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LAW BULLETIN

The Promotion Marketing Industry's leading periodical of what's happening in the law and how it affects your business.

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EXECUTIVE LEGAL SUMMARY

What you need to know and why it's important!

News, New Laws and Regulations, New Cases and Agency Interpretations

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NEWS

FCC sends a broad Notice of Inquiry ("NOI") -re Empowering Parents to Protecting Children in an Evolving Media Landscape

Industry members reacted with real concern to the FTC's recent NOI, asking for comments on a very broad range of content areas; the concern here is that the NOI may assume that media content is dangerous and that something should be done to protect children.

Chief among the apparent dangers reflected in this notice appears to be inappropriate language and content unsuitable for minors, and which tops the list for ahead of "sexual predation" and "fraud and scams". The NOI makes numerous other assumptions about the effects of violent media, product placement and the like including that the "V" chip, the software media blocking device, is "underused".

There are major 1st amendment issues here, as well as issues relating to the scope of the FCC's media authority, including with respect to jurisdiction over media platforms like the internet.

Stay tuned for further developments- please note also the existing notice of Proposed Rule Making re FCC/product placement carried over from the previous administration. See FCC.gov for further information.

Gift Cards Proposal Rule under Regulation E

A proposal has been published in the Federal Register to amend Regulation E:

Highlights of Proposed Gift Cards Rule:

The proposal would amend Regulation E to implement the gift card provisions of the Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit CARD Act). The proposal would set forth new protections

for consumers that purchase or use certain prepaid products, primarily gift cards.

- **Products Covered.** The proposal applies to gift certificates, store gift cards, and general-use of prepaid cards, as those terms are defined in the Credit CARD Act.

- Covered products include retail gift cards, which can be used to buy goods or services at single merchant or affiliated group of merchants, and network-branded gift cards, which are redeemable at any merchant that accepts the card brand.

- Consistent with the statute, the proposed rule would not apply to other types of prepaid cards, including reloadable prepaid cards that are not marked or labeled as a gift card or gift certificate, and prepaid cards received through a loyalty, award or promotional program.

- **Restrictions on dormancy, inactivity, or service fees.** The proposed rule prohibits a person from imposing a dormancy, inactivity, or service fee with respect to a gift certificate, store credit card, or general-use prepaid card.

- Dormancy, inactivity, and service fees may only be assessed for a certificate or card if: (1) there has been at least one year of inactivity on the certificate or card; (2) no more than one such fee is charged per month; and (3) the consumer is given clear and conspicuous disclosures about the fees.

- Fees subject to the proposed restrictions would include monthly maintenance or service fees, balance inquiry fees, and transaction based-fees, such as reload fees and point-of-sale fees.

- **Restrictions on expiration dates.** The proposed rule prohibits the sale or issuance of a gift certificate, store gift card, or general-use prepaid card that has an expiration date or less than five years after the date a certificate or card is issued or the date funds are last loaded.

The expiration date restrictions would apply to a

consumer's funds, and not to the certificate or card itself. The proposal includes provisions intended to help ensure consumers have at least five years to use a certificate or card from the date of purchase.

The proposed rule prohibits the imposition of any fees for replacement of an expired card or certificate if the underlying funds remain valid.

Food Marketing to children 2-17/ Are New statutory standards forthcoming?

On Dec 15, 2009 The FTC announced that together with the FDA, CDC & USDA, it has formed a working group pursuant to federal statute, and will conduct a study and develop recommendations for standards for the marketing of food to children 17 or younger, including considerate of nutrients, calories, portion size, saturated and trans fats, sodium, sugar et al and to consider the role of consumption in the development of obesity among such children.

The appendix of proposal standards for marketing foods to children 2-17 has caused some concern among marketers, particularly in light of the possibility that the FTC may receive new rule-making authority under the Omnibus Bill passed by the House of Representatives in December (see discussion below in this issue)

Consumer Financial Protection Agency Act (U.S. HR 3126) Expansion of FTC Jurisdiction Passed by House/goes to Senate

In December 2009 the House of Representatives passed HR 3126, the Consumer Financial Protection Agency Act ("CFPA"), which would also amend the FTC act by removing procedural safeguards with respect to rule making, including by arguably eliminating the requirement that unfair or deceptive practices be prevalent. This could reach children's advertising and marketing in ways that could severely restrict advertising.

In addition, the act would increase civil penalty authority and independent litigation

authority, of the FTC and aiding and abetting liability of companies.

An Act To Protect Minors from Pharmaceutical Marketing Practices

Further news in the saga on the Maine Predatory Marketing Practice to Minors legislation, passed last fall and effective now, but repudiated by the Maine AG as unconstitutional after a coalition effort in which PMA participated.

A new bill, to be effective 1 year after passage, (LD1677), was introduced in Committee to repeal the old law (Sec110MSRA C1055) and instead prohibit the collection and use of personal information on the Internet from a minor for purposes of pharmaceutical marketing in violation of rules to be adopted by the Attorney General. The bill is in Committee.

FTC WORKSHOPS

FTC recently held several workshops, including a targeted Advertising/FTC Workshop Dec. 7 on online privacy and targeted advertising. At this workshop several commentators alleged that consumers do not understand behavioral advertising; the FTC had previously issued self-regulating guidelines that provide for greater notice/transparency and the opportunity to opt out.

Several associations have already adopted self-regulating guidelines; and members of industry have increased their efforts to become more transparent. Accordingly, several industry groups prepared to begin ad campaigns to educate their respective public about these matters.

FTC ENFORCEMENT

FTC Seeks Public Comment on Program to Keep Web Site Operators in Compliance With the Children's Online Privacy Protection Rule

The Federal Trade Commission is seeking public comment on proposed guidelines that are designed to help Web site operators comply with the FTC's Children's Online Privacy Protection Rule.

The proposed guidelines were submitted to the FTC by a non-profit organization known as iSAFE, Inc. under a provision aimed at industry self-regulation. This provision allows non-profit groups and companies to request FTC approval of proposed guidelines – known as safe harbor programs – that govern compliance with the Rule.

Web site operators participating in FTC-approved safe harbor programs are subject to the programs' disciplinary procedures. In cases where the FTC is considering legal action against a Web site operator, the agency takes into account the operator's response to safe harbor disciplinary procedures.

The Rule requires operators of Web sites that are directed at children under 13 years old and that collect personal information from them – as well as operators of general-audience Web sites that knowingly collect personal information from children under 13 – to notify parents and obtain their consent before collecting, using, or disclosing any such information. Since the Rule took effect on April 21, 2000, four groups – the Children's Advertising Review Unit of the Council of Better Business Bureaus, the Entertainment Software Rating Board, TrustE and Privo, Inc. – have received Commission approval for their safe harbor programs. In a Federal Register notice to be published shortly, the FTC seeks public comment about the proposed iSAFE guidelines; whether the guidelines provide “the same or greater protections for children” as those contained in the Children's Online Privacy Protection Rule; whether the mechanisms used to assess operators' compliance are effective; whether incentives

for operators' compliance with the guidelines are effective; and whether the guidelines provide adequate means for resolving consumer complaints. The comment period will last for 45 days. See FTC.gov

PENDING STATE LEGISLATION

Gift Cards: Illinois

IL HB 4702, Mulligan. Amends the Consumer Fraud and Deceptive Business Practices Act. Provides that the holder of a gift certificate issued on or after January 1, 2011 that has a balance of less than \$10 must be given the option of receiving that balance in cash. Effective January 1, 2011. 01/04/2010-To HOUSE Committee on RULES.

Advance Consent Marketing/Kentucky:

KY BR 144, Firkins. Provides that any person that sells or offers to sell any products or services to a consumer pursuant to a contract that automatically renews unless the consumer cancels the contract shall disclose the automatic renewal clause clearly and conspicuously in the contract, including the cancellation procedure status. 12/15/2009-PREFILED.

SC H 4267, Merrill. Relates to gambling and lotteries, amends existing laws on unlawful lotteries and gambling laws into article 1, and to add definitions. 01/12/2010-To House Ways, Means Committee.

An Act To Protect Consumers from Charges After a Free Trial Period:

ME H 1085, Hunt. This bill prohibits a merchant from offering a consumer product or service for a free trial period if the consumer is required to contact the merchant to avoid receiving additional products or services and incurring a financial obligation. 01/06/2010-HOUSE refers to JOINT Committee on BUSINESS, RESEARCH AND ECONOMIC DEVELOPMENT.

Advance Consent Marketing/NH:

NH H 1605, Wendelboe. An act requiring businesses to disclose the terms and conditions of any continuing or automatic obligation as part of the sale. 01/06/2010-To HOUSE Committee on COMMERCE AND CONSUMER AFFAIRS.

FEDERAL LEGISLATION

Advertising/Tax Deductions:

U.S. 2873, Begich. To amend the Internal Revenue Code of 1986 to deny the deduction for direct to consumer advertising expenses for prescription pharmaceuticals and to provide a deduction for fees paid for the participation of children in certain organizations which promote physical activity. 12/11/2009-To SENATE Committee on FINANCE.

INTERNATIONAL NEWS/UK, et al

Topic: On-line advertising

Who: Information Commissioner's Office / Article 29 Working Party / European Commission / Federal Trade Commission / Internet Advertising Bureau

When: 2009

Where: UK

Law stated as at: 26 November 2009

What happened:

No single data privacy topic has attracted quite as much regulatory, commercial and press attention over the past year or so as online behavioural advertising ("OBA"). So, to help our Marketinglaw readers keep track, we thought it would be helpful to set out a timeline of the data privacy developments in this area (in reverse order – we know you like to see the most recent news first!):

November 2009: What a month for OBA news!
In this single month:

- European legislators adopted new rules on website cookies, potentially requiring website operators to seek prior consent from visitors before using cookies (although the law is unlikely to come into force before 2011) – see our client alert available <http://www.osborneclarke.com/publications/commercial/Alert/12424.asp>;

- the Internet Advertising Bureau ("IAB") promptly proclaimed that online businesses need not worry on the basis that consent could be implied through users' website browser settings (although not everyone – including Osborne Clarke's data privacy experts – is convinced by this argument). Separately, the IAB also produced its guide to online behavioural advertising (available [here](#)) with a view to educating businesses and consumers alike about the potential benefits of OBA;

- meanwhile, the Ministry of Justice published a consultation on fines for data protection breaches, proposing to give the Information Commissioner's Office ("ICO") the ability to impose fines of up to £500k (ok, it's not strictly OBA related, but interested readers can find the consultation [here](#)); and

- finally, the European Commission announced that it would create a "Stakeholder Forum on Fair Data Collection" comprised of website publishers, advertisers, ad-networks to discuss data privacy issues arising out of online data collection. In the meantime, the European Commission also announced that it had rejected the UK's defence that UK e-privacy laws are not out of kilter with the Data Protection Directive (95/46/EC) (see April 2009 below for more details).

October 2009:

- The Office of Fair Trading announced that it would investigate the use of behavioural targeting to deliver individually-targeted prices and whether this could fall foul of consumer protection legislation. The investigation is due to conclude in Spring 2010. Further details can be found [here](#).

• In light of the adverse regulatory, consumer and press attention it received, Phorm announced its intention to withdraw from the UK market for the time being and instead face on overseas markets, including Korea.

September 2009:

• A report by the University of Pennsylvania and the Berkeley Centre for Law and Technology concludes that 66% of US citizens do not want to be served with targeted advertising. This figure rose as high as 86% once behavioural targeting technologies were explained to them.

July 2009:

• As if the FTC's and the IAB UK's self-regulatory principles for OBA were not enough, the IAB in the US, in conjunction with the AAAA, ANA, BBB and DMA (US), produces its own set of self-regulatory OBA principles (available [here](#)). Like their UK equivalent (published in March 2009 – see below), these focus on consumer notice, choice and education.

April 2009:

• The European Commission instigates proceedings (see [here](#)) against the UK for improper implementation of the Data Protection Directive. The Commission decided to take action following the concerns raised about Phorm's use of deep packet inspection technology for OBA, and focuses on whether the Regulation of Investigatory Powers Act 2000 conflicts with individuals' rights to privacy enshrined in the Data Protection Directive.

March 2009:

• Osborne Clarke publishes its OBA survey assessing OBA legal compliance requirements and enforcement risk across more than 40 territories. Please e-mail Stephen Groom (stephen.groom@osborneclarke.com) or Phil Lee (phil.lee@osborneclarke.com) if you would like a copy of this.

• Hot on the heels of the FTC's self-regulatory principles (see February 2009), the IAB launches its "Good Practice Principles for Online Behavioural Advertising" (available

[here](#)) which lay down requirements its signatories must meet when conducting OBA. The principles have seen been "unofficially" adopted by the wider advertising industry as setting out best practice standards for OBA, and place a particular emphasis on consumer notice, choice and education. At the same time, the IAB launched a website www.youronlinechoices.co.uk to educate users about OBA and how they can control it.

• In contrast to its opinion on Phorm (published in April 2008 – see below) requiring opt-in for OBA, ICO publishes a statement in support of Google's use of permanent opt-outs from its AdSense behavioural targeting technology. ICO's support of opt-outs in this instance appears to be based on the fact that Google's technology relies solely on cookies placed on end users' machines and not deep packet inspection.

February 2009:

• Across the pond, the US Federal Trade Commission ("FTC") publishes a set of "Self-Regulatory Principles For Online Behavioral Advertising" (available [here](#)). Commissioner Jon Leibowitz warns that "this could be the last clear chance to show that self-regulation can – and will – effectively protect consumers' privacy in a dynamic online marketplace".

December 2008:

• Fifteen co-plaintiffs issued civil proceedings in the US District Court of Northern California against OBA technology user NebuAd and six ISPs with which NebuAd had worked. The claim cited NebuAd's use of deep packet technology for the purposes of OBA, allegedly without the plaintiffs' prior consent. In total, the plaintiffs claimed more than \$5 million damages. NebuAd has since reportedly shut down.

April 2008:

• ICO wades into the Phorm debate and publishes its opinion that Phorm's use of deep packet inspection technology will require opt-in consent under the Privacy and Electronic Communications (EC Directive) Regulations 2003. The opinion has since been removed from ICO's website.

March 2008:

• This can be thought of as the month in which the OBA debate really kicked off. In this month, the news story breaks that Phorm conducted

"secret" trials of its deep-packet inspection OBA technology on subscribers to BT's internet service without their knowledge. Much of the subsequent discussion, debate and regulation have their origins in this event.

Why this matters:

The above timeline only serves to illustrate what a high profile, complex and fast moving area of data privacy this is. The coming months look to be particularly interesting, with ICO set to publish a consultation on online data collection, the OFT to conclude its investigation in behavioural advertising and targeted pricing and the European Commission to progress its proceedings against the UK for improper implementation of the Data Protection Directive.

The debate has so far focussed on whether individuals should opt-in or opt-out of OBA technologies. Industry has endeavoured to move away from this language and talk instead of allowing users to exercise "choice", arguing that this is less jargonistic and therefore more meaningful to consumers (sceptics, on the other hand, argue it is simply a more palatable way of imposing an opt-out requirement on consumers). However, Europe's recent amendments to the Privacy and Electronic Communications Directive – which calls for website operators to obtain "consent" before placing cookies – has thrown the whole area into confusion once again, highlighting a clear tension between European regulators (who want opt-in) and industry (who wants opt-out).

The fact remains that, for the time being, the legal requirements for OBA are far from clear. To minimise risk, businesses are encouraged to adopt a best practice approach and, wherever possible, obtain opt-in consent from consumers. Further advice can be sought from Osborne Clarke's experts in this area.

Osborne Clarke, London

Topic: Product placement

Who: Department for Culture, Media and Sport

Where: London

When: November 2009-8 January 2010

Law stated as at: 2 December 2009

What happened:

Not for the first time, HM Government launched a second consultation on whether to free up product placement rules on UK commercial TV.

Key milestones to date in an over-long saga are as follows:

December 2005

Ofcom launches a consultation on whether to liberalise the UK's laws governing paid-for product placement on commercial TV ("PP"). The move is to say the least interesting because at that time, PP was in any event effectively forbidden under the EU "TV Without Frontiers Directive" ("TWFD") (89/552/EEC).

October 2006

Ofcom publishes consultation responses and indicates unsurprisingly that no change to PP rules are likely.

November 2007

The TWFD is superseded by the less imaginatively monickered "Audio Visual Media Services Directive" (2007/65/EC).

Implementation by all member states of the "AVMSD" is due by 19 December 2009. The most headline-friendly innovation in the Directive is a provision giving member states the opportunity, if they want, to allow PP within certain constraints.

June 2008

On the eve of the launch of a UK Govt consultation on implementation of the AVMSD, then Culture Secretary Andy Burnham indicates that any change to UK PP laws is very unlikely, despite the impending AVMSD implementation.

June 2008

The UK Govt consults on AVMSD and still appears to be asking for views on new PP freedom, despite Burnham's premature remarks.

August 2008

Tories hint that they will allow PP.

March 2009

HM Govt makes a Parliamentary statement that the "balance of argument" is against freeing up PP.

September 2009

New Culture Secretary Ben Bradshaw indicates that he is inclined to allow PP after all.

November 2009

DCMS launches consultation on liberalising PP with quick closing date of 8 January 2010. This will not apply to BBC programming as the BBC Charter still prohibits PP.

Basic PP groundrules clear?

All member states who decide to permit PP are required by the AVMSD to observe the following seven groundrules:

1. always excluding "children's programmes", PP will be possible in "cinematograph works, films and series made for audiovisual media services, sports programmes and light entertainment programmes";
2. the content and scheduling of programmes featuring PP ("PPPs") must not be influenced in such a way as to affect the responsibility and editorial independence of the media service provider;
3. the PPP must not directly encourage the purchase or rental of goods or services, in particular by making promotional references;
4. undue prominence must not be given to the placed product;
5. viewers must be clearly informed as to the existence of PP. PPPs must be appropriately identified at the start and end of the programme and when the programme resumes after an advertising break BUT all these disclosure requirements can be waived if the PPP has neither been produced nor commissioned by the media service provider itself or an affiliated company;
6. in any event programmes must not contain PP from (i) tobacco products or cigarettes or PP from undertakings whose principal activity is the manufacture and sale of cigarettes and other tobacco products or (ii) specific medicinal products or medical treatments available only on prescription in the Member State within whose jurisdiction the media service provider falls; and
7. PP must always respect basic requirements for all programme content covered by the AVMSD such as not encouraging behaviour prejudicial to health or safety or causing physical or moral detriment to under 18s.

Knotty issues still to be decided

So that's all clear, then, but not necessarily as the DCMS consultation underlines that this still leaves a number of knotty issues to be grappled with including:

- should PP be allowed in "reality" strands such as Big Brother or serious documentary strands such as Channel 4's Dispatches?
- there is no express prohibition in the Directive on PP in news and current affairs programmes, but should PP be allowed in religious, news, current affairs or consumer programmes?
- should PP be allowed in programming that does not necessarily fall within "children's programmes", but has a disproportionately high child audience?
- if PP is allowed in such programmes, should there in any event be bans on PP for certain types of product such as foods that are high in fat, salt or sugar or alcohol?
- How can "undue prominence" be avoided, given the commercial imperative to recognisably show the product so as to make the PP worthwhile?
- Should PP for gambling products, alcoholic drinks be banned outright?
- The AVMSD requires that PP is flagged up to viewers at the start and finish of programmes and either side of commercial breaks, but without more detailed controls, such frequent mentions could themselves end up being yet more (and free) promotion of the products in question. So for example should the PP disclosures actually name the placed product and should there be even more frequent disclosures such as whenever the product appears on screen?
- And what about negative PP arranged by a competitor of the placed product, depicting the placed product in a bad

light. Should specific controls be introduced in respect of such practices?

Why this matters:

So finally, subject to ironing out a few wrinkles, it looks like product placement will be coming to a screen near you.

And this looks likely to happen quite soon, given that the UK regulations implementing the AVMSD as a whole, the Audiovisual Media Services Regulations 2009 ("AVMSRs"), come into force on 19 December 2009.

But how come the Government will still be consulting on some of the details of the new PP rules when the AVSMRs, which appear to pre-judge some of the issues being consulted on, come into force?

The answer is that from 19 December 2009, it will only be PP in on-demand TV services that is allowed. Any widening of this to scheduled programmes will need an amendment to the AVSMRs following the outcome of the current consultation.

Vacillation leads to delay

The Government's vacillation on the issue has regrettably led to this untidy coda to AVMSD implementation in the UK, but the broad consensus appears to be that albeit late in the day, the right decision has been made.

As ever, however, the devil will be in the detail and we await the outcome of the consultation with interest, particularly as given the tight response time, the current administration appears determined to get this reform onto the statute books before its likely demise.

**Thanks to Stephen Groom
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