

ALERT

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Just in Time for the Big Game: FTC Super Bowl Advertising Decision Highlights Importance of Antitrust and Consumer Protection Compliance Programs

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For most American football fans, the upcoming Super Bowl conjures fantasies of casual parties, junk food, beer, Madonna's halftime performance, and – er – wardrobe malfunctions. Even those who are not football diehards eagerly await the parade of commercials, one funnier than the next, advertising everything from automobiles to snack food. The Super Bowl is a national event big enough that advertisers don't just use their spots to sell product. They also use them to generate buzz and promote their brand, prompting content so quirky that some viewers can't immediately tell what's being sold. With ads being previewed and rated in advance on popular websites, the advertising campaigns have become a product in themselves.

Unsurprisingly, the hype surrounding Super Bowl advertisements has triggered government scrutiny. Just in time for the 2012 Super Bowl early next month, the Federal Trade Commission's (FTC) Division of Advertising Practices issued a closing letter involving Super Bowl advertising practices employed during the 2011 Super Bowl. The November 16, 2011 FTC opinion highlights why all companies should have internal antitrust and consumer protection compliance programs in place. See *Hyundai Motor America*, FTC File No. 112-3110.

The FTC's investigation focused on whether bloggers who had been given gift certificates as an incentive by Hyundai Motor America to include links to Hyundai videos in their postings and/or to comment on these forthcoming Super

Bowl ads were told to disclose to their readers that they had received this compensation, or were told *not to* disclose this information to their readers. The FTC has long taken the position that Section 5 of the Federal Trade Communications Act, 15 U.S.C § 45, requires the disclosure of a material connection between an advertiser and an endorser when such a relationship is not otherwise apparent from the communications that contain the endorsement. Thus, the FTC reasoned, an advertiser's provision of a gift to a blogger for posting specific content promoting the advertiser's products or services would be likely to constitute a material connection that would not be reasonably expected by readers of the blog.

The FTC's "Guides Concerning the Use of Endorsements and Testimonials in Advertising," 16 C.F.R. Part 255, explains in more detail the FTC's rationale in this regard. Published in October 2009 in order to clarify "administrative interpretations of laws enforced by the [FTC] for the guidance of the public in conducting its affairs in conformity with legal requirements," the guides "set forth the general principles that the [FTC] will use in evaluating endorsements and testimonials." *Id.* at § 255.0(a). In particular, the guides seek to assist the public with "general principles" to assist "voluntary compliance with the law by advertisers and endorsers" to avoid deceptive advertising. *Id.*

The guides differentiate between "Consumer endorsements," *Id.* at § 255.2, "Expert endorsements," *Id.* at § 255.3, and "Endorsements by Organizations," *Id.* at § 255.4. Whether the blogger was a consumer, an expert, or an organization, however, where Hyundai ran afoul was in its failure to disclose a "connection between the endorser and

the seller of the advertised product that might materially affect the weight or credibility of the endorsement” and “the connection is not reasonably expected by the audience.” *§ Id.* at 255.5. The FTC believed that Hyundai’s provision of a gift to a blogger for posting specific content promoting its products or services is likely to constitute a material connection that would not be reasonably expected by readers of the blog. In such a case, “such connection must be fully disclosed.” *Id.*

While the FTC found that a violation of the FTC Act clearly occurred, it nonetheless decided against an enforcement action for a variety of reasons, all focusing on Hyundai’s lack of intent to deceive the public, as evidenced by its commitment and adherence to a sound compliance program.

First, the FTC noted that Hyundai did not know in advance about the use of these incentives, that a relatively small number of bloggers received the gift certificates, and that some of them did, in fact, disclose this information. In fact, the acts were committed not by an employee of the company, but by an outside media firm hired to conduct the blogging campaign.

Perhaps most importantly, Hyundai had a written and well-enforced compliance policy which prohibited the conduct that occurred and required its agents to abide by its policies. While the FTC noted that advertisers are legally responsible for the actions of those working directly or indirectly for them, the actions at issue here were contrary both to Hyundai’s established social media policy, which calls for bloggers to disclose their receipt of compensation, and to the policies of the media firm in question. Moreover, upon learning of the misconduct, the media firm promptly took action to address it.

The Value of an Internal Antitrust and Consumer Protection Compliance Program

The FTC’s action underscores the importance of companies’ establishing effective codes of conduct and compliance programs for their employees. While they are, of course, not necessarily “get out of jail free” cards for companies under investigation by regulators, there are nonetheless clear reasons for having these programs in place. Most importantly, a good compliance program — one that company employees at all levels understand and agree to comply with — can prevent problems from occurring in the

first place. If unlawful activities do occur, having a compliance program in place has benefits. As the FTC’s decision demonstrates, the FTC and other federal agencies place considerable weight on whether a company had a compliance program in place when deciding whether to impose civil fines. On the criminal side, according to commentary under the Federal Sentencing Guidelines, up to a 95 percent reduction in criminal fines is also available for organizations that can demonstrate they had an “effective compliance program” in place when the violations occurred. An effective compliance program is one that generally includes:

- Clear standards;
- Oversight by senior company officials;
- Effective communication of the program to all levels of employees;
- Reasonable steps to achieve compliance (monitoring, auditing, and ability to report violations without fear of reprisal); and
- Consistent enforcement

Moreover, companies with effective antitrust and consumer protection compliance programs can identify any misconduct quickly, and as the outside media firm did in the FTC case, promptly take action to address it. Companies that self-report misconduct early can also qualify for criminal amnesty and other benefits under the Justice Department’s leniency policy.

Establishing an Effective Compliance Program

For any companies that do not currently have antitrust or consumer protection compliance programs in place (or for those that do but have not looked at them in a while), below are a few suggested items firms might consider including to ensure they have the most comprehensive and effective programs in place:

- An overview of U.S. antitrust and consumer protection laws (Sherman, Clayton, and FTC Acts and relevant state laws) in terms all employees can easily understand, including potential civil and criminal penalties;
- A statement of the company’s specific antitrust and consumer protection policies;

- Specific employee practices prohibited by the company;
- Guidelines on treatment of company documents in case an investigation occurs (emails, IM's, voice messages, text messages, etc.);
- A statement of the company's social media policies (non-authorized publication of sensitive price information, trade secrets, etc.); and
- Employee Do's and Don'ts related to potential problem areas such as marketing and advertising practices and communications/meetings with competitors.

Final Word

Antitrust and consumer protection violations can not only result in substantial monetary penalties, but often lead to private litigation in which treble damages are possible. Furthermore, criminal antitrust violations carry fines of up to \$100 million for corporations and \$1 million for individuals along with jail terms up to ten years. In 2011, federal criminal antitrust fines exceeded \$1 billion, which was an increase of more than 78 percent from 2010. In the end, dodging legal

missteps early through effective internal compliance programs could save your company considerable resources and unwanted negative publicity.

Clearly, Janet Jackson's lack of foresight led to an embarrassing (and ultimately costly) public situation. Don't let a lax attitude about compliance leave your company similarly exposed.

To discuss any questions you may have regarding the opinion discussed in this Alert, or how it may apply to your particular circumstances, please contact:

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