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**I. PROMOTIONS**

**Class Action Suit Filed Against Staples for Alleged Deceptive "Buy One Get One Free" Offer**

A complaint was filed on Aug., 12, 2010 in the Superior Court of New Jersey on behalf of a putative class of New Jersey residents alleging that Staples' "buy one get one free" offer violated the New Jersey Consumer Fraud Act and constituted common law fraud. The complaint alleged that Staples advertisements promised consumers that if they purchased one case of paper for \$43.98, the second case would be free. However, the complaint alleges that under the terms of the offer, the consumer would actually pay for both cases of paper at \$43.98 each, and within 4-6 weeks, the consumer would receive a prepaid credit card in the amount of \$43.98, which the consumer could use at locations accepting VISA cards. The plaintiff claimed that Staples artificially elevated the price of the first case of paper and also recouped its cost on the purportedly "free" second case of paper by retaining for weeks, if not months, the interest on what was essentially a loan from the consumer in the amount of \$43.98, and from non-use and expiration of the cards without redemption.

**TIP: Companies should not increase the price of an "item" being sold as part of a free offer in order to recoup the price of the free item. Companies should also endeavor to promptly ship any promised refund to consumers.**

## **Federal Gift Card Law Went Into Effect August 22, 2010**

The federal regulations on gift cards, promulgated under the Credit Card Act of 2009, will go into effect on August 22, 2010. The federal law prohibits expiration dates on gift cards that are less than five years from the date on which the gift card was issued or when funds were last loaded to the card. The law also requires the terms of expiration to be clearly and conspicuously stated. The law permits dormancy, inactivity, and service fees on gift cards only if (a) there has been no activity on the card in the 12-month period prior to which the charge is imposed, (b) not more than one fee is charged in any month, and (c) disclosure requirements are met. Gift cards must clearly and conspicuously state that a fee may be charged, the amount of the fee, how often the fee may be charged, and that an inactivity fee will be charged. Notably, the fee must be disclosed to consumers before the card is purchased, regardless of whether the card is purchased in person, over the Internet, or by telephone.

The law specifically regulates general-use prepaid cards, gift certificates, and store gift cards. The law excludes: (a) cards that are reloadable and not marketed or labeled as a "gift card" or "gift certificate," (b) cards not marketed to the general public, and (c) cards issued in paper form only.

Under regulations issued by the Federal Reserve, which also go into effect August 22, 2010, loyalty, awards, or promotional gift cards, while exempt from the general requirements of the federal law outlined above, must disclose on the front of the card that the card is issued for loyalty, award, or promotional purposes and the expiration date (if one exists). The gift card must also disclose, on the card itself or in information accompanying the card, the amount of any fees that may be imposed and the conditions under which they may be imposed (if any), and a toll-free number and Web site, if any, that the consumer can go to obtain fee information. A loyalty, award, or promotional gift card is defined as a card, code, or other device that is issued on a prepaid basis primarily for personal, family, or household purposes to a consumer in connection with a loyalty, award, or promotional program and is redeemable at one or more merchants or at ATMs, and contains the required disclosures.

**TIP: Issuers of gift cards should ensure that their gift cards meet the requirements of the federal law by August 22, 2010. Namely, gift cards may not expire in less than five years, inactivity fees can only be charged after 12 months of inactivity, and the law's disclosure requirements must be met. Gift cards issued subject to a loyalty, awards, or promotional program must adhere to the disclosure regulations set forth by the Federal Reserve, including disclosure of the expiration date on the front of the card and identification of the card as issued pursuant to a loyalty, awards, or promotional program.**

## **Court Finds "Handling Fee" May Be "Consideration" and Right to Buy Scarce Tickets May be "Prize" Under Illegal Lottery Analysis**

The 7th Circuit recently held that the NCAA's Final Four ticket distribution practices may constitute an illegal lottery under Indiana law. A class action was filed against the NCAA, in part relating to the NCAA's process for selling tickets to the Final Four tournament whereby each person who applied for tickets was required to pay the full face value of the tickets plus a \$6 "non-refundable handling fee" per ticket. Due to the overwhelming demand for tickets, a

drawing would take place to determine who would receive the tickets. If the applicant was not selected in the drawing as eligible to receive the tickets, he or she would receive a refund of all ticket fees except for the \$6 handling fee.

The 7th Circuit found all three elements necessary to establish an illegal lottery present under Indiana law: (1) a "prize," (2) "chance," and (3) "consideration." Specifically, the non-refundable "handling fee" constituted "consideration" because it bore no relation to the NCAA's actual cost in administering the scheme and was not refunded; the scarcity of tickets which makes their market value much greater than their face value constituted a "prize;" and the fact that the events were much too small to meet ticket demand, which necessitated a drawing, constituted the "chance" element. The court distinguished a previous case which held a somewhat similar scheme to be legal, because in that case, entrants who were not selected received a full refund of the service charge.

**TIP: Schemes that are designed to make a profit based upon the element of chance could run afoul of illegal lottery laws, even if they are not traditional "games" and even if the "consideration" paid is disguised as a payment for services, such as a "handling fee."**

## **II. ADVERTISING**

### **Public Relations Firm to Settle FTC Charges that it Advertised Clients' Gaming Apps Through Misleading Online Endorsements**

Yesterday, the Federal Trade Commission ("FTC") announced that a settlement with the public relations agency, Reverb Communications, over charges that it engaged in deceptive advertising when its employees posted reviews of its client's products on iTunes, posing as ordinary consumers without disclosing that the reviews were written by paid employees. Although the FTC investigated clothing manufacturer Ann Taylor earlier this year relating to similar issues, this is the first FTC settlement relating to its revised Endorsement and Testimonial Guidelines issued in December '09. According to the FTC complaint, Reverb and its owner, Snitker, posted reviews about their clients' games at the iTunes store using account names that gave readers the impression the reviews were written by disinterested consumers. Reverb and Snitker did not disclose that they were hired to promote the games and that they often received a percentage of the sales, which the FTC alleged would have been relevant to consumers who were evaluating the endorsement and deciding whether to buy the gaming applications. Under the proposed settlement order, Reverb and Snitker are required to remove any previously posted endorsements that misrepresent the authors as independent users or ordinary consumers, and that fail to disclose a connection between Reverb and Snitker and the seller of a product or service. The agreement also bars Reverb and Snitker from misrepresenting that the user or endorser is an independent, ordinary consumer, and from making endorsement or user claims about a product or service unless they disclose any relevant connections that they have with the seller of the product or service.

**Tip: Companies or their agencies cannot have their employees or others contacts they request blog about the company's products without disclosing their connection to the company.**

### **FDA Issues a Warning Regarding Improper Use of Social Media**

On July 29, 2010, the FDA sent Novartis Pharmaceuticals a letter regarding Novartis' use of a "Facebook Share" social media widget that generated Novartis-created information regarding its leukemia treatment drug Tasigna. Clicking on the widget sent the Novartis-created information about Tasigna to the user's Facebook page for sharing with other Facebook users. The FDA maintained that this content was misleading because it contained representations regarding the drug's efficacy but failed to communicate any information regarding the risks associated with the drug and improperly implied superiority over competitor's products. Notably, in November 2009, the FDA held public hearings regarding the promotion of drugs and medical devices through social media but the FDA has not yet released guidance on the issue.

**TIP: Remember that even though certain social media applications only provide limited space to communicate with the consumer, the advertiser remains responsible for including all necessary disclosures in the messages communicated using such social media, and sometimes creative means must be used to comply with applicable laws.**

### **Court Finds Product's Healthy Claims Potentially Misleading In Light of High Sugar Content**

A class action was recently filed against the Coca-Cola Company alleging that advertising and labeling claims for its vitaminwater products were false and misleading inasmuch as the claims touted the purported benefits of vitaminwater and promoted the drinks as healthy without disclosing the amount of sugar in the product. The complaint alleges that statements such as "vitamins + water = all you need" and "vitamins + water = what's in your hand" suggest that vitaminwater contains nothing but water and vitamins. In addition, the complaint alleges that flavor names such as "rescue" and "defense" and the description of the product as a "nutrient-enhanced water beverage" along with statements concerning how vitaminwater can "bring about a healthy state of being" or "contributes to an active lifestyle" inaccurately portrays vitaminwater as healthy when it in fact contains a significant amount of sugar.

In a recent decision denying Coca-Cola's motion to dismiss allegations of misleading and deceptive business practices and false advertising, the court held that the fact that the actual sugar content of vitaminwater was stated on the nutrition panel did not preclude the possibility that a reasonable consumer could be misled as to the contents of the product when the labeling contained narrative paragraphs about healthy lifestyles and practices and language implying that that vitaminwater contained only water and vitamins. The court dismissed Coca-Cola's argument that such claims made were mere "puffery," stating that the statements described the content of the product in a manner that the consumers could reasonably rely on when making their purchasing decisions.

**TIP: Advertisers should consider all characteristics of the product when determining whether a product can be advertised as healthy.**

If you have any questions about items that appeared in this bulletin, or would like to learn more about any of these topics, please contact one of the following attorneys:

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