

To: Our Clients and Friends

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## NAD Reviews Use of Facebook's "Like" Feature In Promotions

In 2010, Facebook offered its users the ability to click a button indicating that they "like" a company or a product. Once clicked, the "liked" product appears on a user's Facebook Wall, as well as the user's Facebook Newsfeed for other users to see. In addition, the user's screen name or icon could appear on the company's Facebook page along with other users who liked the product.

Companies, and in particular retailers, quickly realized the benefit of being "liked." Not only does it increase brand visibility by placing the company's name on hundreds, thousands, or even millions, of user's Facebook pages, but it allows companies to quickly tally the number of fans who endorse their products and use that tally for further marketing. As a result, retailers encourage consumers to "like" their products by making incentives such as free coupons, apps, or entries into sweepstakes, contests, or other promotions, available only to those who have liked the product. The practice of requiring consumers to "like" a product in order to gain access to a benefit is often referred to as a "like-gated promotion."

The use of like-gated promotions has raised consumer protection questions. For instance, allegations have been raised that companies have fraudulently induced consumers to "like" their page by offering misleading, or non-existent, promotions. In addition, questions have arisen concerning whether like-gated promotions comply with the Federal Trade Commission's Guides Concerning the Use of Endorsements and Testimonials in Advertising, which recommends that an advertisement that contains a consumer endorsement "clearly and conspicuously disclose" any material benefit provided by the company in exchange for the endorsement. Because of the relative recency of the "like" phenomenon, little administrative, judicial, or self-regulatory guidance addresses these issues.

The National Advertising Division of the Council for Better Business Bureaus ("NAD") recently issued its first decision involving a like-gated promotion. The NAD evaluated allegations that Coastal Contacts, an online retailer of glasses and contacts, used a misleading promotion to encourage consumers to "like" its products, and then boasted that it had half a million Facebook fans. NAD concluded that consumers are aware that people "like" products for many reasons, including to gain access to promotions, contests, and sweepstakes, and that Coastal Contacts had not obtained "likes" through

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misleading or artificial means. In summary, the NAD appears to have held that a company need not affirmatively disclose the fact that it used promotions in order to obtain some, or even the majority, of its Facebook fans. The NAD did, however, caution companies that have multiple Facebook pages from aggregating the number of their fans across product pages without disclosing the aggregate nature of the number. It remains to be seen whether the Federal Trade Commission, and the courts, will concur with the NAD's analysis of like-gating.

If you would like further information on how to comply with laws effecting social media, or the privacy of consumers or employees, feel free to contact [David Zetoony](#) in Washington D.C., at 202-508-6030. You can also "like" Bryan Cave LLP, no strings attached, by clicking [here](#).