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## Advertising Law: NAD issues guidance for Facebook "like-gated" campaigns

The Better Business Bureau's National Advertising Division (NAD) recently issued its first-ever decision addressing a Facebook "like-gated" advertising campaign. A "like-gated" campaign is an advertising campaign designed to increase the number of Facebook users who "like" a particular company or brand's Facebook page, often by providing free products or offers in exchange for a user's "like." NAD's most recent ruling offers important guidance to advertisers on the permissible boundaries of "like-gated" campaigns and puts advertisers on notice that NAD will, in certain circumstances, require advertisers to remove "likes" obtained through misleading or artificial means.

NAD is a self-regulatory alternative dispute resolution service through which companies may settle disputes relating to advertising. NAD reports that it has resolved over 3,700 cases and has a 96 percent compliance rate. NAD's decisions do not create binding law, however, many of its rulings have helped to shape Federal Trade Commission (FTC) policy and rule interpretation. Further, NAD may refer advertisers who fail to comply with its decisions directly to FTC for regulatory review.

### CHALLENGES TO COASTAL CONTACTS' LIKE-GATED PROMOTION

In Coastal Contacts, Inc. (Coastal Contacts Facebook Page), Case # 5387, NAD/CARU Case Reports (October 2011), 1-800 Contacts, Inc. (1-800 Contacts) filed a complaint with NAD against a competitor, Coastal Contacts, Inc. (Coastal) alleging that Coastal had deceptively offered free and discounted products to Facebook users who "liked" Coastal's Facebook page. In particular, the complaint alleged that Coastal's Facebook page included prominent offers for free eyeglasses and discounted contact lenses without explaining the terms and conditions on which the offer was contingent. The express claims on Coastal's Facebook page included the following:

- "Like This Page! So you too can get your free pair of glasses!"
- "Save 70% and Get Fast, Free Shipping!"
- "Save over 70% on Contact Lenses."
- "Save Over 70% Off Weekly Contacts."

- "Contact Lens Coupon – Save on Brand-Name Lenses Save 70% & Get Fast, Free Shipping!"
- "Contact Lens – Save Over 70% Off Weekly Contacts Get Free Shipping on Your Order"

According to 1-800 Contacts, Coastal's Facebook page failed to include material disclosures regarding: (1) the existence of additional shipping and handling costs required for the "free" offer, (2) the fact that only certain styles of eyeglass frames were eligible for the "free" offer, and (3) the fact that only certain types of lenses were eligible for the "free" offer. Additionally, 1-800 Contacts alleged that this advertising was false and misleading, thereby fraudulently inducing consumers to "like" Coastal's Facebook page. Coastal's total number of "likes," therefore, was presented to other Facebook users and investors under false pretenses. Further, 1-800 Contacts claimed that Coastal's claim associated with 70 percent savings was not properly substantiated.

### **NAD'S DECISION**

In its decision, NAD stated that Coastal should, at the outset of the offer (i.e., before a user has "liked" the page), provide a clear and conspicuous explanation of all material terms and conditions of the offer. Further, NAD specified that such explanation should be in close proximity to the "free" claim and must be conspicuous to be effective. NAD will not preapprove individual disclosures. It has, however, identified certain criteria that should be considered by companies when implementing disclosures. Specifically, NAD considers the following factors in cases it hears that challenge the effectiveness of disclosures: "1) the prominence of the qualifying information, especially in comparison to the advertising representation itself; 2) the proximity and placement of the qualifying information vis-à-vis the representations that it modifies; 3) the absence of distracting elements such as text, graphics, or sound that may distract a consumer's attention away from the disclosure; and, 4) the clarity and understandability of the text of the disclosure." See The Dannon Company (Dannon Light & Fit 0% Plus Yogurt), Case #4953, NAD/CARU Case Reports (January 2009).

Regarding the 70 percent savings claims, NAD considers whether the advertiser's evidence demonstrates that "(1) the maximum level of savings claimed can be realized by an appreciable number of consumers under circumstances normally and expectably encountered by those consumers; (2) the number of sales at the maximum savings comprise a 'significant percentage' of all items in the offering; and (3) the advertiser offers at least 10% of the inventory included in the offer at the maximum advertised savings." Coastal Contacts, Inc. (Coastal Contacts Facebook Page), Case # 5387, NAD/CARU Case Reports (October 2011). Here, NAD found that Coastal had no reasonable basis for its claims regarding consumers having the ability to save 70 percent, and recommended that Coastal discontinue its use of such claims.

In the more novel part of the complaint, NAD did not find that Coastal had improperly inflated its number of "likes" because the campaign largely was truthful, even if certain details were misleading. However, NAD did put advertisers on notice that it would not hesitate under different circumstances to require advertisers to remove "likes" obtained using misleading or artificial means. In particular, NAD indicated that it may require the removal of "likes" if (1) consumers who participated in the offer did not receive the benefit of the offer, (2) the advertiser paid a service to inflate the number of likes, or (3) employees of the advertiser were required to "like" the page without informing consumers that they work for the advertiser.

## CONCLUSION

Being required to remove fans from a page is a scary proposition for advertisers, especially well-established companies or brands with large fan bases. Advertisers may wish to carefully consider this ruling when planning and implementing a "like-gated" campaign. If you have any questions about NAD's decision and the implications for your company's advertising, please contact [Jacqueline Pennino Scheib](mailto:Jacqueline.Pennino@robinsonecole.com) at 860-275-8285 or [Brendan J. Witherell](mailto:Brendan.J.Witherell@robinsonecole.com) at 860-275-8377.

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