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Evolving Legal and Regulatory Landscape for Lead Generation

LeadsCon 2012
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The Mirage Resort & Casino
Las Vegas, NV

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Articles

February 21, 2012

New Federal Consumer Protection Working Group Takes Aim at Consumer Fraud

A newly created Consumer Protection Working Group to combat consumer fraud will work across federal law enforcement and regulatory agencies, and with state and local partners. The Consumer Protection Working Group is the latest in a string of efforts undertaken by law enforcement agencies to protect vulnerable populations. Areas of focus include scams that target the unemployed, those in need of payday loans, and those suffering from the burden of high credit card and other debt, as well as exploiting prospective students, active-duty military personnel, and veterans.

The Consumer Protection Working Group is a new unit within the Financial Fraud Enforcement Task Force that was created in late 2009, and is led by the U.S. Department of Justice. The working group, announced by Attorney General Eric Holder on the heels of President Obama's State of the Union speech, held its first meeting on February 10, 2012.

Officials said the effort will be focused and will coordinate efforts among law enforcement and regulators. At the first meeting of the group, Attorney General Eric Holder said that the partnership "will strengthen our collective efforts, enhance civil and criminal enforcement of consumer fraud and educate the public in an effort to prevent consumers from being victimized in the first place."

According to the announcement, the Consumer Protection Working Group will "address several areas of concern, including payday lending and other high-pressure telemarketing or Internet scams, business opportunity schemes, for-profit schools that engage in fraud or misrepresentation, and fraudulent third-party payment processors that facilitate payments on behalf of other fraudsters without the permission of the customer." The Consumer Protection Working Group will likely follow the lead of the Federal Trade Commission ("FTC"), Consumer Financial Protection Bureau ("CFPB"), and several state attorneys general, which are aggressively investigating potential violations of consumer protection laws.

The new working group has set priorities and discussed taking collaborative steps to continue to seek out and prosecute consumer fraud as well as protect consumers from fraud before it happens through outreach and education. The new working group also plans to establish a best-practices toolkit; legislative, regulatory and policy initiatives; and an information-sharing structure.

Members of the Consumer Protection Working Group include representatives from the FTC, CFPB, Department of Treasury, FBI, Internal Revenue Service-Criminal Investigation, Federal Deposit Insurance Corporation, U.S. Secret Service, Financial Crimes Enforcement Network, Executive Office for U.S. Attorneys, Department of Education's Office of the Inspector General, U.S. Trustee Program, the National Association of Attorneys General, U.S. Postal Inspection Service, the Office of the Comptroller of the Currency, the Federal Reserve Board, and the National Credit Union Administration. The state attorneys general are represented on the working group by Attorney General Lisa Madigan from Illinois, Attorney General Greg Zoeller from Indiana, and Attorney General Roy Cooper from North Carolina.

The potential for investigations of companies and, perhaps several companies within multiple sectors, by the members of the working group adds a dimension to areas that have already been under heavy scrutiny. As a result, companies that work in areas that are related to financially distressed consumers should review existing relationships, staff training, compliance, and audit functions and programs. From advertising and marketing, fulfillment, and complaint resolution, all practices could be subject to review. In addition, sectors in the crosshairs of the working group should assess whether they need to improve messaging and the design of self-regulatory programs with strong enforcement mechanisms to help compliant companies distinguish themselves from those that are not in compliance with applicable laws. Finally, in light of the potential for lawsuits, companies that are under investigation will need to be prepared to defend themselves and their actions.

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February 1, 2012

Venturing into Ambush Marketing and Protecting Sponsorships Requires Careful Planning

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As football fans turn their attention to the Super Bowl, companies big and small look to grab the attention of these fans by associating themselves with the big game. For the NFL, teams, and television partners this means big business by selling sponsorships and licensing use of their intellectual property.

Marketing and advertising of sporting events such as the Super Bowl, the NCAA's Basketball Tournaments, the NBA's Championship, NHL's Stanley Cup Tournament, FIFA's World Cup, and the Olympics offer huge potential benefits for companies, and large companies pay millions of dollars a year to associate themselves with prominent sporting events and movie and television award ceremonies.

For companies (including charities) that venture into this area of advertising and marketing, there are significant inherent legal risks in associating your company with third-party trademarks and slogans and other entities without permission. Companies entering this arena will want to take proper steps to ensure they are adequately protected. Companies that operate outside the rules could find themselves on the wrong end of a legal action.

In fact, major sports leagues such as the NFL, the NCAA, NBA, NHL, and FIFA all have taken aggressive efforts to police their respective brands. For example, in 2010, South Africa implemented new intellectual property laws designed to protect promoters and protect the value of World Cup sponsorships.

Most people may be aware that the U.S. Olympic Committee ("USOC") and the International Olympic Committee ("IOC"), sells sponsorships and licenses use of their intellectual property, which is big business for these Olympic Committees. While most of the headlines about Olympic marketing and advertising are focused on the impact of these large sponsorships on company bottom lines and in advancing the events, what has received less coverage has been that behind the Games, many well-known companies have tussled with the USOC regarding guerilla marketing techniques.

Every two years, many companies that seek to associate themselves with Olympic trademarks to advertise their products and services find out the hard way that if Olympic indicia are used, both the advertiser and product or service provider may face statutory liability from the USOC, which is granted the rights to such marks in the United States.

Since the 1950s, a special act of the U.S. Congress gives the USOC the exclusive rights to any symbol consisting of five interlocking rings as well as other "Olympic" mark rights. The law grants the USOC the ability to seek an injunction and treble damages in a civil action for any "uses for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition" of the above terms and emblems without the consent of the Committee.

Unlike typical infringement claims, a claim of likelihood of confusion is not necessary for the USOC to prevail. In addition, the Trademark Counterfeiting Act of 1984 includes special provisions for counterfeit uses of the Olympic trademarks. These provisions include criminal penalties, right of seizure by ex parte application, and award of attorneys' fees and wrongful profits. In addition, there may be liability under other federal and state statutes and exposure for lost profits and attorneys' fees depending upon the cause of action. Further, other rights holders may be able to assert claims depending on the alleged infringement.

In years of policing its marks, the USOC, along with affiliated local host committees and the IOC, has sent out hundreds of cease and desist orders and has filed lawsuits alleging trademark infringement of Olympic symbols. In light of the aggressive position taken by the USOC to protect its statutorily-protected marks and other related marks, the key to minimizing risk in this area is to understand the protection afforded Olympic indicia and to steer clear of potential uses unless authorized.

When specially-protected marks are not involved, basic principles of trademark and promotion law apply. There are important rules of the road, however, that anyone involved in the campaign should know and follow. Would-be ambush marketers should be mindful that trademark owners have available to them remedies under laws that protect against infringement (based on a likelihood of confusion) and trademark dilution, as well as various other protections afforded by statute and common law.

Celebrity endorsement and implied affiliations or sponsorship by celebrities is another area of potential legal pitfalls and reputation risk. Uber-celebrities, talk show hosts with built in audiences and loyal followings and sports stars may mention or use a product or routine that a company might find attractive to mention in its advertising. Rights of Publicity actions and other legal avenues, however, offer protections to these celebrities and their endorsement value. Celebrities vigilantly police the market for mere mentions of their name, which may inflict on the careless marketer unexpected legal expenses.

There are many ways, however, to utilize third-party references without running afoul of the legal protections afforded the owner, particularly if the marketplace is not taken up entirely by the rights holder.

Here are some tips to help minimize legal risks when marketing in this area:

- Implement a full and comprehensive advertising and marketing review process prior to any use of advertisements, scripts, emails, websites, social media posts, and the like.
- Obtain permission, disclaim affiliations, and ensure proper use of third-party intellectual property. Always accurately depict third-party marks and avoid expressing or implying an affiliation or sponsorship if it does not exist.
- Review relevant law and regulations. For sporting events, big entertainment spectacles and the like, check to see if there are specific laws enacted that address the use of certain brands, slogans or logos.
- Educate employees on trademark and advertising do's and don'ts. Employee misuse of intellectual property and overly aggressive advertising can be devastating to a company, both legally and from a public relations perspective.
- Recognize that some names, logos and comparisons may be off limits or severely limited due to statutory protection, general brand vigilance (and quality control), and independent marketing plans.
- Ensure that all advertising and marketing is truthful, can be substantiated, and is not misleading. Maintain a file of your claim support materials.
- Identify and analyze any specific laws and regulations relevant to the underlying product or service being advertised and ensure that the advertisement is appropriately tailored.
- Obtain proper permits, approvals and any other third-party consents before engaging in "in-person" advertising.
- Beware of "associative" advertising imagery and language, and know when to have it reviewed.
- Understand affiliate and other relationships of the rights holder with third-party vendors and potential business affiliates.
- Obtain appropriate comprehensive advertising and marketing insurance.
- Continually ensure that advertising and marketing is up-to-date and that claim support files are updated accordingly.

While no list of suggestions can cover every detail and legal pitfall, the above recommendations, if followed, should help minimize the risk of engaging in unlawful marketing and advertising when creating an association with another.

For those seeking to protect their sponsorship or brands, there are options. For those licensing rights, ensure that sponsorships include rights to block competitors, and include business terms that address the impact of third-party ambush marketing. Moreover, rights holders may have actionable false advertising claims based on the federal Lanham Act (15 U.S.C. § 1125(a)) if the marketing creates a likelihood of confusion as to the source, sponsorship, affiliation, or endorsement of the product.

A basic understanding of the legal parameters of ambush marketing and the use or association with someone else's trademarks or activities in advertising will assist you in conveying your marketing message, while minimizing your company's exposure to liability risks.

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CFPB Watch

January 6, 2012

Consumer Financial Protection Bureau Starts Nonbank Supervision Program

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On January 5, 2011, the Consumer Financial Protection Bureau ("CFPB") launched the first federal nonbank supervision program. "We will begin dealing face-to-face with payday lenders, mortgage servicers, mortgage originators, private student lenders and other firms that often compete with banks but have largely escaped any meaningful federal oversight," said Richard Cordray the newly appointed director of the CFPB.

Coverage of the Nonbank Supervision Program

Under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), a "nonbank" is a company that offers or provides consumer financial products or services but does not have a bank, thrift, or credit union charter. Nonbanks include companies such as mortgage lenders, mortgage servicers, payday lenders, consumer reporting agencies, debt collectors, credit counseling agencies, and money services companies.

The CFPB's nonbank supervision will begin in phases. With a director appointed, the CFPB has the authority to oversee nonbanks, regardless of size, in certain specific markets: mortgage companies (originators, brokers, and servicers including loan modification or foreclosure relief services); payday lenders; and private education lenders.

For other markets, the Dodd-Frank Act also provides that that the CFPB can supervise nonbank "larger participants." Last summer, the CFPB sought public comment to develop an initial rule, identifying six possible markets for consideration: (1) debt collection; (2) consumer reporting; (3) prepaid cards; (4) debt relief services; (5) consumer credit and related activities; and (6) money transmitting, check cashing, and related activities. The CFPB has until July 21, 2012 to issue final rules identifying "larger participants." The agency also has authority to supervise any nonbank that it determines is posing a risk to consumers.

The CFPB's Approach to Nonbank Supervision

According to the CFPB, its nonbank supervision program "is designed to ensure that nonbanks comply with federal consumer financial laws and it is designed to assess risk to consumers arising from these businesses."

Features of the nonbank supervision program include conducting individual examinations and may also include requiring reports from businesses to determine what businesses need greater focus. The agency has said that "how often and to what degree the examinations are performed will depend on CFPB's analysis of risks posed to consumers based on factors such as the nonbank's volume of business, types of products or services, and the extent of state oversight."

For several months now, the CFPB has been hiring supervision and examination staff from state and federal bank and financial services regulatory agencies. Supervision staff will be reporting to regional offices in San Francisco, Chicago, Washington, D.C., and New York.

Challenges for Nonbank Providers of Consumer Financial Product and Services

The launch of the CFPB's nonbank supervision program has significant implications for legal and regulatory compliance and raises a number of new challenges for providers of consumer financial products and services. Nonbanks and their service providers will need to consider such issues as:

- The business's compliance with federal consumer financial laws for the entire life cycle of the product or service, including how a product is developed, marketed, sold, and managed;
- Examiners may conduct interviews with personnel and observe the business's operations; and
- Under Dodd-Frank there are significant whistleblower protections and the CFPB is actively soliciting tipsters to

report potential violations of federal consumer financial laws.

In addition, the agency has said that "one important component examiners will be looking for is the nonbank's internal ability to detect, prevent, and remedy violations that may harm consumers."

The CFPB generally plans to inform nonbank consumer financial product and service providers of an upcoming evaluation and, when necessary work with the company to seek corrective actions. But, the agency has warned that, when necessary, "examiners will coordinate and work closely with CFPB's enforcement staff to bring appropriate legal actions to address harm to consumers."

Preparing for a Regulatory Examination

Nonbanks are now faced with the challenge of demonstrating compliance with federal consumer financial laws to the CFPB. Preparing for a regulatory examination by the federal government can be an extraordinary undertaking. To reduce and avoid surprises, nonbanks must understand the CFPB examination mindset and prepare for a broad range of scrutiny. In order to help reduce the risk of legal exposure, nonbanks should continuously assess their compliance with consumer financial laws, strengthen their compliance policies and processes to ensure that violations do not occur, and if necessary, remedy any potential violations.

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January 9, 2012

FTC Report Highlights Lead Generation Dangers

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A Federal Trade Commission ("FTC") report recently submitted to Congress on the use of the Do Not Call Registry (the "Registry") by businesses and consumers highlights the dangers in misuse of telemarketing leads. According to the FTC, "marketers claiming a business relationship have improperly placed telemarketing calls to consumers after acquiring the consumers' telephone numbers from others." Only in certain circumstances would calls by third- party marketers be permitted to telephone numbers on the Registry after acquiring the number from a lead generator.

Under the FTC's Telemarketing Sales Rule ("TSR") National Do Not Call provisions a company may call a consumer with whom it has an "established business relationship" even if the consumer's number is on the Registry. However, according to the FTC, "telephone calls from telemarketers to phone numbers provided by lead generators generally do not fall within the established business relationship exception because, while the consumers may have a relationship with the lead generator, they do not have an established business relationship with the seller who has purchased the leads."

Except in limited circumstances, the FTC's rules generally do not allow a seller to claim that it has a relationship with the consumer such that it can ignore the consumer's request to not receive telemarketing calls. The FTC report put a spotlight on several enforcement actions that resulted in businesses that made telephone calls to consumers on the Registry after acquiring the consumers' names from a lead generator being forced to pay civil penalties to settle charges that their calls violated the TSR.

For example, the FTC reported that in one case a '"lead generator' collected information on consumer interests through web advertising, by offering coupons or samples, or simply by 'cold calling' consumers in order to determine whether the consumer has any interest in a particular product or service, such as debt relief or home alarms." According to the FTC, the "[l]ead generators responsible for these so called 'call verified leads' often fail to remove numbers listed on the Registry before calling consumers."

The FTC report also details how "some telemarketers and sellers have acquired leads from lead generators and used them in telemarketing campaigns without screening the numbers called to remove numbers listed on the Registry. In this way, a single sales pitch can produce multiple illegal calls, generating one or more calls from both the lead generators and the telemarketer."

The FTC's enforcement actions and investigations into the activities of telemarketers and their vendors, including lead generators, highlights the ongoing focus by the FTC into the practices of anyone that sells or buys leads.

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CFPB Watch

December 2011

Consumer Financial Protection Bureau Opens Whistleblower Complaint Hotline

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The Consumer Financial Protection Bureau (the "CFPB") recently went live with a telephone hotline and email address for tipsters and whistleblowers with information about potential violations of federal consumer financial laws, with an online tips portal to be launched early in 2012. "Tips will help inform Bureau strategy, investigations, and enforcement," said Richard Cordray, Assistant Director of Enforcement for the CFPB.

The Consumer Financial Protection Act (the "CFPA"), Title X of Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), enacted strong anti-retaliation protections for employees of consumer financial product and service companies who are retaliated against for disclosing information concerning fraudulent or unlawful conduct relating to a consumer financial product or service.

The protections apply to a wide range of employers from banks to nonbank financial service providers, such as organizations that extend credit, mortgage lenders and servicers, providers of financial advisory services, consumer reporting agencies, money transmitters, providers of prepaid cards, payday lenders, credit counselors and debt settlement providers, and debt collectors.

Key Elements of the Anti-Retaliation Protections

Section 1057 of the Dodd-Frank Act prohibits banks and other consumer financial services providers from retaliating against an employee for providing information to an employer, a regulatory agency, or law enforcement agency about a reasonably perceived violation of a federal consumer financial law or a regulation of the CFPB. Under the CFPA, the term "federal consumer financial law" is broadly defined to include, among other things, Title X of the Dodd-Frank Act itself, which prohibits unfair, deceptive, or abusive acts and practices in connection with consumer financial products and services, and several "enumerated consumer laws" and their implementing regulations.

The consumer financial products and services whistleblower provisions protect "any individual performing tasks related to the offering or provision of a consumer financial product or service" who engages in certain whistleblowing activities.

Protected activities by an employee include:

- Providing information to the employer, the CFPB, or any other government or law enforcement agency about an act or omission the employee reasonably believes is in violation of the CFPA, or any other law or rule subject to the jurisdiction of the Bureau;
- Testifying in any proceeding resulting from the enforcement of the CFPA or any other provision of law subject to the CFPB's jurisdiction;
- Instituting any proceeding under any federal consumer financial law; and
- Objecting to, or refusing to participate in, any action the employee reasonably believes to be in violation of any law or rule subject to the CFPB's jurisdiction.

Employees that believe they have been discharged or discriminated against in violation of this whistleblower provision have 180 days from the date of the alleged retaliation to file a complaint with the U.S. Department of Labor ("DOL"). The DOL is authorized to investigate these complaints and order the appropriate relief upon finding that a violation has occurred. The DOL has up to 210 days after the date a complaint is filed to issue a final order, otherwise the claimant can bring a suit in federal district court.

Available remedies may include:

- An order requiring the employer take affirmative action to abate the violation;
- Reinstatement;

- Compensation, including back pay;
- Compensatory damages; and
- At the complainant's request, reimbursement of all costs and expenses (including attorney's fees and expert witness fees) reasonably incurred.

These rights and remedies cannot be waived by any agreement, policy, form, or condition of employment. In addition, this whistleblower provision prohibits mandatory arbitration of a dispute arising under this provision.

Challenges for Providers of Consumer Financial Products and Services

The consumer finance whistleblower protections have significant implications for legal and regulatory compliance and raise a number of challenges for providers of consumer financial products and services. Covered employers will need to consider such issues as:

- How to maintain legal and regulatory compliance with consumer financial protection laws and regulations;
- How to ensure that, to the extent there is a violation of consumer financial protection law or regulations, an employee will take advantage of internal reporting mechanisms as opposed to bypassing such mechanisms and going straight to the CFPB;
- How to conduct internal investigations without encouraging whistleblowers; and
- How to successfully mediate any problems discovered.

Steps to Help Minimize the Risk of Whistleblower Lawsuits and Related Enforcement Actions

The spotlight that the CFPB has placed on soliciting whistleblowers adds an additional layer of exposure to a continually evolving legal and regulatory landscape for providers of consumer financial products and services.

As a result, covered employers should review existing training, compliance, and audit functions and programs. The stronger the compliance policies and practices are, the less likely there will be legal and regulatory violations in the first place. It also will be critical to stay up-to-date on the latest regulatory and enforcement developments related to federal consumer financial laws. In addition, the implementation and strengthening of internal reporting mechanisms such as hotlines that are easily accessible, and the prompt investigation of internal complaints should help to curb complaints to the CFPB. Finally, in light of the potential for a private lawsuit, covered employers should review all anti-retaliation policies and procedures to ensure they expressly encompass whistleblowing activity.

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VENABLE® LLP

Avoiding Internet Advertising and Recruitment Pitfalls

Association of Private Sector Colleges and Universities
November 17, 2011, 1 pm – 2 pm ET
Webinar

Jonathan L. Pompan, Esq.
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Venable LLP, Washington, DC

Agenda

- Introduction
  - Legal framework for advertising and marketing
- DoE Misrepresentation Rule
- Additional Sources of Advertising Law & Regulation
- Complying with Advertising & Marketing Laws
- Sources of Additional Guidance
- Questions and Answers
- *This program is approved for MCLE in New York. Credit in Virginia is pending. Stay tuned for the CLE Code.*

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This presentation does not represent any undertaking to keep recipients advised as to all or any relevant legal developments.

This presentation will be available on the APSCU website and at www.venable.com/leads/publications starting on Friday, November 18, 2011

 2

How we got here…

- Postsecondary institutions must communicate full, accurate and complete information in their Internet advertising and other student recruitment efforts.
- A strong grasp of advertising and marketing law is critical in order to avoid pitfalls and costly missteps.

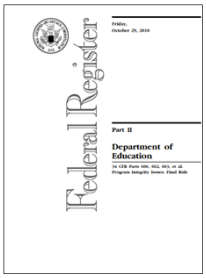
The Misrepresentation Rule

Background (cont'd)

- The HEA permits the DoE to suspend or terminate from participation in Title IV programs an institution that engages in "substantial misrepresentation of the nature of its educational program, its financial charges, or the employability of its graduates."
- Significant changes to the Misrepresentation Rule:
  - Broadened definition of misrepresentation
  - Codified policy of holding institution responsible for vendors
  - Expanded DoE's remedies

Background

- Section 487 of the HEA provides that institutions participating in the Title IV, HEA programs shall not engage in substantial misrepresentation of the nature of the institution's educational program, its financial charges, or the employability of its graduates.
- The DoE amended its Institutional Eligibility regulations, including the "Misrepresentation Rule" in 2010 (after more than 25 years)
- Effective: July 1, 2011



What Does the Misrepresentation Rule Cover?

- The new Misrepresentation Rule makes the institution responsible for ***substantial misrepresentations*** by the institution itself, a representative of the institution, ***or any person or entity with whom the institution has an agreement to provide educational programs, marketing, advertising, recruiting or admissions services.***
- The rule prohibits ***substantial misrepresentations*** "in all forms, including those made in any advertising, promotional materials, or in the marketing or sale of courses or programs of instruction offered by the institution."
- The rule contains lengthy examples of misrepresentations relating to the nature of an educational program, the nature of an institution's financial charges, and the employability of graduates.

What is the Definition of "Substantial Misrepresentation"?

- Misrepresentation means "[a]ny false, erroneous or misleading statement" that the institution, a representative of the institution, or a covered service provider makes "directly or indirectly" to a student, prospective student, a member of the public, an accrediting agency, a state agency, or DoE.
- "A misleading statement includes any statement that has the likelihood or tendency to deceive or confuse."
- Substantial - If a person to whom the misrepresentation was made "could reasonably be expected to rely, or has reasonably relied," on the misrepresentation.

The Consequences of Substantial Misrepresentations

- In the event of a substantial misrepresentation, the Misrepresentation Rule authorizes DoE to:
  1. Deny applications by the institution; for example, to add locations or programs;
  2. Initiate proceedings to fine an institution or limit, suspend, or terminate its participation in Title IV programs; or
  3. Revoke a provisionally certified institution's participation in Title IV programs.

A Closer Look - "*Substantial* Misrepresentation"

- Misrepresentation on which the person to whom it was made could reasonably be expected to rely, or has reasonably relied, to that person's detriment.
- Does not require proof that person actually relied on the misrepresentation.
- Does not require proof of actual injury.

Three Categories of Examples of Misrepresentations

Any false, erroneous or misleading statement related to…

- **Nature of educational program**
  - Transferability of course credits
  - Size, location, facilities
  - Number, availability and qualifications of faculty
  - Whether completion of course qualifies student for acceptance to a labor union or to receive a license or certification
  - Availability, frequency, appropriateness of courses to the employment objectives that program designed to meet
- **Nature of financial charges**
  - Scholarship offers
  - Refund policy
  - Availability or nature of financial assistance
- **Employability of graduates**
  - Institution's relationship with any organization or employment agency
  - Current or future conditions, compensation or employment opportunities
  - Government job market statistics

Other Sources of Advertising and Marketing Law and Regulation

Federal Trade Commission Act

- **FTC pursues deceptive practices under Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45 *et seq.*:**
  - Section 5 gives the FTC broad authority to prohibit "unfair or deceptive acts or practices"
  - Section 13(b) authorizes FTC to file suit in United States District Court to enjoin any act or practice that is in violation of any provision of law enforced by the FTC
- **Enforcement against unfair or deceptive practices**
  - Not required to prove actual deception
  - Wide array of remedies: civil penalties, injunctions, restitution, corrective advertising

Enforcement of Advertising and Marketing Laws

Other agencies, entities, and consumers also can enforce various laws and standards that guard against misrepresentation.

Back To Basics

- Advertising must be truthful and not misleading.
  - Literally false claims are actionable without additional proof.
- Advertisers must have evidence to back up their claims ("substantiation").
  - Substantiation is required for any objective, provable claims (express or implied) made about a product or service in the ad.
- Advertisements cannot be unfair
  - An ad is unfair if it causes harm to consumer that is not outweighed by overall benefit to consumers or competition

Claims Substantiation

- Need a reasonable basis for claims made in advertisements concerning characteristics or efficacy of a service
- Claims purporting to provide a quantifiable result held to higher standard

Endorsements & Testimonials

- FTC Guides Governing Endorsements & Testimonials
  - No longer can simply include a typicality disclaimer on testimonials that report extraordinary results
    - Need substantiation that the endorser's experience is typical
    - Otherwise, must disclose generally expected results
  - Utilize actual customers or clearly disclose otherwise
  - Disclose material connections between advertisers and endorsers

Disclosures & The "Four P's"

- Disclosures must be "***clear and conspicuous***"
  - Prominence
  - Presentation
  - Placement
  - Proximity
- What is the overall net impression?

FTC Guides for Private Vocational and Distance Educational Schools

- Target privately owned schools that offer courses, training or instruction purporting to prepare or qualify individuals for employment.
- Do not apply to institutions of higher education offering at least a 2-year program of accredited college level studies.
- Prohibit following practices
  - Use of deceptive name or designation
  - Misrepresentation of extent or nature of accreditation of school or course
  - Misrepresentation of facilities, services, qualifications of staff and employment prospects
  - Misrepresentation of enrollment qualifications or limits
  - Failure to disclose prior to enrollment total cost of the program and refund policy
  - Failure to disclose all requirements for completing program

Email Marketing & Complying with the CAN SPAM Act

- **Do not use false or misleading header information.**
- **Do not use deceptive subject lines.**
- **Identify the message as an ad.**
- **Provide a valid postal address.**
- **Tell recipients how to opt out of receiving future email.**
- **Honor opt-out requests promptly.**
  - opt-out mechanism must be able to process opt-out requests for at least 30 days after you send your message.
  - must honor a recipient's opt-out request within 10 business days.
- **Monitor what others are doing on your behalf.** The law makes clear that even if you hire another company to handle your email marketing, both the company whose product is promoted in the message and the company that actually sends the message may be held legally responsible.

Private Litigation

- Mini-FTC Acts/Unfair & Deceptive Acts or Practices (UDAP)
- Federal Lanham Act
- State mini-Lanham Acts
- CAN SPAM
- *Qui tam* action under False Claims Act
- Common Law

State Regulation of Advertising & Marketing

- Consumer Protection Acts (Mini-FTC Acts).
  - States have adopted mini- "FTC Acts" that prohibit unfair and deceptive practices
  - States typically follow FTC precedent
  - Frequently Broader Jurisdiction
  - Enforcement by State Attorneys General and Private Litigants (most states)

Complying with Advertising & Marketing Laws

General Best Practices

- Legal Audit.
- Establish and implement an internal compliance policy.
- Design recruiting and marketing materials to comply with FTC and State laws governing deceptive practice and DoE's. Misrepresentation Rule.
- Require recruiting and marketing materials to undergo pre-publication review.
- Use due diligence and contracts with advertisers and marketing contractors and consultants.
- Require pre-approval of all recruiting and marketing materials.
- Monitor advertisements disseminated by marketing contractors.

FTC Crackdown on Affiliate Advertising and Lead Generation

- *Against the advertiser*: In March, a company selling guitar-lesson DVDs agreed to pay $250,000 to settle FTC charges that it deceptively advertised its products through online affiliate marketers who falsely posed as ordinary consumers or independent reviewers.
- *Against affiliates:* In April, the FTC filed 10 lawsuits in federal district court for using fake news websites to market acai berry weight-loss products. FTC asked the courts to permanently bar the allegedly deceptive claims, and to require the companies to provide money for refunds to consumers who purchased the supplements and other products.

Know Your Lead Source

- Qualifications of Vendors/Customers
  - Who are you buying from?
  - Who are they selling to?
  - Where did the lead originate from?
  - What was said to solicit the lead?
- Qualification Procedures
  - Develop a qualification program
  - Develop standard operating procedures
  - Reporting and audit processes
  - Legal protections in your contracts

Recommendations for Contract Provisions

- Right to pre-approve all publicly-disseminated recruiting and marketing materials (including modifications to such materials).
- Legal compliance with all laws, specifically consumer protection laws and the DoE misrepresentation rule.
- Prohibition of compensation of employees and subcontractors based on the number of students enrolled.
- Indemnification provisions.
- Pre-approval of subcontractors and affiliates.
- List of prohibited traffic sources.
- Monitoring and review.

Additional Sources of Information

Questions and Answers

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For additional information on this and related advertising and marketing topics, see www.Venable.com/leads/publications.

Selected Sources for Additional Information

- The Misrepresentation Rule, 34 C.F.R. § § 668.71-75.
- U.S. Department of Education, *Dear Colleague Letter re Implementation of Program Integrity Regulations*, GEN 11-105 (Mar. 17, 2011).
- APSCU *Guidance for Association of Private Sector Colleges and Universities Members – The Misrepresentation Rule and Third-Party Vendors.*
- The FTC has published a number of guidance documents on various areas of advertising and marketing law and regulation. These guides are available on the FTC website.

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Articles

November 17, 2011

Lead Generation through Mobile Marketing: Legal and Regulatory Realities

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A recent enforcement action taken by the Federal Trade Commission ("FTC") to shut down a marketer using text messages highlights the need to be mindful of the law and regulations that govern mobile marketing. On February, 23, 2011, the FTC asked a federal judge to shut down an operation that allegedly blasted consumers with millions of illegal spam text messages. Although the case is many respects a "run of the mill" spam case, what makes this case unique is the services promoted were not those of the sender. Rather, the messages were sent by a lead generator and offered loan modification assistance, debt relief, and other services. The FTC is asking the court to freeze the defendant's assets with charges that he violated the FTC Act and the CAN-SPAM Act – a law that sets the rules for commercial email.

With the rapid proliferation and use of mobile communication devices, mobile marketing is an effective means of capturing the eyes and ears of the consuming public; however, it is a regulated media and has come under scrutiny. Mobile marketing has at times outpaced regulation, but lawmakers have enacted laws to keep pace with innovation, and federal and state consumer protection agencies and private plaintiffs have stepped-up enforcement. Companies seeking to generate or purchase leads from mobile devices must be cognizant of the regulatory – and self-regulatory – landscape governing mobile marketing.

The lead generation industry has always been on the cutting edge of marketing and promotional strategies and practices. Here are some tips on legal considerations for lead generators using mobile marketing to help avoid the issues in the enforcement action discussed above:

Federal Laws

The FTC and the Federal Communications Commission ("FCC") are the primary federal agencies regulating mobile marketing. Like any advertising and marketing, mobile marketing is subject to the FTC Act and its prohibition on unfair and deceptive advertising and marketing.

The FTC's Telemarketing Sales Rule ("TSR") prohibits prerecorded marketing calls to consumers without the call recipients' prior express written agreement. Under the TSR, prerecorded marketing calls must make certain disclosures and provide a specific type of opt-out mechanism that the call recipient can use to be placed on the marketer's internal do-not-call list. These consent, disclosure, and opt-out requirements apply regardless of whether a marketer has an existing business relationship with the called party.

FCC regulations under the Telephone Consumer Protection Act prohibit all calls to wireless devices made using an automatic telephone dialing system or an artificial or prerecorded voice, unless the caller has obtained the called party's prior express consent or there is an emergency situation. The FCC has proposed to harmonize its regulations regarding prerecorded calls with the FTC's rules.

The FCC and courts have stated that the FCC's rules regarding calls to wireless devices apply to both voice and text calls, including short message service ("SMS") calls and text messages sent internet-to-phone or internet-to-phone. FCC regulations also apply to Mobile Service Commercial Messages (MSCMs) – which essentially are email messages sent to an email address on an Internet domain of a wireless carrier. Most wireless carriers maintain an Internet domain name that can be used to send MSCMs to the wireless devices of users on their networks. MSCMs that are ultimately delivered to wireless devices may be considered "calls" under applicable FCC regulations restricting calls to wireless devices when the calls are sent using an automated system or prerecorded or artificial voice.

FTC and FCC Do Not Call Rules prohibit marketers from making telephone solicitation calls to any residential telephone number, including any non-business wireless number, that is registered on the National Do Not Call ("DNC") Registry, unless the consumer has provided express written consent to be called or the marketer has an established business relationship with the call recipient. To help avoid placing a marketing call to numbers listed in the national DNC Registry, marketers should first "scrub" their outbound calling lists against the national DNC Registry to remove any names that appear on the list. Marketers can access the DNC Registry, for a fee, through the FTC. In fact,

federal DNC rules require that marketers check the DNC Registry for updates once every 30 days and that marketers scrub their lists against the list within 31 days of making any solicitation. Companies marketing by phone must also maintain a company-specific DNC list, which must include consumers who requested not to receive future marketing calls from the company.

Identifying wireless numbers can be difficult. Local number portability ("LNP") allows subscribers to transfer (i.e., "port") their wireline numbers to wireless devices and vice versa, which can make it difficult for marketers to identify recently ported numbers. The FCC has created a safe harbor for marketers who unknowingly call a wireless number that has been ported from a wireline service within 15 days prior to the date of the call. Moreover, a division of the Direct Marketing Association offers the Wireless-Ported Numbers File, which updates the list of ported numbers on a daily basis. Marketers can use the Wireless-Ported Numbers File on a regular basis so that, in the event the marketer has taken appropriate steps to avoid calling wireless numbers but inadvertently places calls to one or more wireless numbers, the marketer can take advantage of the FCC's safe harbor.

In addition, the federal Controlling the Assault of Non-Solicited Pornography and Marketing Act ("CAN-SPAM Act") applies to commercial email messages, including text messages, SMS, and MSCMs, sent to an address that includes a domain name posted on the FCC's wireless domain list for at least 30 days before the message is sent. This list is available on the FCC's website. The CAN-SPAM Act prohibits sending commercial email messages to wireless devices unless the recipient has provided prior express authorization to receive such messages from the sender. This authorization may be obtained orally or in writing. Any prior express authorization given by consumer will be interpreted narrowly. It will not necessarily be extended to affiliates or partners, and authorization given to the sender of a message does not entitle the sender to disseminate messages on behalf of third parties. Further, a consumer's prior express authorization for one type of email/text message does not necessarily provide consent for other types – for example, consenting to news updates is not the same as consenting to receiving electronic coupons. The CAN-SPAM Act also requires that all commercial emails include certain specific disclosures and provide a mechanism by which consumers can opt out of receiving future commercial emails from the marketer. The statute also prohibits commercial emails that contain false or misleading subject lines or "header" information; header information includes the source, destination, and routing information attached to an email, as well as the originating domain name and originating email address, and the "from" line.

In addition to federal laws that specifically regulate mobile marketing, lead generators should be aware of broader advertising and marketing laws, including the Federal Trade Commission Act – which prohibits deceptive or unfair commercial acts and practices – and the FTC's Mortgage Assistance Relief Services Rule – which applies to those who offer mortgage relief services, including lead generators in that space.

State Laws

States have various laws applicable to mobile marketing, including laws governing telemarketing, email marketing, and advertising generally. States have brought enforcement actions against companies engaging in mobile marketing for alleged violations of applicable laws. The Florida Attorney General's Office in particular has been very active in the mobile marketing area. In May 2008, the Florida Attorney General's Office announced that it was developing a "zone system" intended to dictate where material terms should be disclosed in an advertisement sent to mobile devices. In addition, many state laws may be enforced by individual consumers and through class-action litigation, which for some plaintiff's attorneys has created an entire cottage industry.

Industry Standards

Several industry groups have adopted guidelines for mobile marketing that require compliance with the applicable federal laws and recommend standards for mobile marketing practices in specific areas. The main principle among industry standards, as well as pertinent laws, is that consumers should have choice as to the marketing content that they receive. In other words, marketing messages generally should be delivered to consumers only if they have consented to receiving such communications.

Among the industry organizations that have established standards for mobile marketing is the Mobile Marketing Association, whose *Consumer Best Practices Guidelines* and other guidance documents set forth both best practices for a wide range of mobile marketing activities, including, among other things, obtaining consumer consent, disclosing terms and conditions of an offer, and sweepstakes and contests offered through mobile ads. The Direct Marketing Association's *Guidelines for Ethical Business Practice* provide comprehensive guidelines for ethical and legal conduct for various types of direct marketing, including mobile marketing. The CTIA – The Wireless Association also has guidelines relating to mobile marketing, although its guidelines primarily address the obligations of wireless carriers.

* * * * * *

Mobile marketing presents lead generators and lead purchasers with opportunities to directly reach consumers wherever they may be – on the go, at home, at the office, etc. As such, marketing to mobile devices can help a company accumulate leads at profitable conversion rates. But mobile marketing is not without legal risks. Lead generators should be mindful of the regulatory "lay of the land" to help effectively mitigate such risks and protect their business interests.

* * * * * *

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This article is not intended to provide legal advice or opinion and should not be relied on as such. Legal advice can only be provided in response to a specific fact situation.

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Buying Smart / Selling Smart – The 10 Biggest Legal Pitfalls in Lead Generation

LeadsCon East
July 26, 2010, 10:15 – 10:45 am ET
Marriott Marquis, New York, N.Y.

Jonathan L. Pompan, Esq.
Venable LLP, Washington, D.C.

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Agenda for Today

- Introduction:
  - Legal Framework for Advertising and Marketing
  - Legal Issues – "Similar Issues, New Platforms"
- Top Ten Legal Pitfalls
- Wrap-Up

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#1: Failing to Consider the Legal Implications of a Particular Advertising Campaign

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#1: Failing to Consider the Legal Implications of a Particular Advertising Campaign

- Advertising and Marketing Liability
  - Federal Trade Commission Act
  - State "mini-FTC Acts"
  - Medium Specific Statutes (e.g., CAN-Spam Act, Telemarketing Sales Rule)
  - FTC Guidance (e.g., Endorsements and Testimonials)
  - New Bureau of Consumer Financial Protection / Consumer Financial Protection Act of 2010 JUST PASSED
- Copyright and Trademark Ownership/Infringement
- Complying with Terms of Social Media and Online Platforms
- Mobile Marketing / Payments
- Vertical Specific Federal and State Laws and Regulations
  - *e.g.*, debt relief, mortgage, edu, payday, health and beauty, etc.
- Sweepstakes, Contests, and Other Promotions

#2: Ignoring the Basics of Advertising Law

Federal Trade Commission Act – Some Basics

- Sections 5 & 12 of the FTC Act:
  - "Unfair or deceptive acts or practices in or affecting commerce are hereby declared unlawful."
  - "It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement . . . by any means . . . for the purpose of inducing . . . directly or indirectly, the purchase . . . of food, drugs, devices, services, or cosmetics."
  - "The dissemination or the causing to be disseminated of any false advertisement . . . shall be an unfair or deceptive act or practice . . . under section 5."
- Deceptive Advertising
  - If it contains a representation or omission of information
  - that would be material to consumers
  - and that would mislead consumers acting reasonably under the circumstances.
- Unfair Advertising
  - If it is likely to cause substantial consumer injury [physical or economic]
  - That is not reasonably avoidable by consumers themselves
  - And is not outweighed by benefits to consumers or competition.

The Basics of Advertising Law (cont'd.)

- All express/implied claims that reasonable consumers take from ad must be truthful and not misleading
- Ad may be literally truthful yet still deceptive
- Ad may be deceptive by omission
  - BEFORE running ad, advertisers must have "competent and reliable scientific evidence" to support all health/safety/ efficacy claims.
  - Fine-print disclosures won't cure an otherwise deceptive ad!
  - If disclosure needed to prevent ad from being deceptive, must be "clear and conspicuous," effectively convey correct net impression.
- Health and Beauty Claims / Children's Advertising Get Special Treatment
- Additional sources: FTC Telemarketing Sales Rule, Guidelines and Enforcement Actions

#3: Not Recognizing the Legal Risks and Consequences of Noncompliance

#3: Not Recognizing the Legal Risks and Consequences of Noncompliance

- Consequences of Unfair and Deceptive Advertising and Marketing Practices
  - Cease and desist orders with 20-year reporting requirements
  - Refunds for consumers
  - Bans and bonds
  - Informational remedies, such as disclosures in future ads or corrective advertising
- Commercial Disputes

The FTC and State Attorneys General Are Taking Notice

- FTC first sued affiliates directly in May 2009, alleging that defendants purchased "sponsored links" that appeared on results pages of Internet search engines when consumers search for "making home affordable." Defendants' ads, which prominently displayed the full govt. URL "www.MakingHomeAffordable.gov," then appeared among the search engines' results.
- Consumers who clicked on ads were not directed to govt. program site, but were diverted to sites that sell paid loan modification services. These commercial sites, not affiliated with govt., required consumers to enter personally identifying and confidential financial info, and then either offered loan modification services or sold consumers' information to companies that market them.
- Although FTC did not name these commercial loan modification websites as defendants or allege they were engaged in deception, it did allege that the affiliate defendants were attempting to defraud homeowners trying to use the govt. site, by falsely implying through search results that visitors were being sent to the govt's website.
- Several recent enforcement actions only underscore perils of affiliate marketing: various state AGs have cited lead generation in their latest actions against online promotions, and these may be followed by other AG actions against merchants, affiliates and/or networks that engage in deceptive advertising or knowingly assist and facilitate it.

#4: Ignoring the Law Specific to the Vertical

#4: Ignoring the Law Specific to the Vertical

- **Debt Relief Services**
  - Unprecedented Enforcement Focus by FTC, states Attorneys General and private plaintiffs against fraudulent companies
  - FTC Rulemaking to Amend the Telemarketing Sales Rule to Address Debt Relief Services
  - State Debt Adjusting Statutes
  - State Credit Services Organizations Acts
  - Industry Guidelines (e.g., AICCCA, TASC, USOBA)
- **Mortgage**
  - Real Estate Settlement Procedures Act
  - State Mortgage Brokerage and Loan Origination Statutes
  - State Mortgage Foreclosure Consultant Acts (i.e., loan modification)
- **Education**
  - Incentive Compensation
  - Gainful Employment
  - Disclosures
  - Industry Guidelines
- **Payday Lending**
- **Health and Beauty / Nutritional Supplements**
- **Auto Service Warranties**
- **Insurance**
- **and More…**

#5: Not Knowing Your Lead Source

How to avoid not knowing your lead source…

- Qualification of Vendors/Customers
  - Who are you buying from?
  - Who are selling to?
  - Where did the lead originate from?
  - What was said to solicit the lead?
- Qualification Procedures
  - Develop a Qualification Program
  - Develop a Standard Operating Procedures
  - Reporting and Audit
  - Legal Protections (e.g., terms and conditions, legal review)

#6: Calling a Consumer on the "Do-Not-Call" List Without Permission

The Telemarketing Sales Rule's "Do-Not-Call" List and Lead Generation

- National Do-Not-Call Registry is Managed by the FTC
- It is a violation of the Telemarketing Sales Rule to initiate any outbound telemarketing call to a person when that person's telephone number is on the National Do-Not-Call Registry unless the seller has an established business relationship ("EBR").
- The central issue is whether the exemption applies to a lender that initiates a telephone call to a consumer based on contact information the purchaser obtains from a lead generator.
- Whether there is an EBR depends on the actions of the lead generator.
- Entity Specific Requirements
- State Licensing May be Applicable
- FTC Enforcement Example:
  - In 2007, the FTC charged a leading mortgage company with improperly calling consumers on the DNC whose numbers had been obtained from third-party lead-generators.
  - Lead generator used Web sites that offered information on financial and other products.
  - The FTC's complaint stated that because consumers whose numbers were on the lead lists were not reaching out to the mortgage company in particular, the company had not developed an EBR with them, making calls to registered numbers illegal.
  - Company also allegedly also ignored consumers' requests to be placed on its entity-specific do not call list.
  - Matter settled for $1 million civil penalty and requirements that any lead generators it uses disclose to consumers, before they provide their contact information, that they will receive a phone call, the maximum number of sellers who may contact them, and, if possible, the identity of any seller that might call them as a result of their inquiry.

#7: Upsells/Cross Sells and Negative Option Marketing Require Careful Planning

#7 Upsells/Cross Sells and Negative Option Marketing Require Careful Planning

- Advance Consent Marketing
  - marketing plans where the consumer gives consent to receive and pay for goods or services in the future on a continuing or periodic basis, unless and until the consumer cancels the plan.
- Negative Option
  - offer or agreement to sell or provide any goods or services, a provision under which the customer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer.
- Chairman Rockefeller's (D-WV) Investigation
- Senate Commerce Hearing
- FTC's Prenotification Negative Option Rule Review
- FTC, State AG Enforcement & Legislation

#8: Contractual Relationships

#8: Contractual Relationships

- Written lead contracts typically include all sorts of provisions about ownership, exclusivity, payment, terms and legal liability.
- Sometimes the documents are standard and there is little opportunity for negotiation.
- Even when the main terms of the agreement are not negotiable there are certain key provisions that can work to everyone's favor.
- Have you considered what you're contractually liable for in the event of a dispute or a government investigation / enforcement action?

#9: Failure to Protect and Safeguard Private Information

#9: Failure to Protect and Safeguard Private Information

- The failure to not adequately protecting personally identifiable ("PPI") information that is governed under federal and state law.
- Purchasers need to take an interest in all promises that are given to consumers regarding their personal information throughout the lead generation process.
- Generally, such information would need to stay encrypted to at least industry-level standards all the way down the chain from generation to use.
- Don't ignore disposal issues, which may trigger certain legal requirements.
- Be cognizant of all promises that are given to consumers regarding their personal information throughout the lead generation process.
- Make sure any PPI stays encrypted to at least industry-level standards all the way down the chain from generation to use.
- Failing to protect PPI was one of the claims in the FTC ValueClick case that was settled for record amounts in 2008. The FTC charged that ValueClick and its subsidiaries Hi-Speed Media and E-Babylon provided online privacy policies which stated they encrypted consumer information but either the encryption was not up to industry standard or was not used at all.

#10: Endorsements and Testimonials Require Caution

#10: Endorsements and Testimonials Require Caution

- **FTC Guides for Endorsements and Testimonials**
  - Consumer Endorsements are interpreted as representing that the endorser's experience is representative of what consumers will generally achieve.
  - If the advertiser cannot substantiate that the endorser's experience is typical, the advertisement must clearly and conspicuously either:

    (a) disclose what the generally expected performance would be in the depicted circumstances; or

    (b) clarify the limited applicability of the endorser's experience.

FTC Guides for Endorsements and Testimonials (cont'd)

- **Expanded Liability**
  - Endorsers, as well as marketers, may be liable for statements made in the course of their endorsement.
- **The Death of the Disclaimer**
  - A statement by a consumer about his or her experience with the product is deemed to be a representation that other users of the product can expect the same experience.
  - Many marketers do not have the facts necessary to support such a claim so they merely state that the experience of the testimonial is unique and that "Your Experience Will Vary."
- **Disclosure of Connections: The New Frontier**
- **Social Media and Blogs**

The Top Ten…

#1: Failing to Consider the Legal Implications of a Particular Advertising Campaign

#2: Ignoring the Basics of Advertising Law

#3: Not Recognizing the Legal Risks and Consequences

#4: Ignoring the Law Specific to the Vertical

#5: Not Knowing Your Lead Source

#6: Calling a Consumer on the "Do-Not-Call" List Without Permission

#7: Upsells/Cross Sells and Negative Option Marketing Require Careful Planning

#8: Contractual Relationships

#9: Failure to Protect and Safeguard Private Information

#10: Endorsements and Testimonials Require Caution

FTC Guides for Endorsements and Testimonials (cont'd)

- Both advertisers and endorsers are potentially liable for statements disseminated through new media channels;
- The endorser is responsible for disclosing a material connections with an advertiser;
- Advertisers have a responsibility to advise endorsers of their disclosure obligations; and
- Advertisers should monitor an endorser's statements to ensure they comply with the Guides and take corrective actions if they are not.

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BY JEFFREY D. KNOWLES, JONATHAN L. POMPAN AND KRISTALYN J. LOSON

Avoid Legal Pitfalls in Cause-Related Marketing

Marketers are increasingly looking to affiliate with charities in cause-related marketing efforts, such as arrangements in which a charitable donation is built into the cost of purchase of a good or service. These partnerships provide the charitable organization with financial support and, at the same time, burnish the public image of its for-profit partner. The popularity of cause-related marketing has increased and with it has come increased regulation and scrutiny. As seen by the recent class-action lawsuit filed against Lady Gaga over charity wristbands for Japanese earthquake victims, good intentions are not enough to prevent scrutiny and legal trouble. Below we highlight a few of the key issues to be considered.

Commercial Co-Venturer Registration

Currently, more than 20 states regulate "commercial co-ventures," typically defined under state law as "arrangements between a commercial entity under which the commercial entity advertises in a sales or marketing campaign that the purchase or use of its goods or services will benefit a charity or a charitable purpose." While commercial co-venturer relationships come in many shapes and forms, the most common scenario involves a for-profit, taxable business using the name and logo of a charitable organization for the purpose of increasing sales of the for-profit entity's products or services while at the same time increasing revenue to the charity.

In some states, the commercial entity – often referred to as the "co-venturer" – is required to register with the state prior to the marketing of the commercial co-venturer relationship and must meet requirements such as posting a bond and filing financial reports with the state. In other states in which registration may or may not be required, specific recordkeeping requirements and/or mandatory contractual terms between the organization and the commercial co-venturer may be imposed. State statutes also may specify required disclosures for advertising the good or service and typically prohibit the commercial entity from making false or misleading statements in connection with a solicitation.

States have been particularly active in enforcing commercial co-venturer statutes and charitable solicitation laws in general. The Attorney General of each state generally holds enforcement power under these statutes, and fines for violations can be extremely significant. Some of these statutes also contain private rights of action, including, in some cases, allowing plaintiff's lawyers to bring class-action lawsuits on behalf of a large class of consumers, greatly increasing the risk and stakes for the marketers and charities that become targets of those suits. Therefore, it is important that marketers embarking on campaigns with charities consider state regulation of commercial co-ventures and plan for meeting registration, disclosure, filing and other applicable requirements before launching their campaigns.

Unfair and Deceptive Practices

In addition to potential state registration requirements, both the Federal Trade Commission Act (the "FTC Act") and state consumer protection statutes (often referred to as "mini-FTC Acts") prohibit unfair and deceptive trade practices, which include misrepresentations of material facts regarding an advertised product or service as well as omissions of information that would be material to a consumer's decision to purchase a product or service.

The FTC and state Attorneys General have collaborated on a number of actions to enforce the FTC Act and mini-FTC Acts against charities and fundraisers alleged to engage in deceptive marketing practices, including in cause-related marketing efforts. For example, the FTC has brought actions against companies alleged to have deceptively offered advertising space under the guise that it would benefit a law enforcement organization, sellers of household goods alleged to have been manufactured by disadvantaged workers, and a company selling children's activity books claiming to benefit children's hospitals.

In one well-known example, the Georgia Attorney General investigated a Yoplait yogurt campaign designed to benefit the Breast Cancer Research Foundation where the company advertised that it would make a contribution for each lid collected without revealing the agreed-to maximum total donation of $100,000. This investigation concluded with General Mills, the company behind the Yoplait campaign, paying an additional $63,000 to the Breast Cancer Research Foundation, representing the amount that would have been donated through the lid collection efforts of Georgia consumers. Although it does not appear one was initiated in this case, Georgia, like several other states, includes a private right of action for persons injured as a result of a violation of its charitable solicitation statute and also expressly permits class-action lawsuits, adding another level of risk for a cause-related marketing campaign.

As Lady Gaga discovered, claims of certain percentages going to charity often are closely scrutinized, by both government regulators and plaintiffs' lawyers. Therefore, marketers entering into ventures with charities should take care to look at their claims from every possible angle to ensure that, in seeking to increase donations to a worthwhile charitable cause, consumers are not misled. Marketers also should review marketing materials and make appropriate disclosures concerning applicable timeframes for campaigns and any caps on charitable contributions related to those campaigns.

Relationships with Charitable Organizations

Because charities are themselves subject to legal and regulatory requirements different from those governing for-profit enterprises, marketers are opening themselves up to some unique legal and relationship risks by launching cause marketing campaigns. Accordingly, marketers also should perform due diligence on potential partners when entering into any new commercial venture, and cause-related marketing efforts should be no different. Marketers should also consider adopting tailored contractual protections in their cause-related marketing agreements and obtaining appropriate insurance coverage. Together, these two steps can significantly reduce the marketers' legal exposure in the event its charitable organization partner is not in compliance with applicable state and federal laws.

The rise in popularity of cause-related marketing allows consumers another way to demonstrate their support of and contribute to worthy causes while purchasing products or services. While there are certainly some risks involved for both marketers and their charitable partners, both parties can avoid trouble if they perform sufficient due diligence, negotiate strong agreements and secure appropriate indemnifications. By taking the proper precautions to manage risks in these novel relationships, marketers and charities can to steer clear of legal pitfalls and create a win-win-win situation for themselves and for consumers. eR

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CFPB Watch

June 2011

CFPB Targets Nonbanking Consumer Financial Markets for Supervision

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On June 23, 2011, the Consumer Financial Protection Bureau ("CFPB") announced that it had targeted six nonbanking consumer financial markets– debt collection, consumer reporting, consumer credit, money transmission, prepaid cards, and debt relief services – that could be classified as "larger participants" and subject to supervision by the CFPB.

The CFPB's announcement, in the form of a Notice and Request for Comment ("Notice"), was made in preparation for an eventual rulemaking on a key element of the agency's nonbank supervision program: the statutory requirement to define who is a "larger participant" in certain consumer financial markets.

Under the Consumer Financial Protection Act (the "Act" or the "CFPA"), Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act – the CFPB must issue an initial "larger participant" rule no later than July 21, 2012, one year after the CFPB will be up and running. Once the scope of the nonbank supervision program is established, the operation of the program will be based on an assessment by the CFPB of the "risks posed to consumers in the relevant product markets and geographic markets."

The Act gives the CFPB authority to supervise, without regard to size, covered persons in the residential mortgage, private education lending, and payday lending markets. The Act authorizes the CFPB to require reports and conduct examinations of such companies.

Designation as a "larger participant" under this supervisory program would not impose new consumer law requirements on nonbank companies, as all companies, regardless of size, are required to comply with applicable federal consumer protection laws with respect to the products and services they provide.

The comment period closes 45 days after the publication of the Notice in the Federal Register. The Notice is available online at **www.consumerfinance.gov**, and contains information about how to submit responses.

A brief summary of the Notice and areas for comment follows.

CFPB Nondepository Supervision Authority

The CFPA charged the CFPB with ensuring that both banks and nonbanks comply with federal consumer financial laws. The CFPB is required under Section 1024 of the Act to implement a risk-based supervision program for certain nondepository covered persons.

The purposes of this supervision program are to: (1) assess nondepository covered persons for compliance with federal consumer financial law; (2) obtain information about such persons' activities and compliance systems or procedures; and (3) detect and assess risks to consumers and to the consumer financial markets.

The CFPB has said that in implementing this supervision program it may, among other things, require submission of reports and conduct onsite examinations of a covered person to assess the covered person's compliance with federal consumer financial law and achieve the other purposes described above.

Although the CFPB can require such entities to register, the Notice indicates that they intend to make such a decision in a separate rulemaking. The CFPB, however, has said that registration could help to support the implementation of the supervision program.

The Act authorizes the CFPB to supervise depository institutions and certain other entities that provide consumer financial products or services ("nondepository covered persons") and all sizes of nonbank (1) origination, brokerage, or servicing of residential mortgage loans secured by real estate, as well as related mortgage loan modification or foreclosure relief services; (2) private education loans; and (3)

payday loans. But, before the CFPB begins its nonbank supervision program in other markets, the Act requires that the agency first define by rule who is "a larger participant of a market for other consumer financial products or services."

Once the scope of the nondepository supervision program is established, the Act requires that the operation of the program be based on an assessment by the CFPB of the "risks posed to consumers in the relevant product markets and geographic markets." Under the Act, the factors to be considered in making this assessment include asset size, volume of transactions involving consumer financial products or services, risks to consumers, the extent to which institutions are subject to state supervision, and any other factor that the CFPB determines to be relevant.

Issues in Drafting a Rule to Define a "Larger Participant"

The CFPB seeks public comment on the issues presented in drafting a rule to define a "larger participant." The Notice presents a number of general questions for comment, although the CFPB has invited public comment on all issues relevant to the development of this proposal.

The general questions asked in the Notice for comment span three principal areas:

1. Criteria and Thresholds to Define a Larger Participant.
   - What criteria to use to measure a market participant.
   - Where to set the thresholds for inclusion.
   - Whether to adopt a single test to define larger participants in all markets (measure the same criteria and use the same thresholds), or instead use tests tailored for specific markets.
2. Data to Be Used in Measuring Criteria.
   - What data are available to be used for these purposes.
3. Measuring Dates and Supervision Timeframes.
   - What time period to use to measure the size of a market participant.
   - How long a participant should remain subject to supervision after initially meeting the larger participant threshold, even if subsequently falling below the threshold.
   - What consumer financial markets to include in the initial rule.

Consideration of Markets to Include in the Initial Rule

In addition, the CFPB solicits comment on whether the six categories identified in the Notice – debt collection, consumer reporting, consumer credit and related activities, money transmitting, prepaid cards, and debt relief services – should be covered in the initial rule, whether each particular category consists of a single market or multiple markets, and whether other markets also should be addressed. Although the CFPB anticipates including certain specified markets in an initial rule, additional markets may be added through subsequent rulemakings. The specific questions asked by the CFPB in the Notice are:

- What consumer financial product or service markets should be included in the initial rule?
- How should the financial product or service markets included in the initial rule be defined? In addition to considerations relating to how to define the relevant product markets, should all markets be national in scope, or should the CFPB consider regional or other geographic markets in certain instances? If regional or other geographic markets should be considered, describe with specificity how they could be defined.
- What specific criteria should be measured, and threshold levels set, to define a larger participant in the markets identified above, and in any other markets that should be included in an initial rule? What data should be used to assess whether the thresholds have been met?

* * * * * *

Update: The Notice was published in the Federal Register on June 29, 2011. The deadline for comments is August 15, 2011. The Notice is available **online** and contains information about how to submit a response.

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investigations and law enforcement actions.

This article is not intended to provide legal advice or opinion and should not be relied on as such. Legal advice can only be provided in response to a specific fact situation.

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June 2011

FTC Plans to Update Dot Com Disclosure Guidance

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Update: On June 10, 2011, the Federal Trade Commission staff announced that the comment deadline was extended for 30 days until August 10, 2011.

Digital advertising and marketing is constantly evolving. "Eleven years ago, mobile marketing was just a vision, there was not an "App" economy, the use of "pop-up blockers" was not widespread, and online social networking was nowhere as sophisticated or extensive as it is today."

The Federal Trade Commission ("FTC' or "Commission") recently announced that it was updating its *Dot Com Disclosures: Information About Online Advertising* guidance document and would seek comments on proposed areas for changes through July 11, 2011.

The primary focus of the document, which has not been revised since it was first issued in 2000, informs advertisers that consumer protection laws and the requirement to provide clear and conspicuous disclosures applies to the online world in addition to the offline world.

FTC's Request for Comment

FTC requests comments on a change to its Internet "dot com disclosures" on the following questions:

- What issues have been raised by online technologies or Internet activities or features that have emerged since the business guide was issued (e.g., mobile marketing, including screen size) that should be addressed in a revised guidance document?
- What issues raised by new technologies or Internet activities or features on the horizon should be addressed in a revised business guide?
- What issues raised by new laws or regulations should be addressed in a revised guidance document?
- What research or other information regarding the online marketplace, online advertising techniques, or consumer online behavior should the staff consider in revising "Dot Com Disclosures"?
- What research or other information regarding the effectiveness of disclosures – and, in particular, online disclosures – should the staff consider in revising "Dot Com Disclosures"?
- What specific types of online disclosures, if any, raise unique issues that should be considered separately from general disclosure requirements?
- What guidance in the original "Dot Com Disclosures" document is outdated or unnecessary?
- What guidance in "Dot Com Disclosures" should be clarified, expanded, strengthened, or limited?
- What issues relating to disclosures have arisen from such multi-party selling arrangements in Internet commerce as (1) established online sellers providing a platform for other firms to market and sell their products online, (2) website operators being compensated for referring consumers to other Internet sites that offer products and services, and (3) other affiliate marketing arrangements?
- What additional issues or principles relating to online advertising should be addressed in the business guidance document?
- What other changes, if any, should be made to "Dot Com Disclosures"?

Dot Com Disclosures 1.0 Background

The "Dot Com Disclosures" advised online advertisers that the same consumer protection laws that apply to commercial activities in other media apply online, and that any disclosures required to prevent an advertisement from being misleading must be clear and conspicuous.

The business guide discussed, in the context of online advertisements, the traditional factors used to evaluate whether disclosures are likely to be clear and conspicuous, including:

- the placement of the disclosure in an advertisement and its proximity to the relevant claim;
- the prominence of the disclosure; whether items in other parts of the advertisement distract attention from the disclosure;

- whether the advertisement is so lengthy that the disclosure needs to be repeated;
- whether disclosures in audio messages are presented in an adequate volume and cadence, and visual disclosures appear for a sufficient duration; and,
- whether the language of the disclosure is understandable to the intended audience.

The document's appendix contained mock advertisements that illustrated these particular factors and provided a number of examples. In addition, the guidance document discussed the circumstances in which businesses may use email to comply with a Commission rule or guide requirement to provide or send required notices or documents to consumers.

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April 21, 2011

FTC's Smackdown on Affiliate Marketing

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Just days after ad:tech San Francisco, digital marketers that were riding high with justified optimism are now faced with a jolting reminder of the importance of legal compliance. On April 19, 2011, the Federal Trade Commission (the "FTC") moved to stop operators of websites from making allegedly deceptive claims about acai berry weight loss products. The enforcement actions announced by the FTC in their press conference target affiliate marketers who made allegedly deceptive advertising claims by posting online fake news stories about the weight loss benefits of acai berry. The FTC filed 10 federal cases in a total of 6 courts. Also, the Illinois Attorney General has filed one suit in Illinois.

FTC Targets Allegedly Deceptive Websites

The FTC says the sites used logos of legitimate news websites, but were in actuality advertisements aimed at consumers to entice them to buy weight loss products from other merchants. The FTC will ask the courts to permanently bar the allegedly deceptive claims, and to require the companies to provide money for refunds to consumers who purchased the supplements and other products.

The FTC charges that the defendants:

- make false and unsupported claims that acai berry supplements will cause rapid and substantial weight loss;
- deceptively represent that:
  - their websites are objective news reports;
  - independent tests demonstrate the effectiveness of the product, and
  - comments following the “articles” on their websites reflect the views of independent consumers; and
- fail to disclose their financial relationships to the merchants selling the products.

FTC's Next Steps

The FTC decided to pursue acai advertising because it was prominent and the FTC had prior enforcement experience with acai berry products. But, the FTC will look at other areas promoted by affiliate marketers. During the press conference, one FTC speaker noted that one defendant ran other affiliate advertising operations promoting teeth whitening and government grant programs. Work-from-home offers also were mentioned and have been the focus of ongoing enforcement actions. The FTC will actively explore the role of product marketers in the affiliates’ claims. The FTC will use investigatory methods to determine how much participation product marketers may have had in the development of affiliates’ claims.

The FTC is sending a clear message that it will be using its enforcement authority against product marketers, affiliate networks and affiliates that allegedly imitate news sites, make unsubstantiated advertising claims, and engage in deceptive advertising. While this announcement is about weight-loss claims and allegedly deceptive websites, what makes this announcement significant is that it sends a message that scrutiny being placed on affiliate networks and affiliate marketers is at an all time high. When an industry is the target of coordinated FTC and state attorney general lawsuits it is critical for individual companies to review their own legal compliance program and to ask how they can help the entire industry avoid major enforcement sweeps and retaliatory regulation.

* * * * * *

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Articles

January 7, 2011

New Limits for Online Data-Pass and Negative Option Marketing Expected

DMConfidential.com

Many affiliate marketers and lead generators engage in advertising and marketing for affiliates and customers that rely upon easy access to personal financial information and the sale of goods or services through negative option marketing. But, now online advertisers, marketers and merchants will have to comply with a new set of requirements under the "Restore Online Shoppers' Confidence Act," S. 3386 (the "Act"). The Act, which was championed by Senator Jay Rockefeller (D-WV) and supported by the Federal Trade Commission (the "FTC"), and was signed into law by President Obama on December 29, 2010.

The Act addresses online "data-pass" of billing information to post-transaction sellers, requirements for obtaining billing information, and restricts the use of negative-option marketing. Further, the obligations in the Act are on top of rules that the federal banking agencies, credit card associations and payment processors have already in place related to online advertising. As a result, lead generators and affiliate marketers will need to review their advertising and revenue sources carefully under the new regime.

The Act imposes three new obligations for online sellers:

1. Post Transaction Data-Pass Prohibition. The Act prohibits merchants from sharing financial account numbers and "other billing information" used to charge the customer with "third-party sellers" – a seller who markets goods and services online through an initial merchant after a consumer has initiated a transaction. The Act does not specify the types of "other billing information" that will be covered by the law, but does limit the scope to data used to bill consumers. This data pass prohibition will not apply to information shared by the initial merchant with its corporate subsidiaries or affiliates.

2. Requirements for Internet Transactions Prior to Obtaining Consumer's Billing Information. The Act requires a "third-party seller" before it obtains a consumer's billing information, to clearly and conspicuously disclose to the consumer all material terms of the transaction including:

- a description of the goods or services being offered;
- the fact that the third party seller is not affiliated with the initial merchant; and
- the cost of such goods or services.

In addition, the third-party must obtain the consumer's express informed consent for the charge by:

- receiving from the consumer the full account number of the account to be charged and the consumer's name and address and means to contact the consumer; and
- requiring the consumer to perform an additional affirmative action, such as clicking on a confirmation button or checking a box that indicates the consumer's consent to be charged.

3. Restrictions on Online Negative Option Marketing. The Act creates specific new requirements for negative option marketing. Negative option marketing is defined as an offer or agreement to sell or provide goods or services where the customer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer. Before charging a consumer in an Internet-based transaction, negative option marketers must:

- clearly and conspicuously disclose all material terms;
- obtain the consumer's express informed consent to be charged; and
- where there is a recurring charge, provide the consumer with a simple mechanism to stop such charges.

Enforcement

The FTC and state Attorneys General are authorized to bring enforcement actions against violators of the Act. Although there is no private cause of action, private plaintiffs' attorneys may seek through

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litigation to make the Act's requirements the de facto standard for online transactions under state unfair and deceptive trade practices acts that allow for private lawsuits.

* * * * * *

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November 29, 2010

New FTC Mortgage Assistance Rule Targets Lead Generators and Affiliate Marketers

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On November 19, 2010, at the White House, with Vice President Biden at the podium, the Federal Trade Commission (the "FTC") announced its long-expected Mortgage Assistance Relief Services ("MARS") Rule (the "MARS Rule"). Under the MARS Rule, the FTC will subject those offering mortgage assistance relief services, such as third-party loan modification companies, foreclosure consultants, and many attorneys, to new substantive requirements. All provisions of the rule except the advance-fee ban will become effective on December 29, 2010. The advance-fee ban provisions will become effective on January 31, 2011.

Importance to Lead Generators and Affiliate Marketers

While the entire MARS Rule will be of interest to any lead generator and affiliate marketer that is advertising and marketing mortgage assistance to consumers, of greatest interest will be that:

- the MARS Rule applies to entities that provide substantial assistance or support to MARS providers (*i.e.*, more than casual or incidental) when that entity knows or consciously avoids knowing that the provider is engaged in any act or practice that violates the MARS Rule. According to the FTC, substantial assistance "could include such critical support functions as lead generation, telemarketing and other marketing support, payment processing, back-end handling of consumer files, and customer referrals."
- lead generators and affiliate marketers themselves also may qualify as MARS providers, and thus could be liable for primary violations of the MARS Rule, if they "arrang[e] for others to provide" mortgage assistance relief services, which many may implicitly do as part of their advertising and marketing services.
- the advance-fee ban prohibits the collection of any fees until MARS providers have provided consumers with a written offer from their lender or servicer that the consumer decides is acceptable and a written document from the lender or servicer describing the key changes to the mortgage that would result if the consumer accepts the offer.

Overview of the MARS Rule

Among other requirements and restrictions in the MARS Rule, included provisions will:

(1) adopt a broad definition of MARS;

(2) prohibit MARS providers from making false or misleading claims;

(3) mandate that providers disclose certain information about these services;

(4) bar the collection of advance fees for these services;

(5) prohibit anyone from providing substantial assistance or support to another they know or consciously avoid knowing is engaged in a violation of the MARS Rule;

(6) impose the requirements under the MARS Rule on attorneys, with certain limited exceptions; and

(7) impose recordkeeping and compliance requirements.

Enforcement and the New Consumer Financial Protection Bureau

Over the last two years, the FTC has brought more than 30 cases related to mortgage assistance and loan modification operations, and state and other federal law enforcement agencies have brought hundreds more. These cases have included telemarketers, mortgage brokers, lead generators,

payment processors, contractors that provide back-office services, and attorneys.

The FTC can use its powers under the FTC Act to investigate and enforce the Rule, and the FTC can seek civil penalties under the FTC Act against those who violate it. As of July 21, 2011, the new Consumer Financial Protection Bureau ("CFPB") will have jurisdiction to enforce the Rule over persons to the extent they offer consumer financial products or services and to the extent they are subject to certain enumerated consumer laws or authorities transferred to the agency, including the MARS Rule, although the FTC also will retain the ability to also enforce the Rule. In addition, states can enforce the Rule by bringing civil actions in federal district court, subject to notice requirements to the FTC or the "primary federal regulator" (CFPB).

* * * * * *

The FTC and state Attorneys General are focused on advertising that approaches fraud or threatens injury to consumers, and that has led to stepped-up enforcement and new rules. Lead generators and affiliate marketers face an increasingly aggressive FTC and state Attorneys General, who will continue to be vigilant in their oversight of MARS and aggressive in the remedies they seek through enforcement actions. The new MARS Rule gives the FTC, state Attorneys General and, soon, the CFPB, a powerful tool to fight mortgage rescue abuses.

Lead generators and affiliate marketers that focus only on internal compliance, instead of carefully selecting their clients, are those that may end up on the wrong end of a governmental investigation or enforcement action. Simply achieving compliance with consumer facing advertising and marketing will not be enough to insulate a lead generator or affiliate marketer from an enforcement action in the event of a violation of the law by a lead purchaser.

Advertisers and marketers of mortgage assistance that want to survive in the new regulatory environment should study the new rule closely and ensure that an appropriate compliance program is in place to help avoid liability. In light of the new MARS Rule, lead generators and affiliate marketers will want to review their own – and their clients' – advertising and marketing practices, policies and procedures, as appropriate, and understand the services provided to the consumer.

* * * * * *

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*For more information about this and related industry topics, see **www.venable.com/ccds/publications**.*

Articles

July 30, 2010

FTC Issues Final Rules for Debt Relief Services: Landmark Changes for Service Providers, Advertisers and Marketers of Debt Relief Services

AUTHORS

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- FTC Issues Final Rules for Debt Relief Services: Landmark Changes for Service Providers, Advertisers and Marketers of Debt Relief Services

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On July 29, 2010 at the White House, with Vice President Biden at the podium, the Federal Trade Commission (the "FTC" or "Commission") announced its long-awaited amendments to the Telemarketing Sales Rule ("TSR") targeting the sale of "debt relief services" (the "Final Rule" or the "rule"). Under the Final Rule, virtually all debt relief service providers that promote their services through inbound or outbound telephone calls, including in response to inquiries arising from lead generators, will be subject to a ban on advance fees before services are provided, as well as new and existing requirements, and other provisions, of the TSR.

Although the TSR does not apply to *bona fide* nonprofit credit counseling agencies, the new rule potentially may impact such agencies because they now fall under the jurisdiction of the new Bureau of Consumer Financial Protection, which shares enforcement authority with the FTC for violations of the TSR.

The Final Rule will be published in the *Federal Register* shortly, and is available now on the FTC's website. The provisions of the Final Rule will take effect on September 27, 2010, with the exception of the advance fee ban provision, which will take effect on October 27, 2010. Importantly, the advance fee ban does not apply retroactively, so it does not apply to contracts with consumers executed prior to October 27, 2010. The FTC has issued guidelines for complying with the TSR, including the new debt relief rules.

The FTC's stated goals of the new rule to curb deceptive and abusive practices in the telemarketing of debt relief services. The rule defines the term "debt relief service;" ensures that, regardless of the medium through which such services are initially advertised, telemarketing transactions involving debt relief services will be subject to the TSR; mandates certain disclosures and prohibits misrepresentations in the telemarketing of debt relief services; and, most significantly, prohibits any entity from requesting or receiving payment for debt relief services until such services have been fully performed, accepted and documented to the consumer.

A few other highlights of the rule: (1) it will now be illegal to provide "substantial assistance" to another company if you know they are violating the rule or if you remain deliberately ignorant of their actions (this expressly applies to lead generators, back-office processors, and "dedicated account" providers, among others); (2) strict parameters are established regarding "dedicated accounts" utilized to set aside funds for settlement and settlement company fees; (3) there are very specific and strict guidelines for the types of substantiation necessary before certain marketing claims can be made; and (4) the rule can be enforced by the FTC, the new Bureau of Consumer Financial Protection, state Attorneys General, and through private litigation, including class actions.

The Final Rule is likely to cause debt relief providers – primarily for-profit debt settlement companies – to have to transition to new business models and to develop compliance programs that reflect strict advertising and marketing requirements. It also will impact the activities of lead generators, affiliate marketers, back-office service providers, payment processors, banks, and others that provide substantial assistance to debt relief providers, even if they do not sell or provide debt relief services directly to consumers. In short, according to the FTC, those who provide such "substantial assistance" will now be required to review the policies, procedures and operations of debt relief companies to ensure they are complying with the Final Rule, or risk violating the law themselves.

The Commission adopted the rule by a 4-1 vote, with Commissioner J. Thomas Rosch voting "no." In the announcement, Chairman Jon Leibowitz said that the "rule will stop companies who offer consumers false promises of reducing credit card debts by half or more in exchange for large, up-front fees. Too many of these companies pick the last dollar out of consumers' pockets – and far from leaving them

better off, push them deeper into debt, even bankruptcy."

Below we provide a summary of the key provisions of the Final Rule, the FTC's Statement of Basis and Purpose ("SBP"), and the newly issued business guidance for debt relief services. The focus is intended to be broad to cover a range of industry participants and issues. Nevertheless, please note that the discussion is general in nature and how the Final Rule may impact your activities and relationships may differ. In addition, we note that this is not a discussion of all of the requirements under the TSR, which include provisions concerning the Do-Not-Call Registry and other telemarketing practices.

I. Background.

While the FTC's debt relief services rule has its technical origins in the TSR, which is promulgated under the *Telemarketing and Consumer Fraud and Abuse Prevention Act* (the "Telemarketing Act"), the FTC has long been active in bringing enforcement actions to stamp out deceptive debt relief practices. In the last seven years, the FTC has brought over 20 lawsuits against sham nonprofit credit counseling agencies, debt settlement companies, and debt negotiators. These cases involved allegations of violations of Section 5 of the Federal Trade Commission Act (the "FTC Act"), which prohibits unfair and deceptive trade practices, and some of these cases involved TSR violations.

The Commission also has issued numerous publications to consumers warning of debt relief scams and has sent warning letters to media outlets. In addition, the FTC has authority to challenge credit repair companies under the Credit Repair Organizations Act and has a pending rulemaking to address Mortgage Assistance Relief Services.

The state Attorneys General and other state regulators also have been very active in bringing law enforcement actions against debt relief companies, having filed over 200 cases in the last several years. Nearly every state has laws that regulate debt adjusting to some degree, including debt settlement, debt management, and credit counseling, and have used these laws to regulate debt relief service providers.

In light of all of this ongoing activity and the growing number of consumers in financial distress because of the state of the U.S. economy, the FTC held a public workshop in September of 2008 entitled, "Consumer Protection and the Debt Settlement Industry."

On July 30, 2009, the FTC issued a notice of proposed rulemaking that sought comments on the proposed debt relief amendments to the TSR. The comment period, as extended, closed on October 26, 2009. The FTC received 321 comments from interested parties. The FTC held a public forum on November 4, 2009, where Commission staff and interested parties discussed the proposed amendments and issues raised in the comments.

II. Types of Entities Subject to the Rule.

The new rule applies to for-profit sellers of debt relief services and telemarketers for debt relief companies. The TSR defines "telemarketing" as a "plan, program, or campaign . . . to induce the purchase of goods or services" involving more than one interstate telephone call.

In addition, under the TSR, it is illegal for a person to provide "substantial assistance" to another seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates the rule.

Although the TSR generally exempts inbound calls placed by consumers in response to direct mail or general media advertising, there is no such exemption in the Final Rule. The Final Rule, consistent with the proposed rule, carves out inbound calls made to debt relief services from that exemption. As a result, virtually all debt relief transactions involving interstate telephone calls are now subject to the TSR.

A. Definition of Debt Relief Services.

The Final Rule defines "debt relief service" as "any service or program represented, directly or by implication, to renegotiate, settle, or in any way alter the terms of payment or other terms of the debt between a person and one or more unsecured creditors or debt collectors, including, but not limited to, a reduction in the balance, interest rate, or fees owed by a person to an unsecured creditor or debt collector."

The FTC's SBP makes clear that the use of the term "service" is not intended to be limiting in any way. As a result, the Commission states that "regardless of its form, anything sold to consumers that

consists [sic] of a specific group of procedures to renegotiate, settle, or in any way alter the terms of a consumer debt, is covered by the definition." Further, "[t]he Commission believes that this definition appropriately covers all current and reasonably foreseeable forms of debt relief services, including debt settlement, debt negotiation, and debt management, as well as lead generators for these services."

Although the Final Rule does not include "products" in the definition of "debt relief services," the Commission notes in the SBP that this limitation should not be "used to circumvent the rule by calling a service – in which a provider undertakes certain actions to provide assistance to the purchaser – a 'product.' Nor can a provider evade the rule by including a 'product,' such as educational material on how to manage debt, as part of the service it offers."

B. Coverage of Attorneys.

The FTC is concerned with attorneys in connection with debt relief services. Based on the record in the rulemaking, the Commission decided that an exemption from the amended rule for attorneys engaged in the telemarketing of debt relief services "is not warranted." The FTC offers several reasons for its decision, including that:

> [I]n general, attorneys who provide *bona fide* legal services do not utilize a plan, program, or campaign of interstate telephonic communications in order to solicit potential clients to purchase debt relief services. Thus, an attorney who makes telephone calls to clients on an individual basis to provide assistance and legal advice generally would not be engaged in "telemarketing."

In addition, the FTC states that "it is important to retain [TSR] coverage for attorneys, and those partnering with attorneys, who principally rely on telemarketing to obtain debt relief service clients, because they have engaged in the same types of deceptive and abusive practices as those committed by non-attorneys." The FTC also states that its decision to not grant an exemption to attorneys from the Final Rule is consistent with the existing scope of the TSR and several other statutes and FTC rules designed to "curb deception, abuse and fraud."

C. Coverage of Sham Nonprofits.

The Final Rule does not cover *bona fide* nonprofit organizations, but does cover companies that falsely claim nonprofit status. Over the years, the FTC has brought enforcement actions against companies that it has alleged are sham nonprofits in order to curb perceived unfair and deceptive conduct.

D. Persons Providing Substantial Assistance.

The FTC is concerned about those that work with debt relief companies and telemarketers. As mentioned above, the TSR makes it illegal to provide "substantial assistance" to a provider if that person knows that the primary actor is violating the rule or if the person remains deliberately ignorant of their actions. In particular, the FTC provides examples in its business guidance that, in the context of debt relief services, substantial assistance may include: obtaining leads, helping a debt relief provider with its back-room operations, and offering dedicated accounts (as explained below). The FTC warns businesses, "[i]f you work with debt relief companies, review their policies, procedures and operations to make sure they're complying with the Rule. Willful ignorance isn't a defense."

III. Scope of Prohibitions and Disclosure Requirements.

The Final Rule cites a number of practices that it views as deceptive or abusive under the TSR, thus making them illegal. While the Final Rule contains provisions similar to the proposed rule, it differs in a number of critical respects. Below we provide a brief summary of these provisions.

A. Advance Fee Ban.

1. Overview

The FTC rule will make charging an advance fee before providing any debt relief services illegal throughout the United States, effective October 27, 2010. As mentioned above, several states already have laws regulating debt relief services, outlawing advance-fee debt relief services, and establishing maximum fees that may be charged.

As explained in the SBP, the Commission believes that regulating the timing of fee collection constitutes a reasonable exercise of authority under the Telemarketing Act in light of the record and its own observations. In the Final Rule, the FTC takes the position that charging an advance fee for debt relief services is abusive. The TSR already bans the abusive practice of collecting advance fees for

three other services – credit repair services, recovery services, and offers of a loan or other extension of credit, the granting of which is represented as "guaranteed" or having a high likelihood of success. In reaching its decision, the SBP goes into significant detail to address comments both in support of and against the advance fee ban.

Specifically, the Final Rule includes an advance fee ban, but in a form modified from the proposed rule. In short, the Final Rule sets forth three conditions before a debt relief provider may collect a fee for resolving a particular debt:

> (1) the consumer must execute a debt relief agreement with the creditor or debt collector;
>
> (2) the consumer must make at least one payment pursuant to that agreement; and
>
> (3) the fee must be proportional, i.e., the fee must bear the same proportional relationship to the total fee for settling the entire debt balance as the individual debt amount bears to the entire debt amount (the "individual debt amount" and the "entire debt amount" refer to what the consumer owed at the time her or she enrolled the debt in the program); in other words, if the provider settles a proportion of a consumer's total debt enrolled in the program, it may get that same proportion of the total fee. Alternatively, if the provider bases its fee on the percentage of what the consumer saves as result of using its services, the percentage charged must be the same for each of the consumer's debts.

As a result, front-loaded payments – charged by a number of debt settlement companies and the lifeblood of many advertisers and marketers – will be prohibited.

2. Dedicated Account for Fees and Savings

Notably, the Final Rule allows the provider to require customers to place funds in a "dedicated bank account" for provider fees and payments to their creditor(s) or debt collector(s) in advance of securing the debt relief, provided that certain conditions set out in the Final Rule are met. This is a significant change from the proposed rule – as it recognizes the risk of non-payment by consumers for services provided – and bears careful study by debt relief providers who choose to take advantage of this optional provision. There are significant restrictions on how these dedicated accounts may be set up and operated, which serve to safeguard the customer's funds.

3. Limitation on Setup Fees for DMPs

Of particular importance to credit counseling agencies and debt management plan ("DMP") providers, the Final Rule prohibits them from charging a set-up or other fee before the customer has enrolled in a DMP and made the first payment under the DMP, but it would not prevent the provider from collecting subsequent periodic (*e.g.,* monthly) fees for servicing the account. For *bona fide* nonprofit credit counseling agencies, this is a requirement that bears careful scrutiny, even though the FTC does not have the jurisdiction to enforce the Final Rule against such agencies.

4. Relationship with State Law

State laws can impose additional requirements as long as they do not directly conflict with the TSR. However, providers may not charge initial or monthly fees in advance of providing the specified services, even if state laws specifically authorize such fees.

5. No Retroactivity

According to the FTC's SBP, "[t]he Final Rule does not apply retroactively; thus, the advance fee ban does not apply to contracts with consumers executed prior to October 27, 2010."

B. Disclosures.

Under the Final Rule, providers will have to make several disclosures when telemarketing their services to customers. These requirements will take effect on September 27, 2010.

The FTC Rule mandates four debt relief-specific disclosures that must be made before a customer consents to pay for the goods or services offered. These are in addition to the existing, generally applicable disclosures currently in the TSR (not discussed within this article in detail). Before the customer consents to pay, the Final Rule requires debt relief service providers to disclose to the customer, clearly and conspicuously:

(1) the amount of time necessary to achieve the represented results;

(2) the amount of savings needed before the settlement of a debt;

(3) if the debt relief program includes advice or instruction to consumers not to make timely payments to creditors, that the program may affect the consumer's creditworthiness, result in collection efforts, and increase the amount the consumer owes due to late fees and interest; and

(4) if the debt relief service provider requests or requires the customer to place funds in a dedicated bank account at an insured financial institution, that the customer owns the funds held in the account, may withdraw from the debt relief service at any time without penalty, and then may receive all of the funds in the account.

According to the SBP, the above disclosures are required "to the extent that any aspect of the debt relief service relies upon or results in the customer failing to make timely payments to creditors or debt collectors."

The proposed rule contained three additional debt relief-specific disclosures that have been omitted from the Final Rule:

(1) that creditors may pursue collection efforts pending the completion of the debt relief service (which has been combined with another required disclosure);

(2) that any savings from the debt relief program may be taxable income; and

(3) that not all creditors will accept a reduction in the amount owed.

The Commission decided the above omitted disclosures were "largely duplicative or likely to detract from the efficacy of the required disclosures." In addition, the Commission acknowledged that "even those creditors that claim not to work with debt relief providers may do so in certain situations."

C. Misrepresentations.

The Final Rule supplements the existing TSR prohibitions against misrepresentations with a provision specifically intended to target deceptive practices by debt relief service providers. Under FTC precedent, an act or practice is deceptive if: (1) there is a representation or omission of information that is likely to mislead consumers acting reasonably under the circumstances; and (2) that representation or omission is material to consumers.

1. Debt Relief-Specific Illustrative Examples

The Final Rule prohibits sellers or telemarketers of debt relief services from making misrepresentations regarding any material aspect of any debt relief service and it provides several illustrative examples, including misrepresentations of:

- the amount of money or the percentage of the debt amount that a customer may save by using such service;
- the amount of time necessary to achieve the represented results;
- the amount of money or the percentage of each outstanding debt that the customer must accumulate before the provider will initiate settlement attempts with the customer's creditors or debt collectors or make a *bona fide* offer to negotiate, settle or modify the terms of the customer's debt;
- the effect of the service on a customer's creditworthiness;
- the effect of the service on the collection efforts of the customer's creditors or debt collectors;
- the percentage or number of customers who attain the represented results; and
- whether a service is offered or provided by a nonprofit entity.

2. Debt Relief Savings Claims

The FTC requires that representations promising specific savings or other results be truthful, and that the provider have a reasonable basis to substantiate the claims. In this regard, the SBP contains extensive guidance about the specific evidence required to make various representations regarding debt relief services. For example, the SBP states when a debt relief service provider represents that it will save the consumer money, the savings claims should reflect the experiences of the provider's own past customers and must account for several key pieces of information. Although this is consistent with the FTC's longstanding policy statement on advertising substantiation, the Commission provides detailed

guidance on the proper methodology for conducting this historical experience analysis. This guidance should be studied carefully by anyone making debt relief savings claims or other representations concerning debt relief services.

3. Existing TSR Provisions Prohibiting Deceptive Representations and Misleading Statements

In addition to the above debt relief-specific misrepresentations, existing prohibitions found in the TSR will now apply to the inbound or outbound telemarketing of debt relief services. The SBP provides guidance on the meaning of these prohibitions in the context of debt relief services, using claims that are frequently used in the marketing and sale of debt relief services.

D. Recordkeeping.

Under the Final Rule, any debt settlement, DMP or other debt resolution plan from a creditor must be in writing. Providers must keep these documents for at least 24 months. Further, the FTC business guidance recognizes that oral agreements for settlements may be needed in isolated cases, but strongly favors written approval for settlements.

IV. Enforcement and Outlook.

At the July 29 press conference, Chairman Leibowitz promised "aggressive" enforcement of the new debt relief rules. The TSR and the Final Rule are enforceable both by the FTC and state Attorneys General, and allows either the ability to obtain nationwide injunctive relief and consumer redress. Also, the TSR may be enforced by the Bureau of Consumer Financial Protection, under the Consumer Financial Protection Act, which amended the Telemarketing Law. Finally, the TSR provides for a private right of action, whereby injured consumers can bring private litigation, including potentially as class actions, for violations of the TSR.

As a legal matter, the FTC only has the authority to enforce the rule against debt relief providers within its jurisdiction. The FTC Act exempts banks and other depository institutions and *bona fide* nonprofits, among others, from the Commission's jurisdiction. These exemptions apply to the Telemarketing Act and the TSR as well. As discussed above, this means that the FTC's authority to enforce the new rule would not extend to *bona fide* nonprofit credit counseling agencies.

The new Bureau of Consumer Protection was granted authority to enforce the TSR by amendments to the Telemarketing Act that took effect with the enactment of the *Consumer Financial Protection*, which is part of the comprehensive *Dodd-Frank Wall Street Reform and Consumer Protection Act*. As a result, the Bureau has the ability to enforce the FTC's amendments to the TSR regarding debt relief services against *bona fide* nonprofit credit counseling agencies, even though the FTC itself lacks jurisdiction over such agencies. For instance, if the rule was applied to *bona fide* nonprofit credit counseling agencies by the Bureau, no initial DMP set-up fee would be permitted to be charged. This bears close watching by the nonprofit credit counseling industry and other nonprofit organizations providing debt relief services, especially as new less-than-full balance DMP programs and other settlement-type products gain steam.

NEW TSR DEBT RELIEF RULES:
JURISDICTIONAL AUTHORITY FOR ENFORCEMENT

	For-Profit Debt Relief Service Provider	***Bona fide* Nonprofit Credit Counseling Agency**
Federal Trade Commission	Yes	No
Bureau of Consumer Financial Protection	Yes	Yes

Although the FTC announced no new enforcement actions at the press conference, we understand that it has a number of pending non-public investigations in response to perceived abuses by debt settlement companies and others, including affiliate marketers and lead generators. We also are aware that several state Attorneys General and other state regulators have open investigations and pending lawsuits against a number of debt relief providers. In addition, it is not unusual for the FTC to coordinate with state Attorneys General to bring a law enforcement sweep against violators shortly after a new rule

becomes effective (this happened after the enactment of the Credit Repair Organizations Act, for instance). Lastly, FTC staff has publicly stated that the Final Rule is in addition to existing compliance obligations under Section 5 of the FTC Act, which would allow the Commission to bring an enforcement action even if the activities in question fall outside of the TSR.

V. Debt Settlement Industry Legal Challenge Possible.

The FTC is authorized to conduct rulemaking proceedings under the Telemarketing Act using the Administrative Procedure Act's "notice-and-comment" procedures. The FTC generally does not have rulemaking authority under Section 5 of the FTC Act, which prohibits unfair or deceptive acts or practices. Moreover, unlike the FTC's pending rulemaking for mortgage assistance relief services, this rulemaking was not authorized specifically by statute. Rather, the FTC is using the Telemarketing Law's deceptive and abusive practices standard as its basis to issue the Final Rule.

As a result, while expedient, the FTC's use of the Telemarketing Act to regulate the debt relief services industry is aggressive since a "debt relief" rule was not specifically authorized by law. Although it is safe to assume the FTC believes it is on firm ground, there are some significant questions about whether the rule is enforceable given its origins. Therefore, debt settlement industry opponents of the rule potentially may attempt to challenge the authority of the FTC to issue the rule under the Telemarketing Act. The prospects for industry success are uncertain in light of the record developed by the FTC during the rulemaking and the discretion granted by courts to government agencies.

VI. FTC Business Guidance Released and Additional Information.

As mentioned above, the FTC staff issued a compliance guide to help businesses comply with the new debt relief rules, including detailed examples and best practices. The new rule and the compliance guide are available on the agency's website at **http://www.ftc.gov/opa/2010/07/tsr.shtm**.

In addition, several articles, presentations and alerts are available on this subject on our firm's website, including our articles:

- *Public Forum on Proposed Debt Relief Amendments to the Telemarketing Sales Rule*, available at **http://www.venable.com/ftc-hosts-public-forum-on-proposed-debt-relief-amendments-to-the-telemarketing-sales-rule/**;
- *Federal Trade Commission Issues Notice of Proposed Rulemaking to Amend Telemarketing Sales Rule to Cover Debt Relief Services*, available at **http://www.venable.com/federal-trade-commission-issues-notice-of-proposed-rulemaking-to-amend-telemarketing-sales-rule-to-cover-debt-relief-services-07-31-2009/**; and
- *FTC Commissioner Rosch Calls for More Responsibility and Reforms in the Debt Settlement Industry*, available at **http://www.venable.com/ftc-commissioner-rosch-calls-for-more-responsibility-and-reforms-in-the-debt-settlement-industry-04-06-2009/**.

Lastly, for additional information about the Bureau of Consumer Financial Protection and the Consumer Financial Protection Act, see our article, *The Dodd-Frank Act: What It Means for Credit and Housing Counseling Agencies and Other Debt Relief Service Providers*, available at **http://www.venable.com/the-dodd-frank-act-what-it-means-for-credit-and-housing-counseling-agencies-and-other-debt-relief-service-providers-07-26-2010/**.

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For several years now, many in the debt relief industry and consumer groups had publicly wondered who would be the executioner of the present day for-profit debt settlement business model that relies on advance fees to maintain their business and finance advertising and marketing. The answer to that question now appears clear. With the announcement of the Final Rule, the FTC has taken decisive action to promulgate rules and issue guidance related to debt relief services. Now the questions become: (1) Will the Final Rule be enforceable?; (2) How will the Bureau of Consumer Financial Protection utilize the rule?; (3) How will providers of debt relief services react to and comply with the new requirements?; (4) For those that are not able to or are unwilling to comply, how long they will be able to continue before the FTC, state Attorneys General, or consumers (acting under a private right of action) catch up to them in a law enforcement action or private lawsuit?; and (5) What will happen to debt settlement company customers if a company chooses to or is forced to close its doors?

In addition, up until just a week ago, for nonprofit credit counseling agencies, the proposed rule had only been a policy matter that was easy to support. Now, however, nonprofit credit counseling agencies will potentially be confronted with new compliance requirements under the Bureau of Consumer Financial Protection that will share enforcement authority under the Telemarketing Law with the FTC. In addition, the new Bureau is likely to look at the FTC for guidance in developing its own rules, including rules to regulate credit counseling, debt management plan services, and other debt relief services. As a result, as nonprofit credit counseling agencies develop new services to address the needs of consumers in financial distress that closely resemble those services regulated under the TSR – such as less-than-full-balance DMP programs – they should be mindful of the baseline requirements established by the FTC.

Lastly, as a practical matter, the Final Rule (and business guidance) may be viewed by many as establishing a new minimum level of standards to which those advertising and engaged in providing debt relief services may be held by regulators and private plaintiffs, irrespective of whether they are organized as nonprofit or for-profit organizations. As a result, all providers of debt relief services – both nonprofit and for-profit – should carefully consider their operations, policies and procedures, including advertising and marketing (*e.g.,* websites, inbound telephone scripts, print, radio, television and Internet advertisements, affiliate relationships, lead generation relationships, back-office provider relationships), in light of the new rule.

* * * * * *

***Jonathan Pompan**, an attorney in the Washington, DC office of Venable LLP, represents nonprofit credit counseling agencies and others in a wide variety of areas, including regulatory compliance, as well as in connection with federal and state investigations and law enforcement actions. **Jeffrey Tenenbaum** chairs Venable's Credit Counseling and Debt Services practice, as well as its Nonprofit Organizations practice. For more information, please contact Mr. Pompan at 202.344.4383 or **jlpompan@venable.com**, or Mr. Tenenbaum at 202.344.8138 or **jstenenbaum@venable.com**.*

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Articles

February 5, 2010

Mortgage Assistance Relief Services Targeted in Federal Trade Commission Rulemaking

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On February 4, 2010, the Federal Trade Commission ("FTC" or "Commission") issued a Notice of Proposed Rulemaking ("NPRM"), seeking comment on a proposed Rule that would regulate loan modification, foreclosure rescue, and other mortgage assistance relief ("MARS") providers.

The proposed Rule would ban MARS providers from collecting fees prior to delivering these services, prohibit misrepresentations in the marketing of these services, and require certain affirmative disclosures about the nature and terms of the service. Significantly, the proposed Rules also would extend liability for violations to persons or companies who provide assistance or support to MARS providers that violate the proposed Rule.

The Commission invites comment from entities that would be covered under the proposed Rule as well as those with an interest in the rulemaking. The NPRM lists general questions to which the Commission seeks responses from the public, such as "what changes should be made to the proposed Rule to increase benefits to consumers and competition" and "how would the proposed Rule affect small business entities," as well as questions about specific proposed provisions, some of which are enumerated below. Of particular note are comments requested on a jurisdictionally-based exemption for *bona fide* nonprofits (including *bona fide* nonprofit housing counselors) and a limited exemption for attorneys.

Comments are due on or before March 29, 2010.

Background

The 2009 Omnibus Appropriations Act, [1] as clarified by the Credit Card Accountability and Disclosure Act [2] ("Credit CARD Act"), gives the FTC specific rulemaking authority to prevent unfairness or deception in practices involving loan modification and foreclosure rescue services. This NPRM follows up on the Commission's June 1, 2009 Advanced Notice of Proposed Rulemaking addressing MARS. [3]

The Commission has continued an aggressive approach in protecting consumers against the alleged deceptive practices of MARS providers. In the past two years, the Commission has filed over 28 lawsuits against entities in the industry and the proposed Rule would provide an additional basis for enforcement. States also are active in the regulation of MARS providers and state Attorneys General have investigated over 450 MARS providers, resulting in hundreds of enforcement action.

On the same day that the NPRM was issued – February 4, 2010 – FTC Chairman Jon Leibowitz testified before the U.S. Senate Committee on Commerce Science and Transportation about the Commission's enhanced efforts to protect consumers during the economic downturn, including initiating hundreds of cases against mortgage relief scams.

Who Is Covered by the Proposed Rule?

The proposed Rule is directed toward MARS providers and is intended to apply to "every solution that may be marketed by covered providers to financially distressed consumers as a means to avoid foreclosure or save their homes." The proposed Rule defines "mortgage assistance relief service" to include "any service, plan or program, offered or provided in exchange for consideration on behalf of the consumer, that is represented, expressly or by implication, to assist or attempt to assist the consumer" in negotiating a modification of any term of a loan or obtain other types of relief to avoid delinquency or foreclosure.

The Commission intends the definition to include mortgage brokers to the extent that they market MARS but would generally exclude loan holders, servicers, and agents of such holders and servicers. However, the Commission does not intend the proposed Rule to apply to "*bona fide* loan origination or refinancing services." In addition, the proposed Rule generally exempts loan holders and servicers and

their agents. The Commission seeks comment on the scope of this exemption, including whether services have engaged in covered conduct that warrants encompassing them in the proposed Rule.

The proposed Rule would only apply to entities under FTC's jurisdiction. Accordingly, the proposed Rule generally exempts from the definition of MARS providers any nonprofit excluded from the FTC's jurisdiction. [4] The proposed Rule states, "The Commission intends for this exemption to include bona fide nonprofit housing counselors presently offering mortgage assistance services." Note there is no similar express statement of exclusion for nonprofit credit counseling agencies in the FTC's proposed Rule to amend the Telemarketing Sales Rule ("TSR") to cover debt relief services. It should also be noted, however, that the FTC has a long history of enforcement against entities it deems to be "sham nonprofits."

For similar reasons as the *bona fide* nonprofit exclusion, the reach of the proposed Rule would not cover banks, thrifts and federal credit unions, as the FTC Act places these entities outside the FTC's jurisdiction. Although the exclusion of nonprofits (and banking entities) is a jurisdictional issue, the Commission seeks responses on the effect of these exclusions, such as whether the proposed Rule creates an incentive for for-profit entities to become nonprofits.

In addition to jurisdictional exclusions, the proposed provides a limited exemption for attorneys engaged in MARS. The NPRM states, "[t]here is no general exemption for attorneys from the requirements of the proposed Rule. The Commission, however, proposes a limited exemption for licensed attorneys' conduct in connection with a bankruptcy case or other court proceeding to prevent foreclosure, where that conduct complies with state law, including rules regulating the practice of law." The Commission explains that attorneys who provide such representation in bankruptcy or court proceedings would be exempt from prohibitions on advance fees, and also would be permitted to advise consumers to cease contact with their lenders. Attorneys would still be subject to the proposed Rule's ban on misrepresentations, disclosure requirements, prohibitions on known substantial assistance, and recordkeeping requirements. The NPRM notes that these rules are designed to balance the potential value of a legal review to consumers who are trying to save their homes with the unfortunate fact that growing number of attorneys are allegedly involved in deceptive and unfair MARS activities, including serving as a front for organizations seeking to avail themselves of the attorney exemptions under various state MARS laws. In justifying the delicate balance the limited attorney exemption strives to achieve, the NPRM asks for comment on different ways the exemption could be tailored, and whether the exemption should apply to any other groups.

Key Areas

The proposed Rule focuses on five key areas: (1) Prohibited Representations; (2) Ban on Collection of Advance Fees; (3) Required Disclosures; (4) Liability for Substantial Assistance; and (5) Recordkeeping/Compliance.

1. Prohibited Representations

The proposed Rule prohibits several specific representations as deceptive or unfair, including:

- Instructing consumers to stop communications with their lenders or servicers,
- Misrepresentation of likelihood of time necessary to obtain results,
- Wrongful suggestions of affiliation with government, nonprofit housing counselors, or program, lenders or loan servicers,
- Implication of relief of payment and obligations under the existing mortgage, and
- Misrepresentation of refund and cancellation policies of the MARS provider.

2. Ban on Collection of Advance Fees

Under the proposed Rule, MARS providers would be prohibited from charging or collecting any payment from consumers until they provide a documented offer from the mortgage lender or service provider to modify mortgage terms or deliver on a similarly-promised service. This proposal takes aim at what the Treasury Secretary Timothy Geithner characterizes as "bad actors who promised to loan modifications but never delivered," and would essentially prohibit the charging of any up-front fees or piecemeal payments. The NPRM states that typical up-front fees can be in the thousands of dollars. The results that MARS providers must achieve before requesting or collecting payment are those results which their claims cause consumers to expect or that consumers reasonably expect given the type of service sold. The NPRM specifically requests data on the costs to MARS providers if they are prohibited from charging advance fees and also seeks comments on alternatives to the advance fee prohibition.

3. Required Disclosures

Prominent and clear disclosures are required by the proposed Rule in a variety of media formats, including written, audio and video disclosures, as well as disclosures in interactive media. Specific requirements such as size, text and duration of display of the disclosures are addressed.

The subjects of the disclosures mirror the prohibited representations and include, among others, that: (1) the provider is a for-profit business and is not endorsed by either the government nor the consumer's lender; (2) the total fee the consumer will have to pay to purchase, receive and use the service; and (3) that even if the consumer purchases the service, the consumer's lender may not agree to change their loan.

Required disclosures under the proposed Rule are to be provided in all commercial communications. The Commission admits that it does not have any empirical research on whether the proposed disclosures are an effective means of conveying the status, cost and limitations of MARS providers and seeks comment in this area. The FTC also inquires whether other disclosure requirements should be added to the proposed Rule, such as requiring MARS providers to disclose their historical performance.

4. Liability for Assisting and Facilitating

The proposed Rule includes provisions extending liability to entities that work with MARS providers engaged in deceptive or unfair practices if they “know or consciously avoid knowing that the provider is engaged in any act or practice that violates the Rule.” This “substantial assistance” provision is modeled after a similar provision in the FTC’s Telemarketing Sales Rule and what has, in recent years, become the FTC’s general enforcement position. The NPRM lists the provision of advertising services, telemarketing, marketing support, payment processing, and lead generation as activities that might constitute substantial assistance. On the other hand, the proposed Rule specifically excludes from liability entities that provide basic support and services but have no reasonable way of knowing the providers are engaged in violation of the rule. Both the FTC and state law enforcement officials are able to obtain monetary and injunctive relief against those who “substantially assist” culpable MARS providers.

5. Recordkeeping

The proposed Rule requires MARS providers to retain several different types of records for a period of 24 months. The failure to do so is a violation of the proposed Rule. The recordkeeping requirement is modeled after similar requirements in TSR and requires the following to be kept:

- All contracts between the provider and any consumer for mortgage assistance relief services;
- Copies of any written communications between the provider and the consumer occurring before the consumer enters into a contract or agreement for mortgage assistance relief;
- Copies of documents or telephone recordings created in compliance with requirements to monitor employees’ and independent contractors’ compliance with proposed Rule;
- All consumer files containing the names, telephone numbers, dollar amounts paid, and quantity of items or services purchased if such information is kept in the ordinary course of business;
- Copies of materially-different sales scripts, training materials, commercial communications, and other marketing materials; and
- Copies of documentation required to be given to the consumer.

In addition to preservation of required records, the proposed Rule also requires that MARS providers take enumerated steps to monitor compliance of their employees and independent contractors, and to investigate “promptly and fully” any consumer complaints. Documentation of such monitoring is requested under the proposed Rule.

Waiver

The proposed Rule would provide that “[a]ny attempt by any person to obtain a waiver from any consumer of any protection provided by or any right of the consumer under this rule constitutes a violation of the rule.”

Enforcement

The Commission has authority to investigate and enforce the proposed Rule, and can impose monetary penalties up to $16,000 per violation, including against those who substantially assist entities in violation. States also can bring civil actions in federal district court to seek civil penalties and other relief.

* * * * * *

The NPRM states that the proposed Rule is likely to cover several hundred MARS providers, with a conservative estimate of 500 covered entities. Venable's Credit Counseling and Debt Services team is available to assist in preparation of comments to this NPRM, as well as assisting MARS providers and advertisers and marketers of MARS with regulatory compliance.

* * * * * *

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For more information about this and related industry topics, see ***www.venable.com/ccds/publications****.*

This article is not intended to provide legal advice or opinion and should not be relied on as such. Legal advice can only be provided in response to a specific fact situation.

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[1] 2009 Omnibus Appropriations Act, Pub. L. 111-8, 123 Stat. 524.

[2] Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. 111-24, 123 Stat. 1734 (Credit CARD Act).

[3] *Mortgage Assistance Relief Services, 74 Federal Register* 26130 (June 1, 2009) (MARS ANPR). For a summary of the MARS ANPR, see Venable's article available at **http://www.venable.com/federal-trade-commission-rulemaking-targeting-foreclosure-assistance-and-mortgage-practices-opportunities-for-housing-counseling-agencies-to-comment-06-19-2009/**.

[4] Under the Omnibus Appropriations Act, the Commission can regulate for-profit entities that provide mortgage-relate services, but its jurisdiction does not extend to *bona fide* nonprofit entities.

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Advertising agencies

Consumer products companies

Direct-response advertisers

Entertainment companies

Telecommunications companies

MEDIA TYPES

Short-form and program-length

TV commercials

Internet

Radio

Print

Direct mail

PRACTICE FOCUS

Electronic retailing

Product development

Labeling and packaging

Advertising content

Copyrights, patents and trademarks

Privacy protection

Compliance counseling

Public policy and legislation

Deceptive trade practices

REGULATORY KNOW-HOW

Consumer Financial Protection Bureau

Federal Trade Commission

Federal Communications Commission

Food and Drug Administration

United States Postal Service, Postal Rate Commission

Do-Not-Call regulations

State consumer agencies

Electronic Retailing Self-regulatory Program

Better Business Bureau,

response rates and build customer lists in campaigns of all kinds. We can help you comply with state and federal disclosure rules and ensure your sweepstakes isn't found to be an illegal lottery.

Someone has the nerve to copy a product you've spent years developing.

Venable attorneys are skilled at stopping infringements of your patents, trademarks, copyrights and trade dress.

In many cases, we're able to negotiate licenses or royalty payments that add to our client's revenue and profits. In other cases, we've been successful in litigation, including patent trials that have resulted in damage awards to our clients.

Basically, we do two things:

1. Help clients comply with advertising regulations and other laws—so they don't run afoul of regulators.
2. Defend clients when a regulator or competitor attacks their products or their advertising.

Most clients employ us for both compliance and defense, depending on the campaign and the context. We can help you decide which makes the most sense for the issue you have in mind.

In a nutshell: What happens in Washington affects your business. When proposed legislation will increase your costs or limit your opportunities, you want to be heard.

And when agency officials are writing regulations you'll have to deal with every day, they need to know your side of the story. We understand the issues you face. We've been part of the direct-marketing industry for nearly three decades.

Our reputation and relationships in Washington give you a seat at the table and a powerful network of contacts on Capitol Hill and across the spectrum of federal agencies.

How can we help you? To find out, please contact us at 1.888.VENABLE or www.Venable.com.

National Advertising Division

Network broadcast standards

LITIGATION FOCUS

False advertising

Unsubstantiated claims

Intellectual property rights

Direct-to-consumer marketing

Business torts

Employment

Lanham Act claims

Defense in investigations, challenges and litigation brought by regulatory agencies

ASSOCIATION LEADERSHIP

Venable attorneys have long-standing relationships with many industry associations, such as

Electronic Retailing Association

Direct Marketing Association

Interactive Advertising Bureau

Association of Postal Commerce

Promotional Marketing Association

Direct Response Marketing

VENABLE SNAPSHOT

Over 500 lawyers in seven offices

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129 practice groups ranked, "Best Law Firms" *U.S. News & World Report-Best Lawyers* 2011-2012

Over 50 attorneys and 30 practice areas ranked, *Chambers USA 2011*

Counsel to 38 of the Fortune 100

ADVERTISING AND MARKETING LITIGATION QUICK FACTS

Visit Venable's new Advertising and Marketing blog at: www.allaboutadvertisinglaw.com

A team of over 30 attorneys focused on national advertising litigation matters from offices in New York, Washington, DC and Los Angeles

Extensive experience with national and local government regulators and before self-regulatory bodies

HONORS AND AWARDS

Winner of the 2011 and 2010 *Chambers USA* Award for Excellence in Advertising and Marketing

Nationwide Advertising Litigation (Band 1), *Chambers USA*, 2010-2011

U.S. News-Best Lawyers 2010 and 2011 "*Law Firm of the Year*" in Advertising Law

Tier 1 Advertising Law (National)

Tier 1 Advertising Law (DC)

Ranked among the nation's top advertising firms in *Legal 500*

Attorneys with top rankings by:

ADVERTISING AND MARKETING LITIGATION

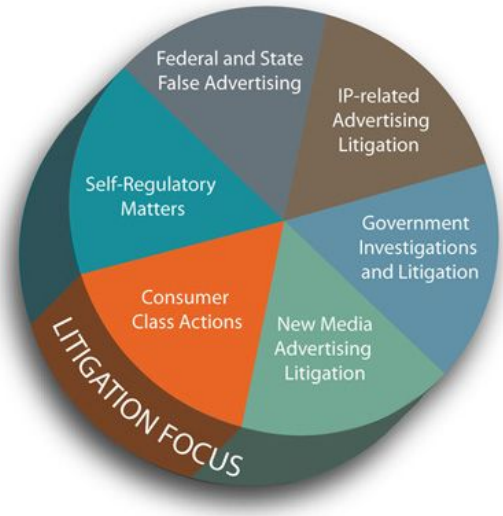
from Madison Avenue to Pennsylvania Avenue

Your advertising campaign was creative and carefully considered. Your product seemed certain to succeed, and some of the best advertising minds helped launch it with a campaign that spanned traditional and new media.

Then came the lawsuit.

A challenge to your marketing is a challenge to your product, your brand, and a threat to your bottom line. Venable has one of the most extensive and successful advertising and marketing litigation practices in the United States. Whether the lawsuit comes from a competitor, a consumer or a government regulator, our team is considered by peers and clients alike to be one of the nation's top law firms for advertising-related litigation and regulatory compliance.

A NATIONAL LEADER IN ADVERTISING AND MARKETING LITIGATION



Veterans of traditional media. On the leading edge of new media.

Many of Venable's litigation attorneys focus on advertising and marketing litigation. Our advertising and marketing litigators are highly sought after because of their extraordinary perspective. They have all the tools needed to litigate and win advertising cases in any forum – extensive knowledge of advertising law, deep understanding of their clients' businesses and product/service categories, experience in the courtroom, close ties to federal and state regulatory agencies, intimate understanding of industry self-regulatory bodies, and geographic reach. Many of Venable's attorneys have decades of experience working with the advertising industry; indeed, some of them have held senior positions in the industry and with the agencies that regulate the clients they now advise.

We represent clients that produce products, provide services, and market products in myriad industries including, but not limited to: consumer products and services, apparel, floor care, home products, quick-serve restaurants, pharmaceuticals, dietary supplements, direct response, entertainment, telecommunications,

Chambers USA

Legal 500

Best Lawyers

LITIGATION FOCUS

Lanham Act false advertising

Self-Regulatory Matters, including

- NAD
- ERSP

IP-related advertising litigation

CAN-SPAM compliance

Affiliate marketing matters

Government litigation and investigations, including

- CFPB investigations
- FTC investigations
- State attorneys general investigations

Unfair and deceptive trade practices

Consumer class actions

Anti-counterfeiting

ADVERTISING FOCUS

Traditional media, including

- Television
- Radio
- Print

Direct mail and telemarketing

Retail packaging and store displays

Internet, mobile and social media

Word-of-mouth and viral marketing

Affiliate marketing

Keyword and other search issues

Network marketing

Lead Generation

INDUSTRY FOCUS

Lead Generation

Apparel

Artwork

Banking and financial services

Communications

automotive, credit counseling, and debt management.

The cases handled by Venable litigators involve every type of advertising: traditional television, radio and print media; direct mail and telemarketing; retail packaging and in-store displays; cutting-edge Internet, mobile marketing, social media, viral and other word-of-mouth marketing; affiliate marketing, keyword and other search issues; and multi-level (network) marketing. With a home base in Washington, DC, offices on the east and west coasts, and ties to firms around the world, Venable has the ability to assist clients around the globe on any advertising litigation matter.

A track record of success across a multitude of venues.

From the highest court in the nation to industry self-regulators, Venable has established a long record of success in every venue where advertising cases are heard.

Venable's successes range from unanimous, precedent-setting U.S. Supreme Court victories to self-regulatory matters at the National Advertising Division of the Better Business Bureau; from federal appellate decisions to state court class actions and false advertising claims; and from federal Lanham Act jury trials to federal district court victories against government regulators.

Venable regularly obtains and defends against preliminary injunctions and temporary restraining orders relating to advertising issues. Part of this success in obtaining and defending emergency actions stems from Venable's pre-emptive management and advice relating to claims, substantiation, and advertising review prior to the client launching its advertising campaigns.

Venable litigators also frequently stave off advertising-related investigations from the Federal Trade Commission, state attorneys general, and district attorneys from counties around the country. Venable assists clients in responding to civil investigative demands and subpoenas, and regularly keep clients out of litigation brought by governmental regulators.

REPRESENTATIVE EXPERIENCE

At the forefront of cutting-edge advertising litigation.

Venable's attorneys are consistently at the forefront of advertising litigation under the Lanham Act, having played decisive roles in some of the most important cases. We have litigated dozens of Lanham Act advertising cases, representing internationally esteemed clients seeking to protect their brand assets and defending clients in high-profile litigation involving cutting-edge issues of law.

Venable's advertising and marketing litigation attorneys are nationally recognized for their experience and successes. Venable's seasoned, precedent setting attorneys include Bill Coston, a member of the American College of Trial Lawyers, who argued and won unanimously one of the most influential Lanham Act decisions by the U.S. Supreme Court in the past decade, *Wal-Mart v. Samara Brothers*. Roger Colaizzi, who chairs the IP litigation practice group, has over the last decade successfully obtained or defended against more than 50 advertising related preliminary injunctions and temporary restraining orders. Joshua Kaufman has obtained a unanimous Supreme Court victory in a landmark decision changing the landscape of copyright law. Jeffrey D. Knowles, who founded and served for 13 years as general counsel to the Electronic Retailing Association, is nationally recognized as the leading attorney in the direct response television industry and has successfully negotiated hundreds of resolutions in federal regulatory litigation actions.

Venable has litigated more than 30 Lanham Act cases involving advertising issues, representing clients in highly publicized, high-profile actions. When false advertising claims are at issue, often the most effective relief available is an expedited action in court to enjoin the false claims. Venable's reputation for success in this expedited setting stems from its knowledge of the law and its ability to quickly gather evidence, obtain consumer surveys, and marshal the experts necessary to obtain a winning outcome. Venable's consistent successes in these expedited types of cases is made possible by its attorneys' significant courtroom experience consisting of the attorney's ability to present live witnesses and effectively argue the case.

- Consumer products and services
- Credit counseling and debt management
- Dietary supplements, cosmetics and functional foods
- Direct Response
- Drugs, medical devices and biologics
- Electronics
- Government
- Healthcare
- Home products
- Hospitality and lodging
- Life sciences
- Manufacturing
- Marketing
- Media and entertainment
- New Media
- Pharmaceuticals
- Software
- Telecommunications

Resolving disputes through industry self-regulatory bodies.

Sometimes, advertising disputes are best resolved not by courts, but by industry self-regulators. These forums have specialized knowledge of advertising claims, are less formal and expensive, and often render relief more quickly than court action. Fortune 100 companies regularly use these self-regulatory bodies to resolve advertising disputes with competitors.

Venable has successfully guided a number of clients through the self-regulatory process including the manufacturer of a leading weight-loss supplement advertised as the "#1 Selling Weight Loss Supplement for Women." When the manufacturer faced accusations that this advertising was misleading, Venable successfully defended it before the National Advertising Division (NAD) of the Better Business Bureau (BBB).

More than 30 of Venable's lawyers have participated in these specialized arenas, offering clients a valuable alternative to expensive and time-consuming federal litigation for advertising dispute resolution. Victories for national industry leaders in dietary supplements, housewares and exercise/weight loss industries prove Venable's sophisticated understanding of these alternative forums.

Defending clients at the intersection of advertising and IP.

Intellectual property suits, including trademark, copyright, patent, counterfeiting and gray market goods, regularly include advertising issues and advertising claims. Venable's work on intellectual property matters that relate directly to advertising include cutting-edge issues involving social networking websites, domain names, and keyword advertising.

Venable's advertising litigation involving e-commerce is second to none. Venable achieved success in over 40 domain name disputes through Uniform Dispute Resolution Policy. The firm also has several attorneys engaged in and litigating matters involving social media outlets such as Facebook and YouTube, including the negotiation of take-downs of infringing postings. Venable's comprehensive experience in advertising litigation also includes hundreds of proceedings at the U.S. Trademark Trial and Appeal Board, where the firm seeks to protect clients' valuable trademark assets used to establish consumer recognition and goodwill in the marketplace. Venable's trademark practice group is recognized as one of the top ten practice groups for trademarks issued in the country. By preemptively policing and litigating trademark and branding issues during the application process, Venable helps clients avoid the expense of protecting their brands in more costly federal litigation.

Success in new media advertising channels.

Venable's work extends across all areas of advertising litigation. We are actively engaged in two of the hottest issues in internet advertising – keyword advertising and affiliate marketing, including high profile matters with national implications.

Knowing how to respond when government regulators come knocking.

With our home office in Washington, DC, and a team that includes former high-ranking FTC staff and regulatory attorneys, Venable regularly defends clients from challenges to advertising brought by federal and state regulators. These cases can sometimes involve multiple government agencies and reach from coast to coast.

For instance, Venable is coordinating the response to related subpoenas in 37 states regarding internet advertising practices. Additionally, in just the past year, Venable has participated in over 20 investigations under the FTC Act. Venable's comprehensive knowledge of the federal and state regulations and regulators and the breadth of experience of its advertising and marketing practice groups provide the framework for successful resolution of government challenges.

We help clients respond to subpoenas and other compulsory processes, litigate complaints, negotiate consent agreements, and handle compliance investigations in advertising-related matters. Our broad experience in advertising law and comprehensive knowledge of federal and state regulations and regulators provide the framework for successful resolution of government challenges.

In consumer class actions, experienced advocacy is key.

Venable has distinguished itself as a leader in the defense of consumer class action advertising matters, defending over a dozen class action cases in the last year

alone. Consumer class actions come with the threat of substantial damage awards. But they also require additional elements of proof that make them vulnerable to astute advocacy by experienced counsel.

This was illustrated when our rapid response to a consumer class action likely saved a national clothing retailer hundreds of thousands of dollars in litigation expenses and potential damages. The complaint alleged failure to properly reimburse customers who returned items purchased using coupons. Although similar cases had settled for as much as $500,000, we resolved the matter for a token payment, before an initial pleading was ever filed.

Venable has distinguished itself as a leader in the defense of consumer class action and advertising matters. Our experience representing a broad range of industry-leading, national companies against allegations of false and deceptive advertising practices demonstrates our ability to succeed in these actions.

If your advertising and marketing cannot stand up to a legal challenge, your product or service will stumble. Advertising litigation is a complex field requiring careful navigation. Venable is a national leader in advertising and marketing litigation. When leading businesses need help in structuring or defending their campaigns, they turn to us.

How can we help you? To find out, please contact us at 1.888.VENABLE or www.Venable.com.

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CLASS ACTION QUICK FACTS

Attorneys who have held senior positions at federal agencies, including:

- Department of Justice
- Federal Trade Commission
- Securities and Exchange Commission
- Federal Deposit Insurance Corporation
- Department of Labor
- Office of the Comptroller of the Currency

ADVERTISING AND MARKETING CLASS ACTION DEFENSE

Class action lawsuits against advertisers and marketers are on the rise and they pose significant threats to their brands and their businesses. Successfully defending these cases requires mastery of the issues and complexities that are unique to class action litigation, as well as the procedural nuances in courts and jurisdictions around the country.

Venable is widely recognized as one of the nation's most highly regarded advertising and marketing law practices. We defend clients against class action claims alleging violation of state and federal deceptive trade practices, false advertising, unfair competition and other consumer protection statutes. Our experience ranges from achieving precedent-setting U.S. Supreme Court victories, acting in relation to federal appellate decisions, and defending class actions in state and federal court.

In addition, we frequently defend clients against false advertising claims before self-regulatory bodies such as the National Advertising Division (NAD). Venable's experience handling consumer class actions, Lanham Act jury trials, securing federal district court victories against government regulators and staving off advertising-related investigations from the Federal Trade Commission (FTC) sets the firm apart from its competitors. Over the years we have prevailed in some of the toughest advertising-related litigation to go to trial.

Our experience in the courtroom, close ties to federal and state regulatory agencies, intimate understanding of industry self-regulatory bodies, and geographic reach are the primary reasons why clients turn to us for strategic counsel, advice, and legal representation.

If your advertising and marketing cannot stand up to a legal challenge, your product or service offering will most certainly be negatively impacted. Venable is a national leader in advertising and marketing litigation. When leading business need help defending advertising class actions, they turn to us. Over the past year, Venable has defended over a dozen class action cases. Below is a description of some of our current and recently concluded matters in this area. These matters highlight Venable's track record of success, our ingenuity, and our ability to find value for our clients even in the face of daunting class action claims.

REPRESENTATIVE MATTERS

- Venable is defending a major producer of poultry products in a putative consumer class action lawsuit pending in the District of New Jersey. Plaintiffs principally claimed that the "Humanely Raised" and "Raised Cage Free" labels on our clients' chicken products are false and deceptive. The lawsuit is being supported by the Humane Society of the United States, an animal rights organization, of which the two plaintiffs are both members. In late November 2011, the Court granted Venable's motion to dismiss the complaint, agreeing that plaintiffs lacked standing to pursue certain claims, and that they had failed to allege sufficient facts to plead their remaining claims. The Court also agreed with Venable that the "Raised Caged Free" label could not form the basis for liability because the complaint acknowledged that the label was accurate. The Court has granted plaintiffs time to attempt to replead a limited subset of their claims.

- In a case that has garnered national media attention, Venable is defending an ABA-accredited law school in a putative class action filed in New York State Supreme Court by three of the school's alumni. Plaintiffs allege that the school published misleading statistical information regarding its graduates' employment rates and salaries, and claim fraud, negligent misrepresentation, and violations of New York's consumer protection statute. As damages, plaintiffs seek disgorgement of all tuition paid by members of the putative class, which if aggregated, would exceed hundreds of millions of dollars. Plaintiffs also seek an injunction that would affect future publication of the school's graduate employment statistics. In October 2011, Venable filed a motion to dismiss all of the claims against the law school, which prompted plaintiffs to amend their complaint. In December 2011, Venable moved to dismiss the amended complaint. One of Venable's arguments for dismissal is that the complaint fails to state a claim because, as plaintiffs concede, the law school's statistics complied with the operative guidelines of the American Bar Association, which is entrusted by the U.S. Department of Education to accredit law school programs.
- Venable was retained by a major national footwear retailer to be lead settlement counsel in a class action pending in the Northern District of California, claiming violations of the federal Telephone Consumer Protection Act. Plaintiffs' claims for statutory class-wide damages in the aggregate exceeded $4 billion. Following settlement discussions and two days of mediation, Venable and plaintiffs' counsel agreed to a resolution under which class members would receive certificates which could be used to purchase up to $25 worth of items at our client's retail stores. The value of the settlement was capped at $6 million. In August 2011, the Court granted preliminary approval to the settlement, noting the unusual realities of the case.
- Venable recently defended a foreign consumer products company (as well as its corporate parent and its two founders) in 16 putative class actions that were filed around the country. The lawsuits challenged the accuracy of our client's marketing claims concerning the efficacy and ingredients of its weight-loss products. The complaints sought class-wide damages which, in the aggregate, would exceed $200 million. Venable removed the state court actions to federal court, and successfully opposed efforts to remand them back to state court. Then, on Venable's motion to the Judicial Panel on Multidistrict Litigation, the 16 cases were consolidated and transferred to the District of Massachusetts. The effect of these procedural motions was to streamline the litigation and save our client substantial amounts in legal fees and expenses. Venable then moved to dismiss the complaints. These motions led to the dismissal of the corporate parent on personal jurisdiction grounds, and the elimination of several substantive claims against the remaining defendants. After some discovery, the parties conducted settlement negotiations that culminated in an extremely favorable settlement for our clients – including nationwide consumer releases covering all our clients' weight-loss products, total settlement payments to class members of less than $50,000, and a payment for plaintiffs' attorney's fees and expenses that was less than 40% of the "lodestar" value of plaintiffs' attorneys' time. In late November 2011, the settlement received final approval from the Court.
- In 2008, on behalf of the nation's largest non-profit credit counseling company, Venable defeated class certification in an action alleging violation of a Georgia consumer protection statute. The District Court for the Northern District of Georgia held that the two named plaintiffs were inadequate to represent the putative class because they lacked basic knowledge about the claims and had effectively abandoned the case to their counsel. As an independent ground, the Court held that class treatment was inappropriate for plaintiffs' strict liability statutory claims, where statutory damages on a class-wide basis would exceed $13 million, and where Venable demonstrated that our client had acted in good faith.
- In 2008, Venable nipped in the bud a consumer class action filed against a national clothing retailer by a consumer in New York State courts, saving our client hundreds of thousands of dollars in litigation expenses and potential damages. The complaint alleged that the retailer had routinely failed to properly reimburse customers who returned items purchased using coupons, in violation of New York State unfair and deceptive trade practices laws. The suit also included common law breach of contract and fraud claims. After receiving Venable's motion to dismiss the complaint, plaintiff's counsel immediately commenced settlement negotiations. Although similar cases had settled for close to $1 million, Venable resolved the matter for a token payment.

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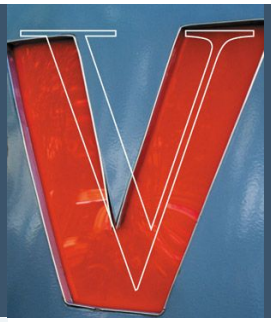

our experience

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PRIVACY AND DATA SECURITY QUICK FACTS

More than 20 attorneys experienced in data privacy issues

Authors/editors of the forthcoming *BNA Portfolio on Privacy Law*

Authors of LexisNexis®' *The Homeland Security Deskbook: Private Sector Impacts of the Defense Against Terrorism*

Recognized nationally by

Chambers USA

Legal 500

HONORS AND AWARDS

Ranked among the nation's top firms, Technology: Data Protection & Privacy, in *Legal 500*

Winners of the 2009 *Chambers USA* Award for Excellence

Two of the "Top 25 Privacy Experts" – *Computerworld 2007*

Attorneys with top rankings by

Chambers USA

Legal 500

PRACTICE FOCUS

Consumer marketing

PRIVACY AND DATA SECURITY

managing the risks of collecting and using data

For every major corporation, data privacy and security loom as critical elements of risk management. While other law firms are assembling teams to address some of the issues, no other firm has the type of experienced team we have—a team that is already providing coordinated solutions to the business, operations and legal aspects of gathering and protecting information about consumers, customers, employees and others.

MANAGING ALL THE PIECES

our integrated approach to data privacy

Policy expertise reinforced by hands-on operational experience.

The experience our attorneys bring to clients mirrors the interwoven relationship between privacy law and the practical challenges faced by companies charged with the responsibility of collecting and protecting information.

Our work combines advice on broad policy questions and specific solutions to everyday industry problems. We offer both front-edge knowledge of the thinking of legislators and regulators and first-hand experience solving the issues that confront the executives of electronic commerce, financial services and communications companies.

Our policy work enhances our operational advice, and vice versa. We combine legal theory and practical know-how in an integrated approach to complex privacy and security issues.

When trouble strikes, we know how to deal with it.

Venable attorneys have years of experience defending clients in enforcement actions by regulatory authorities and mounting challenges to agency regulations, as well as litigating privacy issues and defending clients in class-action lawsuits.

With the increased risks and costs of privacy breaches, we place particular emphasis on issues involving the acquisition, aggregation and national and international transfer and use of personal data. For example, we have represented:

Electronic commerce
Financial services
Government surveillance
Healthcare
Homeland security
International transfers
Workplace privacy

WHAT WE DO

Advice on legal compliance and risks
Defense in investigations or civil suits
Forecasts and analyses of the impact of legislative/regulatory proposals
Input at the product development stage
Investigations of privacy breaches
Privacy reviews and audits
Representation before Congress on data security, Social Security number privacy and similar issues

INDUSTRY FOCUS

Electronic publishing
Entertainment
Financial services
Healthcare
Hospitality
Marketing
Retail
Telecommunications
Transportation

- **retailers, financial institutions and marketers** in connection with credit card and other data security breaches;
- **a personal Web page services provider** in the Federal Trade Commission's first case alleging failure to adhere to a privacy policy describing the use and disclosure of registration and other consumer information;
- **trade associations** seeking to strike down financial privacy regulations issued by the FTC, the Securities and Exchange Commission and the federal banking agencies pursuant to the Gramm-Leach-Bliley Act and challenging the national "Do Not Call" registry and related FTC telemarketing regulations;
- **a major cable television company** in class-action suits filed under the privacy provisions of the Cable Act;
- **the Direct Marketing Association** in connection with legislation and regulations concerning numerous marketing issues related to new communications technologies;
- **various clients** in matters pending before the Department of Homeland Security;
- **a health services marketer** in connection with the requirements of the Health Information Portability and Accountability Act related to pharmaceutical discount cards; and
- **a global provider of Internet services** on criminal compliance matters.

Because data privacy is a global issue, we operate globally.

Many of our clients collect and protect data in Canada, Latin America, Asia and the European Union. Therefore, we regularly meet with international regulators and have developed a specialist network of data protection lawyers in more than 20 countries.

Making your views known to legislators and regulators.

We are in constant contact with policy makers in the United States, where our work has had an impact on privacy and information security laws and regimes such as:

- Bank Secrecy Act and anti-money-laundering rules;
- Behavioral advertising;
- CAN-SPAM ACT;
- Children's Online Privacy Protection Act;
- Communications Assistance for Law Enforcement Act;
- European Union Data Protection Directive;
- Fair Credit Reporting Act;
- Federal Right to Financial Privacy Act;
- Gramm-Leach-Bliley Act provisions on privacy and security of customer information;
- Health Insurance Portability and Accountability Act;
- IRS information disclosure rules;
- Office of Foreign Assets Control;
- Telecommunications Act;
- USA PATRIOT Act;
- Use of Social Security numbers; and
- U.S.-EU Safe Harbor Agreement.

Venable attorneys also help draft and implement self-regulatory programs and standards for trade associations. We are the long-standing privacy counsel to the Direct Marketing Association.

Our combined experience—mastering the intricacies of compliance with a maze of federal laws, defending clients in regulatory actions and guiding the data and privacy aspects of corporate mergers and alliances—enables us to respond quickly when new issues arise in any client's business.

How can we help you? To find out, please contact us at 1.888.VENABLE or www.Venable.com.

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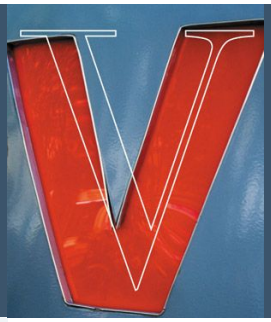

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- Federal Deposit Insurance Corporation
- Department of Labor
- Office of the Comptroller of the Currency

PRIVACY CLASS ACTION DEFENSE

attorneys who understand the value of information

Venable brings together a deep understanding of one of the most critical tools of your business. That tool is information. Your ability to collect data on customers, competitors, employees and ideas is both an asset and a liability. Venable's team of advertising and privacy lawyers are recognized around the world for their knowledge and experience with the regulations that govern data security, advertising and privacy. They combine this experience with proven success in helping companies navigate and defend against government investigations and litigation.

> *"The team deals with cutting edge issues in the privacy field and demonstrates a sound understanding of market trends." — Chambers USA*

Venable attorneys have years of experience defending clients in class actions arising under state and federal privacy statutes. We have defended these same clients in simultaneous enforcement actions by regulatory authorities covering the same areas.

REPRESENTATIVE MATTERS

- On behalf of a research and publishing company, Venable defeated class certification in a California class action involving alleged privacy violations arising from our client recording telephone communications between its sales force and customers. The court denied class certification on the grounds that the recordings were authorized by state tariffs. The victory saved our clients tens of millions in potential class damages.
- Securing a summary judgment against S.D. Cal. putative class claims challenging ordinary course of business telephone call monitoring and recording under California Invasion of Privacy Act ("CIPA") and 12 other state privacy statutes. We established that the California legislature never intended to reach ordinary course of business call monitoring when it enacted CIPA, that a business entity is incapable of "eavesdropping" on its own telephone calls under state wiretap statutes, and that the client complied with telecommunications requirements for CIPA and CPUC business use exceptions to apply. Summary judgment of privacy claims upheld on appeal by the 9th Circuit. *Thomasson v. GC Services L.P.*, 321 Fed.Appx. 557 (9th Cir. 2008)
- Venable won a putative class action for an international security company in the Central District Court of California. Plaintiff alleged that our client failed to protect its employees' personal, confidential information from theft, in violation of privacy statutes. Venable moved to dismiss for lack of causation between the alleged theft of some computers and the claimed potential harm. Rather than oppose the motion, plaintiff agreed to dismiss the case with prejudice for a settlement payment of $750.
- On behalf of a national bank, Venable successfully moved to dismiss with prejudice a putative nationwide class action filed in the Southern District of Texas, alleging that the bank's marketing and administration of life insurance products to account holders violated state and federal privacy and RICO laws. Plaintiffs sought class-wide damages of tens of millions of dollars. The decision is currently on appeal to the Fifth Circuit. *Gonzalez v. Bank of America.*

- Venable defeated class certification in a putative multi-state class action challenging our client's alleged data pass and other magazine subscription continuity programs, cancel/save and IVR system issues. Plaintiffs sought to certify classes for damages claims and injunctive relief. Venable opposed class certification on the grounds that circumstances surrounding each subscriber's initial acceptance and subsequent renewal or cancellation of magazine subscriptions would need to be litigated on a case-by-case basis to determine defendant's liability. The court agreed. Plaintiff's estimated value of the class-wide damages was several hundred million dollars. The decision is currently on appeal to the Third Circuit. *McNair v. Synapse Group Inc.*

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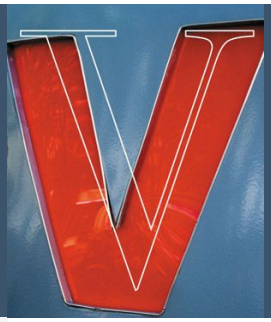

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Over 500 lawyers in seven offices

American Lawyer's AmLaw 100

129 practice groups ranked, "Best Law Firms" *U.S. News & World Report-Best Lawyers* 2011-2012

Over 50 attorneys and 30 practice areas ranked, *Chambers USA 2011*

Counsel to 38 of the Fortune 100

TASK FORCE QUICK FACTS

A team of over 20 attorneys with experience in all of the key areas impacted by the Consumer Financial Protection Act

Practice groups named as winners of the *Chambers USA* Award for Excellence in 2009, 2010 and 2011

Attorneys with top rankings by

- *Chambers USA*
- *Legal 500*
- *Best Lawyers in America*
- *Martindale-Hubbell*
- *Super Lawyers*

GOVERNMENT EXPERIENCE

Attorneys who have held senior positions at key government agencies, including

- Federal Trade Commission
- Department of Justice
- Federal Deposit Insurance Corporation
- Office of the Comptroller of the Currency
- Department of Treasury

CONSUMER FINANCIAL PROTECTION BUREAU TASK FORCE

an integrated team guiding you through uncharted waters

In uncharted waters, experience is your best guide. The Dodd-Frank Wall Street Reform and Consumer Protection Act maps out a new course in financial regulation. As noted recently by president Obama, the new regulations "represent the strongest consumer financial protections in history." Included in the reforms is the creation of the Consumer Financial Protection Bureau, a consumer watchdog whose role will be, in the words of president Obama, "looking out for people – not big banks, not lenders, not investment houses – in the financial system."

In short, these regulations will indelibly alter the consumer financial landscape, and businesses who ignore them do so at their own peril. But while the route is new, the skills needed to navigate it are not. Venable has the experience to guide businesses through what lies ahead in financial and consumer regulation.

Sweeping changes to banking and financial regulation.

The Dodd-Frank Act is the most sweeping financial legislation in decades, signaling a new era of tighter regulation and heightened enforcement. The legislation includes 300 new rules and regulations and more than 50 studies.

A central element of the Act is the creation of a new Bureau of Consumer Financial Protection, an independent watchdog housed within the Federal Reserve System. Taking on powers formerly exercised by various regulatory agencies, the bureau is authorized to write and enforce consumer protection regulations targeting a broad range of financial services and products.

Other provisions of the act set new requirements for banks, mortgage lenders, insurers, investment advisors, hedge funds, private-equity funds, ratings agencies, and companies that trade or sell derivatives.

A spectrum of new regulations seen through the prism of our experience.

For businesses that fall under this consumer protection legislation, uncertainty lies ahead in the form of new regulations and enforcement powers.

Venable is uniquely prepared to guide companies through this uncertain environment. We have multiple, long-established practices focused on the intersection of consumer protection and government regulation in finance and commerce. Our decades of experience span advertising and marketing, banking and financial services regulation, corporate and consumer finance, nonprofit and trade association law, and legislative and government affairs.

We are skilled practitioners of consumer protection law. While the Bureau of Consumer Financial Protection is new, it takes over responsibilities from agencies we know intimately – such as the Federal Trade Commission, the Treasury Department, the Department of Housing and Urban Development, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation and the Federal Reserve System – and in areas of law that we know inside and out.

With uncertainty ahead, businesses need a trusted guide.

The Dodd-Frank Act is unprecedented in its scope. But the issues it addresses and the

State attorney general offices, including the Consumer Protection Division of the Maryland Attorney General

businesses it affects are ones we know well. For decades, Venable has helped companies navigate regulatory and legislative initiatives and the laws governing commerce, finance and trade. Our experience is your best guide.

How can we help you? To find out, please contact us at 1.888.VENABLE or www.Venable.com.

VENABLE® LLP

bio

Ari N. Rothman

Associate

Washington, DC Office

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anrothman@Venable.com

Ari Rothman focuses on complex litigation and transactions with a particular emphasis on Internet marketing and advertising matters involving advertisers, advertising networks, affiliates/publishers, list owners/managers, credit card processors, Internet service providers, and hosting companies. He also has extensive experience pursuing and defending civil actions involving a wide range of commercial matters, including employment and insurance matters, commercial contractual disputes, trade secrets, copyrights, trademarks, consumer fraud, email/"spam," eminent domain, shareholder disputes, antitrust, defamation, and disability and voting rights. Significant litigation matters include:

- Obtaining summary judgment and dismissals with prejudice in favor of affiliate networks and affiliates/publishers in actions brought under California's email spam and consumer protection statutes
- Litigating and negotiating favorable settlement for ad network that sued a competitor for misappropriation of trade secrets case involving consumer data/email lists
- Litigating and negotiating favorable settlements for advertisers and ad networks in consumer fraud actions initiated by Federal Trade Commission and state attorneys general, and by consumers in class actions
- Representing advertising networks in investigations initiated by the Federal Trade Commission and state attorneys general
- Litigating and negotiating favorable settlement for advertiser accused of infringing trademarks of a competitor through labeling products placed on shelves of major nationwide retailers
- Representing debt counseling centers in actions challenging 26 U.S.C. § 501(c)(3) status and handling of consumer credit counseling procedures
- Litigating on behalf of District of Columbia in eminent domain action to acquire and pay for properties needed for the current Washington Nationals baseball stadium
- Representing and obtaining favorable settlement for a client that sued its competitor for antitrust violations
- Obtaining judgment after trial against Duval County, Florida for violations of the Americans with Disabilities Act where Duval County purchased voting equipment that was inaccessible to voters with manual impairments and voters with visual impairments

Mr. Rothman has experience defending criminal actions including money laundering, "structuring," and wire and mail fraud, and has been involved in bankruptcy adversary proceedings. Mr. Rothman also has experience representing clients in asset freeze cases brought under CAFRA (Civil Asset Forfeiture Reform Act).

In addition, Mr. Rothman:

- Drafts, revises and updates marketing/advertiser agreements, ad network

AREAS OF PRACTICE

Commercial Litigation

Antitrust

Antitrust Investigations

Class Action Defense

Litigation

Advertising and Marketing

Advertising and Marketing Litigation

BAR ADMISSIONS

District of Columbia

Ohio (inactive)

COURT ADMISSIONS

U.S. District Court for the District of Columbia

U.S. District Court for the Northern District of Illinois

U.S. District Court for the District of Maryland

U.S. Court of Appeals for the Eleventh Circuit

U.S. Tax Court

EDUCATION

J.D., cum laude, Case Western Reserve University School of Law,

2002

A.B., Kenyon College, 1999

MEMBERSHIPS

American Bar Association

agreements, publisher agreements, and employee agreements, and represents clients in negotiations concerning those agreements

- Provides compliance advice as to advertisements created, published, and/or hosted by the client, and dissemination of such advertisements
- Advises advertising networks, advertisers, and publishers concerning asset and technology protection, privacy issues, protection of client and pricing information, and other compliance and best practices matters
- Consults with clients concerning trademark, patent, and copyright matters

Mr. Rothman regularly attends conferences and speeches in the on-line marketing industry, and keeps informed of all developments affecting his clients nationwide.

HONORS

Member of the trial team awarded Washington Lawyers' Committee Outstanding Achievement Award for work on an election lawsuit in Florida.

Anderson Publishing Company Book Award, Civil Clinic

SPEAKING ENGAGEMENTS

- May 3, 2011 - May 5, 2011, Response Expo 2011
- December 8, 2010 - December 9, 2010, AffCon 2010 - Miami: The Affiliate Marketing Conference

VENABLE® LLP

bio

Jonathan L. Pompan

Of Counsel

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Jonathan L. Pompan is Of Counsel in the firm's Washington, DC office. With extensive Washington experience, Mr. Pompan focuses his practice on providing comprehensive legal advice and regulatory advocacy to a broad spectrum of clients, including for-profit companies and nonprofit organizations and trade and professional associations. He also counsels clients in the areas of consumer protection and financial services. He helps his clients develop creative approaches to meet their objectives while complying with applicable regulatory frameworks.

Mr. Pompan is a frequent speaker and author on legal and regulatory issues of significance to providers of consumer financial products and services, advertisers and marketers, and nonprofit organizations.

Consumer Financial Products and Services

A substantial portion of Mr. Pompan's work involves advising clients on how to minimize the legal risks related to providing, advertising and marketing financial products and services to consumers under federal and state consumer protection laws, including laws and regulations under the jurisdiction of the Federal Trade Commission and the federal Consumer Financial Protection Bureau ("CFPB"). Mr. Pompan's experience includes representing various companies in state Attorney General and state banking/financial institution department investigations and enforcement actions; conducting compliance audits; and assisting in the formation and development of new companies, products and services.

Advertising and Marketing

Mr. Pompan is an experienced advertising attorney who regularly advises clients on consumer protection issues, specifically with regard to advertising and promotions, including digital media, as well as consumer credit and financial services laws and regulations. He has extensive experience in the issues surrounding mobile marketing, target marketing, lead generation, affiliate marketing, social media, and user-generated content. Mr. Pompan also defended clients in investigations and enforcement actions pursued by the FTC, state Attorneys General, and other state regulatory agencies, as well as in private litigation involving claims such as false or misleading advertising or unfair and deceptive trade practices.

Credit Counseling and Debt Services

Mr. Pompan is widely recognized as one of the leading credit counseling and debt services attorneys in the country. Mr. Pompan represents numerous clients in the credit counseling and debt services community, including nonprofit tax-exempt credit counseling agencies, housing counseling agencies, and a substantial number of industry-related service providers.

Prior Experience

Mr. Pompan joined Venable after serving as in-house associate counsel at one of the nation's largest industry trade associations. His responsibilities included contracts, intellectual property (trademark and copyright), advertising, antitrust, general

AREAS OF PRACTICE

Advertising and Marketing

Advertising and Marketing Litigation

Tax-Exempt Organizations

Tax and Wealth Planning

Consumer Finance

Regulatory

INDUSTRIES

Nonprofit Organizations and Associations

Credit Counseling and Debt Services

Consumer Products and Services

Consumer Financial Protection Bureau Task Force

BAR ADMISSIONS

District of Columbia

Maryland

EDUCATION

J.D., Washington University School of Law, 2001

B.A., The George Washington University, 1998

Recipient of the George

Washington Award, 1998

MEMBERSHIPS

American Bar Association (Section on Business Law and Nonprofit Committee)

business/trade association matters, and counsel on federal and state regulatory advocacy. In this position, Mr. Pompan worked on matters such as negotiating hotel and convention contracts; pre-publication review of literature, web sites, and commercial advertising scripts; review of meeting minutes and agendas; the legal management of the association's trademark portfolio; the design and management of a contract management program; and numerous industry specific issues.

Mr. Pompan also has a significant amount of Washington regulatory and political experience in government. During law school, he served as a legal intern in the Office of the Commissioner Michael Powell at the Federal Communications Commission, and with the Enforcement Division of the Bureau of Consumer Protection at the FTC.

Mr. Pompan also has previous law firm experience working on federal appropriations, legislative and administrative law matters.

Prior to attending law school, Mr. Pompan worked in the government relations office at The George Washington University, served as a Congressional Page, and worked on Capitol Hill.

REPRESENTATIVE EXPERIENCE

- Developed self-regulatory program for coaching and mentoring programs as part of nationally established self-regulatory program.
- Settled multiple state investigations and enforcement actions on behalf of various nonprofit and for-profit clients concerning consumer protection issues and related allegations.
- Represented various financial services companies and their advertisers in FTC investigations alleging violations of the FTC Act; representation of company in one of the first CFPB investigations.
- Coordinates legislative and regulatory advocacy team for a financial education and counseling industry coalition and provides related strategic advice.
- Assists various clients in regulated industries with comprehensive state licensing (e.g., money transmitter, debt adjusting, debt collection, and mortgage loan origination) and the design of related compliance programs.
- Represented an equity fund by providing due diligence consumer protection regulatory advice with respect to acquisition targets.
- Assists various clients, including online lead generators, in website design and development.
- Successfully guided the reorganization and transfer of the assets of a nonprofit, tax-exempt provider of financial education and counseling to an unrelated nonprofit, tax-exempt provider of similar services.

ACTIVITIES

Mr. Pompan is a former member and parliamentarian of the board of directors of The George Washington University Alumni Association. He is a member of the Barcroft School & Civic League in Arlington, VA, and has been a past volunteer in the Everybody WINS! elementary school reading program.

SELECTED PUBLICATIONS

- February 21, 2012, New Federal Consumer Protection Working Group Takes Aim at Consumer Fraud
- February 1, 2012, Venturing into Ambush Marketing and Protecting Sponsorships Requires Careful Planning
- January 20, 2012, Exploring Consumer Arbitration Provisions after CompuCredit v. Greenwood
- January 6, 2012, Consumer Financial Protection Bureau Starts Nonbank Supervision Program
- January 9, 2012, FTC Report Highlights Lead Generation Dangers

- January 10, 2012, Know the Rules before Working with Nonprofits, DRMA Voice
- December 2011, Consumer Financial Protection Bureau Opens Whistleblower Complaint Hotline
- December 2, 2011, Advertising News & Analysis - December 2, 2011
- November 22, 2011, Cause-Related Marketing in the Crosshairs: What the New York Attorney General's Breast Cancer Investigation Means for Nonprofits and Their Corporate Supporters
- November 17, 2011, Avoiding Internet Advertising and Recruitment Pitfalls
- November 17, 2011, Lead Generation through Mobile Marketing: Legal and Regulatory Realities, DMConfidential.com
- November 17, 2011, The 10 Biggest Legal Hazards for Lead-Generation Marketers, DMConfidential.com
- October 2011, Avoid Legal Pitfalls in Cause Related Marketing
- September 22, 2011, Advertising News & Analysis - September 22, 2011, Advertising Alert
- August 11, 2011, Avoiding Legal Pitfalls in Cause-Related Marketing
- July 2011, HUD Issues SAFE Act Final Rule: Implications for Housing Counseling Agencies and Other Nonprofit Organizations
- July 2011, FinCEN Reaffirms Exclusion for Debt Management Plans
- July 28, 2011, Advertising News & Analysis - July 28, 2011, Advertising Alert
- July 22, 2011, FTC Issues Mortgage Acts and Practices - Advertising Final Rule, DMConfidential.com
- July 21, 2011, Consumer Financial Protection Bureau Opens for Business: The Implications for Debt Relief Service Providers and Housing Counseling Agencies
- July 21, 2011, The Future of Credit Counseling Industry State and Federal Regulation: A New Uniform Debt-Management Services Act, Other State Laws, and Federal Regulation
- July 2011, A Collection of Venable's Credit Counseling and Debt Services Legal Articles and Presentations from the First Half of 2011, Credit Counseling Alert
- June 2011, CFPB Targets Nonbanking Consumer Financial Markets for Supervision, CFPB Watch
- June 2011, CFPB Targets Debt Relief Services Market for Supervision, CFPB Watch
- June 2011, FTC Plans to Update Dot Com Disclosure Guidance, DMConfidential.com
- May 23, 2011, Telemarketing Sales Rule, Credit Repair Organizations Act, and Litigation Risk Developments
- May 13, 2011, IRS Denies 501(c)(3) Status to Bankruptcy Counseling Agency
- May 10, 2011, California DFI: CA Money Transmission Act Does Not Apply to Credit Counseling Agencies
- May 5, 2011, U.S. Supreme Court Upholds Class-Action Waivers: What It Means for Consumer Product and Service Providers, CFPB Watch
- April 21, 2011, FTC's Smackdown on Affiliate Marketing, DMConfidential.com
- April 13, 2011, Considerations in Mergers and Asset Transfers of Credit Counseling Agencies
- April 12, 2011, Internal Revenue Code Section 501(q) and Its Critical Implications for the Nonprofit Housing Counseling Industry in Light of Recent IRS Guidance
- March 10, 2011, Lead Generation through Mobile Marketing: Legal and Regulatory Realities, DMConfidential.com
- January 20, 2011, The Legal Aspects of Using Social Media: How to Avoid the Pitfalls and Capitalize on the Opportunities
- January 2011, The Dodd-Frank Act and Implications for Nonprofit Organizations, CFPB Watch
- January 18, 2011, New Limits on Online Marketing: The Implications for Nonprofit

Organizations

- January 7, 2011, New Limits for Online Data-Pass and Negative Option Marketing Expected, DMConfidential.com
- January 2011, 2011 Legal and Regulatory Outlook for Credit Counseling Agencies
- July 26, 2010, Buying Smart / Selling Smart – The 10 Biggest Legal Pitfalls in Lead Generation

SELECTED SPEAKING ENGAGEMENTS

Mr. Pompan is a frequent speaker and author on legal and regulatory issues of significance to providers of consumer financial products and services, advertisers and marketers, and nonprofit organizations.

- June 20-22, 2012, “What the Consumer Financial Protection Bureau means for Private Sector Colleges and Universities,” Association of Private Sector Colleges and Universities (APSCU) 2012 Annual Convention & Expo
- May 10, 2012, "Tips on How to Avoid Legal Liability and Enforcement Actions" for the Association of Credit Counseling Professionals
- February 27, 2012, "Evolving Legal and Regulatory Landscape for Lead Generation" at LeadsCon 2012
- February 14, 2012 & February 15, 2012, Consumer Protection and Private Sector Colleges and Universities: Students First, Association of Private Sector Colleges and Universities (APSCU) Senior Executive Seminar
- January 27, 2012, "Consumer Financial Protection Bureau: Impact Explored" live webcast for The Knowledge Congress
- January 20, 2012, "Exploring Consumer Arbitration Provisions after CompuCredit v. Greenwood" at AICCCA's Mid-Winter Conference
- December 14, 2011, "The Informed Consumer: Putting Students First," Association of Private Sector Colleges and Universities (APSCU) Symposium 2011
- November 17, 2011, "Avoiding Internet Advertising and Recruitment Pitfalls" webinar for APSCU
- November 15, 2011, "An Interview with State Regulators" at the Association of Credit Counseling Professionals (ACCPros) Fall 2011 Conference
- March 2, 2011, "Whose Brand Is It Anyway? Trademarks, Brand Consideration & Compliance" at LeadsCon Las Vegas
- January 20, 2011, "The Legal Aspects of Using Social Media: How to Avoid the Pitfalls and Capitalize on the Opportunities" at AICCCA's 18th Mid-Winter Conference
- November 2, 2010, Reverse Mortgage Counseling Association Annual Conference
- October 5, 2010, "New Federal Regulation of Tax Resolution, Tax Negotiation and Tax Settlement Services" webinar hosted by National Policy Group and Venable LLP
- September 21, 2010, What the New Consumer Financial Protection Act Means for Credit Counseling Agencies and Other Debt Relief Service Providers
- July 26, 2010, "Buying Smart/Selling Smart – The Ten Biggest Legal Pitfalls in Lead Generation" at LeadsCon East
- May 26, 2010, "Preparing For Change: Legal and Regulatory Challenges and Opportunities for Credit Counseling Agencies" to the Association of Credit Counseling Professionals
- February 24, 2010, "Keeping Compliant – Legal and Regulatory Developments for Lead Generators" at LeadsCon 2010
- September 25, 2009, Advertising Law 101 American Society of Association Executives (ASAE) Annual Association Law Symposium
- July 17, 2009, Legal and Regulatory Outlook: Challenges and Opportunities Facing Credit Counseling Agencies in 2009 and Beyond

- July 15, 2009, “Hot Topics” for Credit Counseling Agencies: A Legal and Regulatory Update
- June 8, 2009, "Hot Legal Topics in the Debt Settlement Industry" at United States Organizations for Bankruptcy Alternatives (USOBA) Summer Conference
- April 14, 2009, Legal Quick Hit: The Attorney-Client Privilege and In-House Counsel
- January 21, 2009, Association of Independent Consumer Credit Counseling Agencies (AICCCA) 16th Mid-Winter Conference
- November 10, 2008, United States Organizations for Bankruptcy Alternatives (USOBA) Winter Conference
- September 9, 2008, ACC Nonprofit Organizations Committee September 2008 Teleconference
- July 17, 2008, Association of Independent Consumer Credit Counseling Agencies (AICCCA) 15th Annual Conference
- June 23, 2008, United States Organizations for Bankruptcy Alternatives (USOBA) Summer Conference 2008
- February 21, 2008, Non-Profit Executive Breakfast Seminar Series: Good Governance: Actions Required for a Transparent Association
- January 16, 2008 - January 18, 2008, Association of Independent Consumer Credit Counseling Agencies (AICCCA) 15th Mid-Winter Conference
- November 12, 2007 - November 13, 2007, United States Organizations for Bankruptcy Alternatives (USOBA) Fall Conference.
- October 4, 2007, Non-Profit Executive Breakfast Seminar Series: Association Law Developments
- July 12, 2007, AICCCA 14th Annual Conference
- May 31, 2007, Introduction to Nonprofit Management
- May 9, 2007, Credit Counseling Industry Federal Legislative Summit
- February 26, 2007, The Rapidly Changing Legal Landscape: Keeping It All in Perspective and What Every Debt Settlement Company Needs to Know
- February 26, 2007, United States Organizations for Bankruptcy Alternatives (USOBA) Winter Conference
- January 18, 2007, Mid-Winter Conference of the Association of Independent Consumer Credit Counseling Agencies
- October 3, 2006, "Nonprofit and Association Law" at George Mason University
- July 21, 2006 - July 22, 2006, United States Organizations for Bankruptcy Alternatives (USOBA) Summer Conference
- July 12, 2006 - July 14, 2006, Association of Independent Consumer Credit Counseling Agencies 13th Annual Conference
- February 2, 2006 - February 3, 2006, United States Organizations for Bankruptcy Alternatives (USOBA) Winter Conference
- November 7, 2005 - November 9, 2005, American Association of Debt Management Organizations Fall Conference