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Heard on the Hill

Legislative Update

Congress recently returned from recess to address a host of issues. Healthcare will continue to dominate the immediate legislative agenda, but we expect attention to other issues to increase as well. In the Senate, the Senate Commerce Committee is expected to continue a series of hearings in its oversight role of the FTC. The Senate Commerce Subcommittee on Consumer Protection, Product Safety, and Insurance held two hearings in July 2009 to examine advertising trends and consumer protection issues. The first hearing examined the proliferation of financial scams in a down economy. The second explored the negative impact that deceptive advertising has on consumers and the effect of different communication tools, such as testimonials and blogs, in the market. Additional related hearings are expected in the coming months.

The House Energy and Commerce Committee is expected to circulate draft privacy legislation this fall with corresponding hearings. This will follow the June 2009,

joint hearing held by the Subcommittee on Commerce, Trade, and Consumer Protection and the Subcommittee on Communications, Technology, and the Internet to examine online behavioral advertising practices and to consider whether federal privacy legislation is necessary to address concerns associated with these practices.

We also expect the House Financial Services Committee to continue its consideration of H.R. 3126, the Consumer Financial Protection Agency Act (“Act”). On July 8, 2009, House Financial Services Committee Chairman Barney Frank (D-MA) introduced H.R. 3126. The Act would give sweeping authority to a newly created Federal Consumer Financial Protection Agency (“Agency”). The Agency would be an independent agency in the executive branch and would be the primary authority for protecting consumers in the financial services marketplace. While the Act would transfer authority over consumer financial protection from many of the financial regulators to the Agency, the Act would also grant the Federal Trade Commission new rulemaking and enforcement powers, including the authority to pursue aiders and abettors. The Act had been moving quickly through Committee until concerns arose with the breadth and scope of the Act. A markup of the bill is now expected to take place in mid-October.

Around the Agencies

Federal Trade Commission Announces Roundtable Discussion on Privacy

The Federal Trade Commission (“Commission”) recently announced that it will hold a series of public roundtable discussions beginning on December 7, 2009, to address developing challenges to consumer privacy created by new technology and business practices. The roundtables will explore the impact of a range of practices, including, *inter alia*, online behavioral advertising, social networking, cloud computing, and mobile marketing. The panels will also explore the uses of information by retailers, data brokers, third-party applications, and other entities. The Commission intends to facilitate discussions of the risks and benefits of information collection and use from these practices.

Stakeholders with an interest in serving on a roundtable panel have until October 30, 2009 to make a request to participate. Additionally, parties may submit comments to the Commission by November 6, 2009, addressing such topics as: (1) the risks and benefits of the collection, sharing, and use of consumer information; (2) common consumer expectations about how consumer information is collected and used; and (3) whether existing law and self-regulation adequately protect consumer privacy interests.

Federal Trade Commission Announces Increased Fees to Access Do Not Call Registry

Effective October 1, 2009, fees for telemarketers to access phone numbers registered in the National Do Not Call Registry (“Registry”) will increase. Under the Telemarketing Sales Rule (“TSR”), telemarketers must pay an annual fee to obtain numbers from the Registry to ensure that they do not call those phone numbers that consumers have registered. Currently, telemarketers must pay \$54 per area code for the year, or \$27 per area code to access the numbers for the second half of the year, with a maximum of \$14,850 for access to all area codes. Pursuant to the Do-Not-Call Registry Fee Extension Act of 2007 (“Act”), which amends the TSR, the fees will increase this October to \$55 to access phone numbers in a single area code, with the maximum set at \$15,058 for access to all area codes.

The fees charged by the Federal Trade Commission (“FTC”) to access the Registry

have stabilized and even decreased in recent years due to the Act. Prior to passage of the Act, fees to access the Registry rose from an original fee of \$7,250 in 2003 to a fee of \$17,050 in 2006. The Act authorizes the FTC to increase fees by an amount tied to the rate of change in the consumer price index.

Ban of Prerecorded Messages Goes into Effect

As of September 1, 2009, marketers are now prohibited from delivering prerecorded messages that include a telemarketing message without the called party's prior written agreement. This new rule governing prerecorded messages is more restrictive than the prior rule and significantly restrains the ability of marketers to communicate with current customers. Under the FTC's prior rule, a marketer could deliver a prerecorded message to customers with whom the marketer has an established business relationship.¹ The FTC's new rule prohibits a marketer from making any outbound telephone call that delivers a prerecorded message that includes an offer to purchase a good or service unless the marketer has an express written agreement from the recipient of the call to receive prerecorded messages.² The law sets out rigorous requirements regarding what qualifies as a customer's agreement to accept prerecorded messages.

Federal Trade Commission Reopens Comment Period on Negative Option Rule

In August 2009, the Commission announced that it had reopened the public comment period for the review of its Rule Concerning the Use of Prenotification Negative Option Plans ("Rule"). Comments are due by October 13, 2009. The Rule regulates "negative option plans," which are arrangements under which a seller may interpret a customer's silence as acceptance of an offer.³ The Rule was originally promulgated in 1973, and was previously reviewed by the FTC in 1986 and 1997. The Commission is now seeking comments on whether the Rule should be expanded to cover additional forms of negative option offers. Presently, the Rule covers prenotification negative option plans. The Commission has noted that the Rule does not include other types of negative option plans, including: (1) continuity plans, (2) trial conversions, and (3) automatic renewals. The Commission is also seeking comment on what modifications should be made to the Rule to reflect relevant technology or economic conditions.

In the States

Strict Maine Law on Marketing to Children Goes into Effect

Maine's restrictive new law on marketing to children took effect on September 12, 2009. The statute provides that it is illegal to collect or receive health-related or personal information for marketing purposes from a minor child without the verifiable consent of that minor's parent or guardian. The consent required is any reasonable effort, given available technology, to ensure that a parent or guardian is notified of, and authorizes, any information collection, use, and disclosure covered by the law before the information is collected. The personal information covered by the law includes name, home or other physical address, Social Security number, driver's license or state identification card number, and any other information collected about a minor in combination with these types of identifiers.

¹ 71 Fed. Reg. 77634 (Dec. 27, 2006).

² 73 Fed. Reg. 51164 (Aug. 29, 2008).

³ 16 C.F.R. § 425.1(c)(1).

The statute also prohibits “predatory marketing,” regardless of parental consent. Specifically, the law bans any use of health-related or personal information regarding a minor for the purpose of marketing a product or service or promoting a course of action relating to a product.

The statute provides that Maine’s attorney general may pursue an alleged violation of the new statute as an illegal unfair trade practice. Maine Attorney General Janet Mills has pledged that she will not enforce the law because she has concerns about its constitutionality. However, the law also includes a private right of action for any person who is the object of predatory marketing or illegal information collection. Prevailing plaintiffs may obtain both injunctive relief and damages, either the greater of actual damages or up to \$250 in statutory damages per violation.

In August, a coalition of companies sued to obtain a preliminary injunction to block the Maine law from going into effect. The parties agreed to dismiss the suit just days before the law became effective, after the Maine attorney general opposed an injunction because of her prior pledge not to enforce the measure. Although the dismissal order warns that private challenges could suffer constitutional infirmities, it remains possible for individuals to file private lawsuits. Given the significant attention to the law, its authors have announced their intent to revisit the statute when the Maine legislature reconvenes.

Federal Trade Commission and State Attorneys General Continue to Examine Blogs

The Federal Trade Commission (“FTC”) and state law enforcement agencies are closely scrutinizing the practice of using fake blogs – or “flogs” – to generate interest in an advertiser’s products and services. In proposed revisions to its *Guides Concerning Use of Endorsements and Testimonials in Advertising*, the FTC is looking to create standards where an advertiser would be liable for false statements made through a blogger’s endorsement and the blogger would be liable for unsubstantiated representations made in the course of the endorsement. The FTC has indicated that advertisers must establish better controls on affiliate marketing practices and monitor affiliates for compliance. Separately, in the past six months, state attorneys general in Connecticut, Texas, and New York have publicly announced investigations and charges against advertisers whose products and services have been promoted by flogs and fake testimonials. According to the states, unsubstantiated claims about product results contained in flogs have duped consumers into purchasing products and services that they may not have otherwise bought.

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