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1.

As we close in on the end of 2008, we contemplate the changes approaching in 2009. We will welcome a new administration and a new Congress. We will see new leadership in both the Senate and House Commerce Committees and leadership changes in the federal agencies. We anticipate that the early legislative and regulatory agendas will be focused on financial reform, implementation of the bailout, healthcare, and energy.

This final issue of 2008 includes articles on the Federal Trade Commission's report on Social Security numbers and identity theft, the proposed revisions to the Commission's guides on the use of endorsements and testimonials in advertisements, new compliance deadlines for the Massachusetts data security regulations, and a new law that directs the Federal Communications Commission to investigate parental control technologies.

From your team at Venable, we wish you happy holidays and a Happy New Year. We look forward to working with you in 2009.

Around the Agencies

FTC Report on Social Security Numbers and Identity Theft

On December 17, 2008, the Federal Trade Commission (“FTC” or the “Commission”) issued a report focusing on the private use of Social Security (“SSNs”) numbers and recommending five measures to help prevent SSNs from being used for identity theft. The report was developed in response to a recommendation made by the President’s Identity Theft Task Force. In the report, the FTC concluded that a comprehensive approach would best address the issue of SSNs and identity theft. The Commission indicated that a multi-faceted approach could include comprehensive federal legislation and an extension of safeguards similar to those in place in the financial sector to entities not subject to bank regulatory agencies. Below follows a summary of the Commission’s recommendations.

Recommendation 1: Improve Consumer Authentication

The Commission recommended that Congress consider establishing national consumer authentication standards that would cover all private sector entities that maintain consumer accounts other than financial institutions, which the FTC explained are already under the jurisdiction of bank regulatory agencies that require such standards. In developing the authentication standards, the Commission stated that Congress should consider several factors. First, the FTC said that the cost of implementing new standards should be evaluated by determining what is “reasonable.” Second, the Commission stated that consumer convenience should be included in the reasonableness determination. Third, the Commission observed that the use of authentication procedures that require consumers to provide additional information about themselves may raise privacy concerns.

Recommendation 2: Restrict the Public Display and the Transmission of SSNs

The Commission recommended that Congress consider creating national standards for the public display and transmission of SSNs. The FTC also expressed support for federal legislation to establish a national approach to decrease the unnecessary exposure and transmission of SSNs. The Commission suggested that various federal agencies develop more precise standards through the rulemaking process. Additionally, the FTC stated that such standards should permit the display and transference of SSNs when required by law or when a substantial business need outweighs exposure risks.

Recommendation 3: Establish National Standards for Data Protection and Breach Notification

The Commission expressed support of its prior recommendation that Congress consider establishing national security breach notification standards. The FTC suggested that such standards should require private sector entities to provide public notice when the entity suffers a security breach of consumers’ personal identifying information and that breach creates a significant risk of identity theft or other harms.

Recommendation 4: Conduct Outreach to Businesses and Consumers

The Commission recommended increasing education and providing guidance on additional steps to reduce the use of SSNs in identity theft. The FTC noted that it anticipated disseminating additional guidance to businesses and consumers on what

they can do to reduce their use of SSNs and to provide greater protection of such identifiers when they are used.

Recommendation 5: Promote Coordination and Information Sharing on Use of SSNs

The Commission recommended that appropriate governmental entities explore assisting private sector organizations establish a clearinghouse of best practices. The FTC explained that such practices would enable organizations to share approaches to SSN usage and protection, fraud prevention, and consumer authentication.

FTC Proposes Revisions to Guides on Use of Endorsements and Testimonials in Advertising. Comments are Due January 30, 2009.

I. Proposed Revisions

The Federal Trade Commission (“FTC” or “Commission”) on November 21, 2008, announced proposed revisions to the Guides Concerning Use of Endorsements and Testimonials in Advertising (the “Guides”). The FTC’s Guides are advisory in nature, but provide advertisers insight into the considerations that inform the Commission’s enforcement decisions regarding testimonials and endorsements. The current version of the Guides has been effective since 1980 and has become the basis for industry standards with respect to testimonials and endorsements used in advertisements. Many of the testimonials and endorsements used in today’s advertisements, however, would be prohibited under the proposed revisions. The Commission has stated that revisions are necessary to show how various principles articulated in the Guides apply in high-tech contexts. Comments on the proposed revisions are due January 30, 2009. Below is a summary of the key proposed revisions.

A. Old Rules, New Media

Under the proposed revisions, advertisers could face liability for false or unsubstantiated statements made in endorsements, or for failing to disclose connections between the advertisers and endorsers and could face liability for their statements. These are not new principles, and are in fact, the subject of Commission enforcement proceedings. The Commission, however, demonstrated that these principles are applicable to new media, such as to bloggers that test products and make representations to their readers. In such cases, the advertiser and the blogger could be held liable for endorsements made through the blog.

B. Consumer Endorsements

The Commission would interpret consumer testimonials in advertisements as representing that the product is effective for the purpose shown in the advertisement. Advertiser would be required to substantiate support for efficacy claims made in testimonials just as it would be required to do if they made the representations directly. The Commission indicated that anecdotal evidence about a consumer’s individual experience would not be sufficient to substantiate a claim requiring scientific evidence.

Testimonials that depict atypical results would be required to clearly and conspicuously disclose the generally expected performance in the depicted circumstances and the advertiser must possess and rely on adequate substantiation for the representation. A “Results not typical” disclaimer would be inadequate under the proposed revision. Instead, whenever atypical testimonial are used, advertisers would be required to identify and disclose the generally expected

performance. Research needed to substantiate such claims would likely increase costs for advertisers.

C. Expert Endorsements

The Commission proposes to amend the Guides to require that an expert endorser must have the expertise that the advertisement implies the expert possesses. The Commission also proposed to clarify that it is deceptive for an endorsement by an institution whose name implies that it is an independent testing organization with expertise, when that is not the case.

D. Disclosure of Material Connections

The Commission has expressed support for retaining the requirement that advertisers must disclose connections between themselves and endorsers that may materially affect the weight or credibility of an endorsement. However, the Commission proposed to delete the language from the Guides that currently states that so long as an advertiser does not represent that an expert or well-known personality has provided an endorsement without compensation, the advertiser need not disclose that the endorser has been paid.

E. Celebrity Endorsements

The Commission proposed requiring advertisers to disclose their financial connection with a celebrity endorser. Specifically, the Guides would provide that an advertiser should disclose when a celebrity has been paid for endorsing a product during a routine interview and knowledge of this financial interest likely would affect the weight or credibility of the endorsement. However, the Guides would not require such a disclosure when a celebrity appears in an interview wearing clothes with the insignia of a company with which the celebrity has an endorsement contract but does not mention the company or the clothes.

II. Request for Comments

The Commission has asked interested parties to comment on the following specific issues:

1. Whether there are product categories for which the requirement – that an advertisement should clearly and conspicuously disclose the generally expected performance in a depicted circumstance when an advertiser does not possess adequate substantiation for the representation – would prevent advertisements from using endorsements even though the advertiser believes that an endorser’s experiences are or likely are generally representative; and if there are any such categories, the costs and benefits to the advertiser, competition, and consumers of the inability to use endorsements in ads along with supporting empirical data;

2. If consumers know that an expert has a significant financial interest in sales of the product (e.g., ownership interest in a company or compensation based on product sales), is this information likely to affect their assessments of the expert’s credibility; and whether there are other financial compensation arrangements that would be relevant to how a consumer assesses an expert’s credibility;

3. Whether a celebrity’s financial connection to an advertiser should be disclosed when a celebrity has been paid for endorsing a product during a routine interview and knowledge of this financial interest likely would affect the weight or credibility of the endorsement; and whether such disclosure should not be required when a celebrity appears in an interview wearing clothes with the insignia of a company with which the celebrity has an endorsement contract but does not mention the company or the clothes;

4. Whether the general principle that material connections between endorsers and advertisers should be disclosed to new forms of marketing, including blogs, discussion boards, and “street teams”; and consumer’s expectations regarding the relationships between advertisers and endorsers in these new marketing contexts;

5. The Commission’s decision to modify Example 1 of Section 255.5 to provide additional factual background and to explain why an advertiser’s payment of expenses to a research organization need not be disclosed in an advertisement; and whether there is a discrepancy between Section 255.5 and the current Example 1; and extrinsic evidence of consumer understanding regarding this issue.

From the States

Massachusetts Delays Implementation Date of New Data Security Regulations

On November 14, 2008, the Massachusetts Office of Consumer Affairs and Business Regulation (“OCABR”) extended the implementation deadline for the new identity theft prevention regulations designated in 201 Mass. Code Regs. 17.00 et seq. Unveiled by OCABR in September 2008, the regulations establish standards for how businesses must protect and store personal information of Massachusetts consumers. Specifically, the regulations require businesses to encrypt all personal information of Massachusetts residents transmitted across public networks or wirelessly, and such information that is stored on laptops or other portable devices. Originally set to take effect January 1, 2009, the regulations will now take effect upon a tiered deadline schedule in order to accommodate businesses that may be facing financial difficulties given the current economic climate.

Below follows the new deadlines:

- The general compliance deadline for 201 Mass. Code Regs. 17.00 et seq. has been extended from January 1, 2009 to May 1, 2009.
- The deadline for requiring third-party service providers to be capable and contractually bound to protect personal information has been extended from January 1, 2009 to May 1, 2009. Additionally, the written certification requirement from third-party providers has been extended from January 1, 2009 to January 1, 2010.
- The deadline for encrypting laptops has been extended from January 1, 2009 to May 1, 2009. The deadline for encrypting other portable devices, such as memory sticks, DVDs, and PDAs, has also been extended from January 1, 2009 to January 1, 2010.

Heard on the Hill

Child Safe Viewing Act

The President on December 2, 2008, signed the “Child Safe Viewing Act” making it law. The Act, which was introduced by Sen. Pryor (D-Ark), requires the Federal Communications Commission (“FCC”) to investigate technologies designed to assist parents control what their children view on television or the Internet. Specifically, the Act requires the FCC to initiate a notice of inquiry to examine the availability of advanced blocking technologies that are compatible with a variety of communications devices or platforms, and to explore methods of encouraging the development, deployment, and use of such technologies in a manner that does not

impact the packaging or pricing of a content provider's offering. Lastly, the Act states that the FCC must examine parental empowerment tools and initiatives already in the market.

The Act specifies that when conducting the inquiry, the FCC must consider advanced blocking technologies that:

- may be appropriate across a range of distribution platforms;
- may be appropriate across a variety of devices that can transmit or receive video or audio programming;
- can filter language using information in closed captioning;
- are independent of ratings pre-assigned by the creator of video or audio programming; and
- may assist parents protect their children from indecent or objectionable programming as defined by the parent.

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