

Advertising Law

October 21, 2011

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Manatt Partners Invited to Co-Chair and Speak at 33rd Annual PMA Marketing Law Conference

2011 marks the Promotion Marketing Association's 100th year representing thousands of brands worldwide. In the year of this milestone anniversary, PMA will host its 33rd Annual Marketing Law Conference. As a testament to Manatt partner [Linda Goldstein's](#) longstanding commitment to the organization through chairing its Government/Legal Affairs Committee, PMA has asked Linda to serve as co-chair of this highly respected event.

Linda, Chair of Manatt's Advertising, Marketing & Media Division, and Manatt partners [Christopher Cole](#) and [Marc Roth](#) have also been asked to provide insight on pressing legal, regulatory and enforcement issues for marketers in three separate presentations taking place throughout the conference:

- "What's New in the Game Today – New Twists on Traditional Sweeps, Contests and Promotions," Linda Goldstein
- "The Perils of Partners – Affiliate /Advanced Consent Marketing," Marc Roth
- "Courting Trial – Mock Trial of Promotional Mishaps," Christopher Cole

The Marketing Law Conference will be held November 14-16, 2011 in Chicago, IL. As a friend of Manatt, Phelps & Phillips, LLP, we are pleased to extend a VIP offer of discounted registration which amounts to a \$100 reduction per law conference attendee. Please visit <http://www.pmalink.org/law2011> to take advantage of this discount by entering the following priority code at registration: **mpplawguest2011**.

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IWG Anticipates Making "Significant Changes" to Government Guidelines

In a letter to the House Energy and Commerce Committee, the Interagency Working Group said it "anticipates making significant changes to both the marketing and nutrition principles" found in the preliminary guidelines regarding marketing food to children.

Newsletter Editors

Linda A. Goldstein
Partner
[Email](#)
212.790.4544

Jeffrey S. Edelstein
Partner
[Email](#)
212.790.4533

Marc Roth
Partner
[Email](#)
212.790.4542

Practice Area Links

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Upcoming Events

October 26-27, 2011

ACI Social Media, Business Technology and the Law Conference

Topic: "You Better Disclose That: Ensuring that Your Company is Closely Adhering to the FTC's Endorsement and Testimonial Guidelines"

Speaker: [Marc Roth](#)
New York, NY

[For more information](#)

November 14-16, 2011

PMA Marketing Law Conference

Topic: "What's New in the Game Today - New Twists on Traditional Sweeps, Contests and Promotions," [Linda Goldstein](#); "The Perils of Partners - Affiliate/Advanced Consent Marketing," [Marc Roth](#); "Courting Disaster - Mock Trial of Promotional Mishaps," [Chris Cole](#)

Chicago, IL

[For more information](#)

November 15, 2011

ABA Private Advertising Litigation and Consumer Protection Teleseminar

Topic: "The Television Network Advertising Clearance Process: Soup to Nuts"

Speaker: [Jeff Edelstein](#)

[For more information](#)

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The [preliminary guidelines](#), issued in April, drew criticism from the food industry. As drafted, they called for food and beverage companies to modify the content of their products to meet nutrition standards or eliminate the marketing of such products to children under age 18.

Industry groups argued that the guidelines, albeit voluntary, would violate their First Amendment rights and would amount to de facto regulations.

In a letter authored by the heads of three of the agencies making up the IWG – Thomas J. Vilsack, Secretary of the Department of Agriculture; Kathleen Sebelius, Secretary of the Department of Health and Human Services; and Jon Leibowitz, Chairman of the Federal Trade Commission – the IWG appeared to back off its preliminary report. Noting that it received more than 29,000 comments, the agencies said they planned to make “significant changes” to the principles in the report while developing final recommendations to Congress. The letter also noted that the IWG is considering the [industry’s own self-regulatory plan](#).

“This industry-led voluntary effort complements the goals of the IWG, and we intend to take this significant development into account, as well as other stakeholder comments, when developing our final recommendations,” the agencies wrote.

To read the IWG’s letter, click [here](#).

Why it matters: While the language in the letter indicated a positive turn of events for the food industry, commenters were cautious in their optimism. “This may end up being a positive development, but before anybody starts popping champagne corks, we need to see what is actually being proposed,” Dan Jaffe, the executive vice president of the ANA told *AdWeek*. “There have to be very significant changes to the proposal to make them acceptable.”

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New Labeling, Packaging for Four Loko

Beverage maker Four Loko has agreed to new labeling and packaging for its controversial fruit-flavored alcohol products to settle allegations by the Federal Trade Commission of deceptive advertising. The agency sent a [warning letter](#) in November 2010 to the marketers of Four Loko and other caffeinated alcohol drinks, warning that their marketing could be in violation of the FTC Act.

Phusion Projects, the maker of Four Loko, agreed to remove the caffeine and other stimulants from the drink. But the agency alleged that the packaging and labeling remained deceptive, based on claims that the 23.5-ounce can contained the alcoholic equivalent of two regular 12-ounce beers that could be safely consumed on a single occasion. According to the FTC, the can contained as much as four to five 12-ounce beers and that the consumption of a container on a single occasion would constitute “binge drinking.”



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The agency said that the company urged merchants to place Four Loko near other single-serve alcoholic beverages, and its Web site featured pictures of consumers drinking directly from the cans. Pursuant to the administrative settlement, Phusion Projects must disclose on containers how much alcohol the drink contains as compared to the amount of alcohol found in regular beer in a statement centered on the front of the container. In addition, beginning six months after the settlement takes effect, only resealable containers can be used for beverages that have more alcohol than the equivalent of two and a half regular beers.

The company is also barred from misrepresenting the alcohol content of any of its beverages or from depicting consumers drinking directly from the container of a product that has more alcohol than that of two and a half regular beers. Phusion and its three owners – all named in the complaint – are also subject to five years of monitoring by the agency.

“We don’t share the FTC’s perspective and we disagree with their allegations,” Jaisen Freeman, one of Phusion’s cofounders, said in a statement. “We don’t believe there were any violations. However, we take legal compliance very seriously and we share the FTC’s interest in making sure consumers get all the information and tools they need to make smart, informed decisions.”

To read the complaint in *In the Matter of Phusion Projects*, click [here](#).

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

Why it matters: The settlement with the FTC might stem the tide of some of the legal problems facing Phusion Projects. After a teenager allegedly died as a result of drinking too much Four Loko, several states – including Michigan, Oklahoma, Utah, and Washington – banned the drinks, and Sen. Charles Schumer (D-N.Y.) argued that the Food and Drug Administration should ban caffeinated alcohol drinks entirely. Responding to critics, Phusion Projects has already removed caffeine from its products and has now agreed to packaging and labeling changes. The company still faces a [consumer class action](#) in which plaintiffs maintain that Phusion deceptively marketed Four Loko to look like nonalcoholic energy drinks by using vibrant colors and designs and fruit-flavor names.

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FTC Testifies About COPPA Changes

Appearing before the House Subcommittee on Commerce, Manufacturing and Trade, a Federal Trade Commission staffer testified about the agency’s recently released proposed changes to the Children’s Online Protection Privacy Act Rule.

“The Commission takes seriously the challenge to ensure that COPPA continues to meet its originally stated goals, even as children’s interactive media use moves and changes at warp speed,” according to the testimony by the agency’s associate director for advertising practices, Mary K. Engle.

At the hearing, “Protecting Children’s Privacy in an Electronic World,” Engle told lawmakers that in the 11 years since the Rule’s enactment, the agency has brought 17 COPPA enforcement actions that have garnered more than \$6.2 million in civil penalties.

She noted the challenges of enforcing the Rule, particularly with regard to social media, and highlighted recent actions that include the record [\\$3 million civil penalty](#) against the developer of virtual online worlds and the [first COPPA case involving mobile applications](#), which resulted in a \$50,000 fine.

The agency [proposed modifications](#) to the COPPA Rule in September.

Engle said the changes are intended to improve operator compliance and address evolving technology, particularly the way children access and use the Internet.

The agency proposed changes in five areas: definitions, parental notice, parental consent mechanisms, confidentiality and security of children's personal information, and safe harbor programs. Engle touched on all of the major changes, one of which will broaden the definition of "personal information" to include persistent identifiers like an IP address and geolocation data. This change will protect children from behaviorally targeted advertising, according to the testimony: "While the Commission is not aware of any operator directing online behavioral advertising to children, the Commission hopes to obtain further information during the comment period." To ensure parents receive information up front, the FTC proposed changes to the parental notice requirements by specifying the precise information that operators must provide to parents for each different form of direct notice required by the Rule, with hyperlinks to additional information online. "In the Commission's experience, privacy policies are often long and difficult to understand, and may not be the most effective way to communicate salient information to consumers, including parents," Engle said.

To read the text of the FTC testimony, click [here](#).

Why it matters: The FTC is accepting public comment on the proposed changes to the Rule until Nov. 28, 2011. Lawmakers at the hearing expressed support for the proposed changes, and given repeated [legislative calls for updating COPPA](#), made clear that operators should prepare for changes in the near future.

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FTC Proposes Changes to Mail or Telephone Order Merchandise Rule

The Federal Trade Commission is seeking public comment on proposed amendments to the Mail or Telephone Order Merchandise Rule, which sets a time frame for marketers to ship items to consumers.

Under the current rule, promulgated in 1975, marketers must have a reasonable basis to expect that they can ship merchandise ordered by phone or mail within the time frame advertised, or within 30 days. If the seller cannot ship the merchandise within the promised time, the seller is required to get the purchaser's consent to the shipping delay or refund his or her payment.

The agency sought comment in 2007 about updating the Rule. Based on the response, the FTC said it "concluded that the Rule continues to benefit consumers and will be retained."

However, the agency proposed four changes to the Rule:

- Clarifying that it covers all orders placed over the Internet;
- Allowing sellers to provide refunds and refund notices to purchasers “by any means at least as fast and reliable as first-class mail”;
- Clarifying sellers’ obligations when buyers use a method of payment not currently listed in the Rule, like debit cards or prepaid gift cards; and
- Requiring that refunds be made within seven working days where purchases were made with a third-party credit card.

Comments will be accepted on the proposed changes until Dec. 14, 2011.

To read the proposed changes to the Rule, click [here](#).

Why it matters: The Commission said it received four comments about the Rule, all in support of retaining it. Two trade organizations, the National Retail Federation and the Direct Marketing Association, both suggested there was a continuing need for the Rule, which was reviewed as part of the agency’s systematic review of all rules and guides. The Rule “creates explicit competition among retailers to minimize and validate shipping times for consumers’ benefit,” the NRF told the agency, while the DMA said the Rule has “been effective in enhancing consumer confidence in the growth of distance selling, which is critical to the development of electronic commerce.”

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