol, flavored tobacco products would be restricted pending a study on the flavor additive. The bill would require the FDA to establish a Center for Tobacco Products, to be funded with fees paid by the tobacco industry based on market share.

The House rejected an amendment by Representative Steve Buyer (R-Ind.) that would create a non-FDA government office to regulate tobacco and promote smokeless tobacco products. Buyer contended the bill would make it tough for the FDA to approve new smokeless products aimed at helping smokers stave off tobacco-related illnesses.

Edward Kennedy, a major sponsor of the Senate legislation, plans to introduce a version of the House bill later this month. Supporters are confident they can get Senate passage and President Barack Obama's signature of the bill into law. However, the battle between public health advocates and some tobacco industry supporters is predicted to be bigger than it was in the House. For one, Senator Richard Burr (R-N.C.) has threatened a filibuster. He is sponsoring an alternative bill that promotes "reduced risk" tobacco products rather than restricting new and existing products.

Philip Morris USA, a unit of Altria Group, supports the bill, reasoning that FDA oversight would create a centralized regulatory framework to facilitate the development and introduction of reduced risk products. Most other tobacco companies oppose the bill, for fear that the law would help Philip Morris, the industry leader in the United States, to solidify its lead.

Lorillard Tobacco, the third-largest U.S. cigarette maker, issued a statement expressing its disappointment in the House's passage of

INFO & RESOURCES

[Subscribe](#)

[Unsubscribe](#)

[Sarbanes-Oxley Act](#)

[Newsletter Disclaimer](#)

[Technical Support](#)

[Manatt.com](#)

the bill. "Thrusting a completely new industry onto the FDA for it to oversee will further burden an agency that is already struggling to meet its core mission to protect America's food and drugs at precisely the time when Americans need to rely on it the most," the company said. It added that the bill as it is currently drafted would "create insurmountable barriers" for new reduced-risk products.

P&G, Georgia-Pacific Settle Paper Towel Spat

Procter & Gamble Co. has agreed to stop claiming in ads and on packaging that its new Bounty towels have "25% thicker quilts," in a settlement ending a lawsuit by Brawny towel maker Georgia-Pacific Corp.

The settlement came on the eve of a hearing in federal court for the Northern District of Georgia on Georgia-Pacific's request that the court issue a preliminary injunction banning P&G from making the claim. According to a Georgia-Pacific spokeswoman, P&G had agreed to "stop making and selling Bounty towels" bearing the "25% thicker" claim, as well as media, point-of-purchase, and media advertising behind the improved product.

Under the settlement, P&G will not pay compensation to Georgia-Pacific, nor will it acknowledge any wrongdoing.

A P&G spokesman said Bounty already had planned to change the packaging artwork in August, in accordance with industry standards restricting use of the claim that a product is "new" after it has been on the market for six months. The settlement means that P&G will make the changes earlier than originally scheduled.

Georgia-Pacific argued in court papers that regardless of the thickness of the "quilts," or indentations on the towels, tests of the new Bounty towels showed them to be at most 5% thicker than prior versions, with the majority not thicker at all. It also said consumer tests suggested that more than half of consumers had the mistaken impression that the towels themselves, not the quilts, were 25% thicker. Finally, it argued that "there are no substantiated performance benefits attributable to having 25% thicker quilts," contrary to a TV spot for Bounty claiming that it "cleans the mess with less."