# Advertising Law

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## Manatt Partner Ivan Wasserman Invited to Present at *Nutrition Business Journal* Summit

Ivan Wasserman, a partner in the Advertising, Marketing & Media practice, will participate in a panel session at the 2012 ***Nutrition Business Journal*** Summit, an annual event that convenes leading food and dietary supplement companies, regulators and thought leaders to explore the opportunities and challenges facing the industry.

On July 25, 2012, Ivan will help to shed light on the "NBJ State of the Industry," highlighting the key marketing, financial and regulatory trends shaping the world of nutrition. He will be joined by Marc Brush (Editor-in-Chief, Nutrition Business Journal), Thomas Aarts (Founder & Principal, NCN & *Nutrition Business Journal*) and Rodney Clark (Managing Director, Canaccord Genuity).

The Summit will be held on July 24-27, 2012 in Dana Point, California. For more information, click here.

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## Senators Debate Online Self-Regulatory Regime

At a hearing before the Senate Commerce Committee in late June, “The Need for Privacy Protections: Is Self-Regulation Adequate?”, legislators debated the efficacy of the online advertising industry's self-regulatory regime. The hearing follows a Commerce Committee hearing in May of this year that examined the recent privacy reports issued by the Obama Administration and the Federal Trade Commission.

At the hearing, Bob Liodice, president and CEO of the Association of National Advertisers defended the industry. "Our self-regulatory system works,” Liodice told lawmakers, stating, "we have built and implemented a system that is operating and effective.” As support for his position, Liodice cited the fact that hundreds of companies are licensing the privacy icon and one million consumers have used the icon to opt out of being tracked online since January 2011.

Others who testified, like Alex Fowler, the chief privacy officer of Mozilla, commented that the industry has not done enough and that "the public is increasingly uneasy about the extent to which their online lives are invisibly profiled, analyzed, packaged, sold and reused to personalize advertising, content and services."

Additionally, Peter Swire, a law professor at Ohio State University, questioned whether the self-regulatory system will work as a permanent solution. "The industry works a lot harder at this when government is paying attention," Swire said, and "relaxes" when regulators and legislators turn their attention to other issues.

Committee chairman Senator Jay Rockefeller (D-W.V.) asked Liodice whether "do not track" should mean "do not collect," as FTC Chairman Jon Leibowitz recently concluded. "The Internet operates on some collection of data," Liodice responded, and even if consumers choose to opt out of collection, companies should be able to continue to collect some data under "necessary exceptions."

Also on the agenda: discussion of Microsoft's decision to make "do not track" the default option under its forthcoming tenth iteration of Internet Explorer.

Liodice, speaking on behalf of the Digital Advertising Alliance, explained why the group is opposed to Microsoft's decision. "The DAA is concerned that this unilateral decision by one browser maker may ultimately narrow the scope of consumer choice, undercut thriving business models, and reduce the availability and diversity of Internet products and services that millions of American consumers currently enjoy and use at no charge."

Why it matters: Whether self-regulation is effective, particularly in the area of Do Not Track, will continue to play out in the coming year. Although Senator Rockefeller, who introduced a federal Do Not Track bill last year, has reiterated his intent to continue pushing for federal privacy legislation, other senators have questioned the need for a new law, including Kelly Ayote (R-N.H.), who expressed concern that legislation could quickly become outdated given the speed at which technology changes. In the FTC Report, “Protecting Consumer Privacy in an Era of Rapid Change,” released in March of this year, the Commission commended industry progress in the area of Do Not Track, while noting that this is one of its priorities for the coming year, but not directly calling for legislation in this area. Since that time, the Commissioners have taken the position that Do Not Track needs to be stricter and that Do Not Track for third-party cookies is critical. It remains to be seen whether the industry can resolve these issues on its own or legislation will be necessary.

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### FTC Releases Report on “Up To” Claims

According to a new study commissioned by the Federal Trade Commission and released on June 29, 2012, when marketers use the phrase “up to” in claims about their products, consumers are likely to believe that they will achieve the maximum “up to” results.

The agency commissioned the study after settling charges in February with five companies that made deceptive energy efficiency and cost savings claims about replacement windows. The study describes what a test group of consumers thought about ads that claimed to provide “UP TO 47% [savings] on heating and cooling bills.” The results indicated that almost half of the respondents (48.2%) expected to save about 47% on their heating and cooling bills.

In a press release about the study, the FTC said that the finding “reinforces [the agency’s] view that advertisers using these claims should be able to substantiate that consumers are likely to achieve the maximum results promised under normal circumstances.”

Mary Engle, associate director of advertising practices for the FTC’s Bureau of Consumer Protection Division, told *Adweek*, “Before advertisers may have thought that if one person got the maximum result, they could make the claim. Our study suggests 50 percent or more of users should get that result.”

To read the FTC’s report, click here.

Why it matters: The FTC expects advertisers to substantiate their "up to" marketing claims at the maximum results promised. The guidance offered by this recent report is more specific than the agency's "up to" claim definition of an "appreciable number of consumers realizing the maximum advertising benefit a substantial amount of time." This is part of a regulatory trend, as the NAD has also provided more specific guidance on "up to" claims in recent decisions.

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## Update: California Court Dismisses False Advertising Class Action Against Cosmetic Companies

On June 28, 2012, the U.S. District Court for the Central District of California dismissed a federal class action against three cosmetic companies accused of falsely advertising their products as "cruelty-free." The suit was filed in February of this year against Estee Lauder, Avon and Mary Kay, seeking $100 million in compensatory damages, plus punitives, on the grounds that the companies engaged in product testing on animals despite representations to the contrary. Plaintiffs asserted claims for violations of California's Unfair Competition Law, False Advertising Law and the Consumer Legal Remedies Act, alleging that defendants profited millions from consumers like plaintiffs who would not have purchased from companies that tested their products on animals.

U.S. District Court Judge Cormac J. Carney dismissed the suit without prejudice.

In dismissing the suit, Judge Carney explained that the plaintiffs had failed to establish they suffered any injury. Carney found that plaintiffs only contended in general terms that they purchased a 'multitude' of Estee Lauder's and Mary Kay's products in reliance on alleged misrepresentations regarding animal testing and would not otherwise have done so. Plaintiffs failed to allege they relied on any particular affirmative misrepresentation or actionable omission, that they purchased any specific product in reliance on those misrepresentations or omissions, or that they suffered a personal, concrete, and palpable injury resulting from those purchases.

To read the court's opinion in *Stanwood et al. v. Estee Lauder*, click here.

Why it matters: In addition to the prospect of false labeling actions, cosmetic companies face potential class actions over false advertising. However, plaintiffs need particularized facts to support their fraud-based claims, even under California's consumer-friendly statutes. Although the cosmetic companies were victorious in their motion to dismiss, Judge Carney did allow the plaintiffs 20 days to file amended complaints, so this case may not be resolved quite yet.

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## Court Dismisses Class Action Against Taco Bell

On June 18, 2012, a U.S. District Court judge in California dismissed a class action complaint against Taco Bell, holding that a single, confirmatory text does not violate the Telephone Consumer Protection Act (TCPA).

The named plaintiff, Jason Ibey, provided Taco Bell with his cellphone number to take part in a survey in February of this year. Shortly thereafter, Ibey allegedly changed his mind and sent the word "STOP" to cease communications with the company and Taco Bell responded by sending a text message to confirm that he had opted out of receiving text message notifications.

The following month, Ibey sued Taco Bell for violating the TCPA, alleging that the confirmatory text message constituted an "unsolicited text message" placed via an automatic telephonic dialing system in violation of the TCPA.

U.S. District Court Judge Marilyn Huff rejected Ibey's claims, granting Taco Bell's motion to dismiss and giving plaintiff 30 days to amend the complaint. In granting the motion to dismiss, the court held, "To impose liability under the TCPA for a single,

confirmatory text message would contravene public policy and the spirit of the statute – prevention of unsolicited telemarketing in a bulk format." In reaching this decision, Judge Huff considered the legislative history of the TCPA and concluded that the purpose of the statute is to prevent unsolicited automated telemarketing and bulk communications. Therefore, the court held the defendant's actions do "not appear to demonstrate an invasion of privacy contemplated by Congress in enacting the TCPA," citing the fact that the plaintiff expressly consented to contact by Taco Bell and even initiated contact with the company.

To read the court's order in *Ibey v. Taco Bell Corp.*, click here.

Why it matters: The motion to dismiss is not the final word in this case, as plaintiffs have already filed a motion for reconsideration. Nevertheless, companies should remember that although text messages are a major part of marketing campaigns, they expose companies to potential liabilities. Facebook, Myspace and Twitter were hit with similar lawsuits over the past year, all of which were withdrawn. Because some jurisdictions, including the Ninth Circuit, consider text messages to fall within the jurisdiction of the TCPA, similar suits are likely. Yet, for the moment, companies can rest assured that a single text sent to confirm a consumer's decision to opt out of receiving text messages will not constitute an unsolicited ad under the TCPA.

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## Hot-Button Issue: Children's Privacy

***Chuck E. Cheese Web Site Needs Greater Privacy Protections***

The Children's Advertising Review Unit (CARU) recently recommended that CEC Entertainment, the operator of Chuck E. Cheese's Web site, take steps to better protect the privacy of children, as it has a reasonable expectation that children under 13 years of age would visit its site.

The matter came to the attention of CARU through its routine monitoring practices. A Chuck E. Cheese television commercial, which aired during children's programming, encouraged viewers to visit the Web site, www.chuckecheese.com, to play games and win tickets to redeem for prizes at the restaurant. CARU was concerned that visitors to the site could also sign up for an "Email Club" by providing an e-mail address and a year of birth. If a visitor entered a year corresponding to an age below 13, he or she received an error message, but if the visitor closed the message and entered a new birth year over the age of 13, the visitor could complete the registration process in which he or she would provide personally identifiable information, including a name, state, zip code, gender and e-mail address.

CARU expressed concern that the age-screening process was flawed and did not effectively identify children under age 13. Specifically it asked only for a year of birth, as opposed to month and day, and failed to make use of technology that helps prevent underage children from changing their age in order to enter the site.

Although the operator argued that the Web site was intended for parent viewing, CARU found "this intention is not controlling," and determined that there was a reasonable expectation that a significant number of children younger than age 13 would visit the site based on the subject matter, content of the site and the ads directing children to the site. Specifically, CARU noted that "children were specifically directed by [the operator] to the website via a television commercial, which aired during children's programming. It used language that invited children to visit the website." CARU also noted that the homepage contained child-friendly images, that children were invited to play child-friendly games, and that the company also featured a tagline "where a kid can be a kid."

After deciding that there was a reasonable expectation that a significant number of children would be visiting the site, CARU found the current method of age screening to be insufficient and recommended that the site enhance the screening process by adding the month and day of birth and employing a session cookie so that the visitor could not change the year of birth and continue to sign up for the Email Club after he or she had first entered an under 13 date of birth.

"The guidelines do not envision a second bite of the apple and [the current method in place] cannot rectify a registration process that does not immediately track a user who states he is under 13 years of age," CARU said.

To read CARU's press release about the decision, click here.

***Update: NJ Settles COPPA SUIT***

Only weeks after filing its first suit alleging violations of the Children's Online Privacy Protection Act, the Office of the New Jersey Attorney General and Division of Consumer Affairs reached a settlement with 24x7, a children's mobile app developer.

The state had contended that 24x7 violated COPPA by failing to obtain consent before compiling the names and unique device identifiers from underage users and sharing the information with a third-party data analytics company.

The consent decree requires 24x7 to destroy all data previously collected and transmitted to third parties. In addition, the app developer agreed to comply with COPPA going forward and receive parental consent prior to collecting and transmitting children's data.

"This is a clear victory for children's privacy in the age of mobile devices and the easy transfer of personal information," New Jersey Attorney General Jeffrey S. Chiesa said in a press release about the settlement.

To read the consent decree in *Chiesa v. 24x7*, click here.

Why it matters: Children's privacy is a hot issue and companies should expect additional developments in the area this year, as the FTC's long-anticipated update to its online privacy rule for children is due out this fall. In the meantime, the CARU decision serves as an important reminder for companies that have a reasonable expectation a significant number of children will visit a Web site. They should employ neutral age-screening mechanisms used in conjunction with technology (e.g., a session cookie) to determine whether verifiable parental consent or notice and opt out is required. In addition to protecting children's privacy online, the New Jersey settlement serves as a reminder that regulators are closely watching for possible privacy violations in the mobile sphere as well. In fact, AG Chiesa mentioned that his office was investigating other apps for potential privacy violations.

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## Noted and Quoted. . . *Response Magazine* Turns to Marc Roth on Consumer Data Privacy Developments

Manatt's Marc Roth, a partner in the firm's Advertising, Marketing & Media Division, authored an article for ***Response Magazine*** titled "Calling All Data Brokers: The FTC Is Watching You," which published on July 9, 2012.

In his article, Roth explains that the Federal Trade Commission has made it a priority this year to ensure that companies that collect and market data to third parties are complying with applicable laws. He recommends that these companies be careful not to make representations that their products may be used for credit, insurance or employment decisions.

Read the article here.