



Federal Trade Commission

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A Look Forward With the FTC: Advertising and Marketing Enforcement Challenges

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Good morning. I want to thank the Electronic Retailing Association (ERA) for inviting me to speak at your Great Ideas Summit. I appreciate having the opportunity to address so many members of the direct-to-consumer industry.

One core mission of the FTC is to ensure that consumers have truthful information so that they may make educated and meaningful decisions when it comes to what to buy, how much to pay, and with whom they want to do business. This seems straightforward. But in this modern age, consumers and the Commission alike are facing issues that we could not have predicted even a few years ago. Internet commerce offers tremendous potential benefits for consumers, but it has also opened the door to new types of deceptive and unfair practices. Even direct-to-consumer advertising in traditional media has in many ways become more sophisticated over time. Today, it is not uncommon for the marketer's message to be filtered through several

¹ The views expressed here are my own and do not necessarily represent the views of the Federal Trade Commission or any Commissioner.

twists and turns – including through one or more third parties such as a scientific expert, advertising agency, celebrity endorser, call center employee, or marketing affiliate – before it finally reaches the consumer.

The Commission strives to keep up with developing technology and ensure that marketers are held accountable for their actions, no matter what medium they use to communicate their messages. In doing so, our objectives with regard to advertising enforcement align with the stated goals of the ERA: commerce – including electronic retailing – works best for everyone when consumers have confidence in the marketplace and know that they will be treated fairly. When a consumer gets taken in by deceptive advertising, trapped in the small print, or enrolled in a continuity plan that she didn't ask for, the consequence is not just an economic injury to that one consumer. It's worse than that. The resulting injury to consumer confidence hurts the entire industry, especially those who are playing by the rules. Our efforts to stop deceptive practices in the advertising industry also increase confidence in the marketplace, and hopefully encourage consumers to take advantage of the many benefits that modern commerce has to offer.

Today, it's becoming harder for consumers to know precisely who they are dealing with and who might be collecting or using their personal information. In this climate, it is more important than ever to ensure that transparency and disclosure rule the day. To this end, I want to discuss several areas of advertising enforcement where the need for disclosure is a central theme, including our revised Endorsement Guides, affiliate marketing, and behavioral advertising.

Endorsement Guides

As I'm sure most if not all of you already know, the Commission recently approved

several changes to our Endorsement Guides, which had been unchanged since they were first introduced in 1980. The changes became effective on December 1. The Guides define endorsements and testimonials and provide guidelines for consumer and expert endorsements and for the disclosure of material connections. Advertisers are responsible for all claims they make through the use of endorsements and testimonials, as they are for claims they make directly. For that reason, advertisers must have substantiation – including, where appropriate, competent and reliable scientific evidence – to support claims made in endorsements. This was true before the Guides were revised and it is still true today.

One major change to the Guides relates to the use of disclaimers with consumer testimonials. We all know that the norm for testimonials has been to show the best case scenario result – even if implausible – accompanied by a disclaimer saying “results not typical,” or “results may vary.” There’s nothing deceptive *per se* with showcasing a very positive consumer result. The problem comes where the net impression delivered by the ad is that the result depicted in the testimonial reflects what consumers can generally expect to achieve from use of the product or service, and consumers make a purchasing decision based on this incorrect understanding. When testimonials convey, as typical, results that most consumers are unlikely to achieve, they are likely to be misleading. This has been particularly problematic in the area of weight loss products, where advertising regularly features extraordinary results that, in all likelihood, are not realistic for the vast majority of consumers.

Research conducted by the Commission shows that consumers do in fact interpret testimonials to depict results that are representative of what most people can achieve. Our research also found that disclaimers such as “results not typical” are simply ineffective. In our testing, the most effective way to counter the otherwise common perception that testimonials

portray typical results is to clearly and conspicuously disclose the generally expected results for consumers in the depicted circumstances.

Without getting into too much detail, there are a few important principles for advertisers to keep in mind. First, remember that a testimonial on a key attribute of your product will likely be interpreted as representing that the endorser's experience is typical of what other consumers will be able to achieve. Second, the use of a disclaimer such as "results not typical" is no longer a safe harbor for the claims made in testimonials. Third, while you may use atypical or best-case testimonials, if you do, you should clearly and conspicuously disclose the generally expected results consumers can expect in the depicted circumstances. Of course, the best practice, and the less risky practice, is to use testimonials that actually reflect what your product or services is likely to deliver. In other words, rather than run ads that give with one hand but take away with the other, it would be better for your ads to give a clear picture of the results a consumer will actually get.

I know there has been some confusion and concern in the industry regarding this change to the Guides, especially surrounding the point I just made on the need to disclose generally expected results if you use outlier testimonials. It's worth pointing out that if you are selling a product to consumers and you are making advertising claims about it, you are already required to have substantiation for all of your performance claims. For that reason, in most cases you should already know what result consumers can generally expect to achieve with your product.

I also want to point out that the Guides refer to disclosing the generally expected performance *in the depicted circumstances*. We know of course that consumer behavior patterns can vary wildly, and we don't expect advertisers to be able to calculate a precise mathematical average for the expected results among all potential product users in all situations. But

advertisers can control the specificity of the circumstances depicted in testimonials. On this point, I urge you to consider carefully the WeightAway example in the Guides.

We understand that this revision in the Guides marks a shift from the way the industry has handled testimonials for decades and that we're in the midst of a period of adjustment for everyone. But we will be enforcing the law when it comes to testimonials; if you use testimonials in your advertising, you are advised to take a careful look at your ads to make sure that you are in compliance.

Social Media Marketing

Another change to the Guides that has garnered quite a bit of attention is the inclusion of several new examples that highlight the applicability of the guides to new media and user-generated content, such as blogs and “word of mouth” marketing. The need for disclosure of material connections between endorsers and advertisers has always been embodied in the Guides. These new examples simply apply this principle to modern forms of marketing.

Today, when consumers seek out information about products and services they are interested in buying, they often turn to the internet. Consumers are often interested in seeing what other consumers have to say about particular products and companies, and one place where it is becoming more and more common to find product reviews is on blogs. Some bloggers have become very influential, and many have an enormous number of followers. In addition, because many blogs relate to very personal aspects of people's lives – for instance, “mom bloggers” who write about the intimate details of raising children – many readers place more weight on bloggers' product reviews than they do on conventional advertising. To some extent, many readers trust the information and opinions posted on certain blogs in the same way they would rely upon advice from a close personal friend.

Some of these bloggers are using the internet to express their personal thoughts and share their viewpoints with the world. But other bloggers have turned their websites into commercial ventures, where they promote an advertiser's products in exchange for free products, payments, or other significant perks. Consumers are entitled to know whether the product review they are reading on a blog is really the objective personal opinion of a disinterested user, or an endorsement from a person who has essentially become part of the advertisers' marketing campaign. This is not to say that there is anything wrong with a marketer using bloggers to promote their products or paying them for this service. But a blogger who receives payments or in-kind compensation – such as free products – to review products is an endorser and should disclose the material connection the blogger has with the seller of the product or service. This is no different from the requirement for endorsers in print, radio, or television advertisements, who must also disclose such connections when they would not be expected by consumers.

In addition, keep in mind that advertisers are potentially liable for statements made by paid bloggers. As with more traditional forms of media, you cannot simply hire someone to disseminate your advertising message and then walk away and expect to be insulated from liability for the message you are paying to disseminate.

We have been asked about enforcement in light of the breath of social media marketing. Historically, we have focused our enforcement actions on deceptive acts and practices that are the most clearly egregious or the conduct that is likely to cause the greatest consumer injury. I do not expect that our priorities will change under the new Guidelines. Accordingly, I expect that our focus will remain on the conduct of advertisers rather than on individual endorsers.

Affiliate Marketing

On a related issue, I want to note our growing concern about online affiliate marketing.

Marketing affiliates are third parties – often website operators or individuals – who drive traffic to a seller’s website in exchange for the payment of a commission from the seller. Affiliates can do this through several methods, including by sending mass emails, purchasing sponsored search engine results, or by purchasing internet display ads. The biggest area of concern for the Commission regarding this type of marketing is the fact that in some cases, affiliates are essentially let loose on the public without adequate direction or supervision to ensure that their advertising is truthful and non-misleading. The affiliate marketing model often compensates affiliates on a “pay-per-click” model where an affiliate’s commission is calculated from the number of consumers it refers to the seller’s site and how many consumers ultimately make a purchase. In many circumstances, affiliates have no or very few up-front costs. This structure gives affiliates an incentive to simply drive as much traffic as possible to the seller’s website, by using any means that will achieve that goal.

At times, those “means” include false and deceptive claims about the product, fake blogs, and other content that is not clearly identified as advertising or fails to disclose the material connection to the seller. Affiliate marketing has become particularly prevalent for certain types of products, including teeth whitening and weight loss products. In addition to the deceptive practices employed to drive consumers to a seller’s website, consumers who purchase products through these websites may be subjected to abusive negative option marketing practices such as hidden upsells, unauthorized charges, and inadequate cancellation procedures. We believe that legitimate marketers can and should play an important role in bringing more order and accountability to the affiliate marketing industry.

The Commission is trying to do its part too, by bringing enforcement actions to stop deceptive and unfair practices. We recently brought charges and obtained preliminary

injunctions against several affiliate marketers who steered consumers to commercial websites that offered loan modification services.² The affiliates purchased sponsored search results at major search engines such as Google and Yahoo. When consumers searched for Making Home Affordable, the federal homeowner relief program offering free mortgage loan assistance, the search engines returned the sponsored results of the defendants, who made it appear that their advertisements were links to the federal government's official website, when in fact, they were not. Consumers who clicked on these sponsored results were instead directed to internet sites where they were prompted to enter personal identifying and confidential financial information. Their personal and confidential information was then sold to companies offering fee-based mortgage loan modification services. In this case, which we brought with assistance from the Special Inspector General of the Troubled Assets Relief Program (TARP), affiliate marketing was used to take advantage of a particularly vulnerable and desperate population, homeowners in financial trouble who were seeking assistance from the federal government to save their homes.

We want to make sure that affiliate marketers are on notice that they will be held responsible for the claims they make. In addition, we strongly encourage any company who chooses to use affiliates to market its products or services – either directly or through affiliate networks – to take some basic steps to ensure that the advertising messages being disseminated on your behalf are truthful. The first step is to give specific and detailed guidelines to the affiliates as to what information should be contained in any advertisements they disseminate. Equally important is guidance as to what reasonably foreseeable types of claims or language

² See Press Release, Court Bars False Claims of Affiliation with United States Homeowner Relief Programs (July 10, 2009), available at <http://www2.ftc.gov/opa/2009/07/homeafford.shtm>.

might be considered misleading and should *not* be used in ads. A second step is to do some quality control on the back end once consumers are directed to your website as a result of affiliate marketing. You should also take a look at the affiliates and advertisements that are generating the largest numbers of referrals to your web site to see what types of claims the ads are making. And if you start to hear things from consumers that seem not quite right – if consumers are under the impression that you are part of the official federal government homeowner relief program and you're not, or whatever the case may be – then follow up and investigate to find out where these misconceptions are coming from, and take action to stop them.

As with traditional forms of marketing, when you pay third parties to act on your behalf, you cannot absolve yourself of responsibility for whatever actions those third parties might take to sell your product. We urge anyone using affiliate marketing, and affiliates themselves, to be cognizant of the fact that FTC liability for deceptive advertising can potentially reach anyone in the chain between a seller and the ultimate consumer. We hope that businesses will become more aware of the potential problems they may encounter with affiliate marketing and proactively take steps to improve compliance in the industry. Finally, with regard to abusive negative marketing practices, you can be assured that we will use the full force of the Commission against those who engage in these particularly reprehensible practices.

Behaviorial Advertising

Along with affiliate marketing, another aspect of online commerce that has increasingly occupied our attention is the area of behaviorial advertising. This is a particularly challenging topic, not only because the marketing practices that implicate privacy are constantly evolving, but also because we don't necessarily have the same well-defined expectations for online privacy

as we do with physical privacy. Everyone knows that consumers don't want people peeping in their windows, looking through their bank statements, nosing around their medical charts, or following them around stores while they shop, writing down a list of everything that they buy or just look at. Yet when consumers go online to get information or make a purchase, they are potentially exposing information of this very nature. Advances in technology have made it possible for companies to collect, store, and analyze massive amounts of data gathered online at virtually no cost, all of which is often done without any knowledge of consumers. In addition, once information is shared online by consumers, they completely lose control of it. They cannot recall it, erase it, prevent it from being shared or sold, see who has access to it, or know what measures, if any, are being taken to keep it secure.

In some cases, the collection and use of data gathered online may potentially benefit consumers. In behavioral advertising, companies track consumers' online activities in order to deliver advertising tailored to the consumers' interests. For instance, a consumer who lives in Washington, D.C. and searches online for information on the New Orleans Jazz Fest might be served ads for airfare sales to New Orleans, New Orleans hotels, or jazz concerts in the Washington, D.C. area. Often, the companies involved in behavioral advertising are "network advertisers," who select and deliver advertisements to multiple websites that participate in their networks. They commonly track consumer behavior by placing a file called a "cookie" on a consumer's computer that tracks which web pages have been visited, what content was viewed, what queries were typed into search engines, and whether the user has clicked on particular advertisements. In many cases, the information collected through the use of cookies is not personally identifiable in the traditional sense of including a consumer's name and address, but is instead identified with a particular computer or IP address. However, in some cases sufficient

amounts of data may be collected that in the aggregate could be analyzed and used to identify a specific person.

Behavioral advertising offers potential benefits for consumers. Online advertising in general helps support free internet content that many consumers value, and the targeted nature of behavioral advertising makes online advertising more efficient and attractive to advertisers. The practice may also potentially reduce unwanted advertising and increase the amount of advertising that a particular consumer finds relevant and useful. The Commission makes an effort not to stifle innovation and to allow responsible business practices to develop and flourish.

However, behavioral advertising also raises serious privacy concerns. These include the invisibility of the practice to consumers, the lack of effective disclosures about the practice, the potential to develop and store detailed profiles about consumers, and the risk that the data collected for behavioral advertising – including sensitive data regarding health, finance, or children – could fall into the wrong hands or be used for unanticipated purposes.

One year ago, the Commission staff issued a set of revised behavioral advertising self-regulatory principles to encourage the industry to provide more comprehensive and accessible protections to consumers. We did this after holding a workshop on the issue and reviewing comments from industry members, privacy advocates, and other stakeholders.

The Commission's four self-regulatory behavioral advertising principles are as follows. First, every website that collects information for behavioral advertising needs to tell consumers that their information is being collected to provide them with tailored advertising, and should allow consumers the choice of whether to allow information collection for this purpose. As with other areas of advertising, the devil may be in the details. Disclosures and notices in this context should be easy to find and easy to understand. But all too often privacy policies are multiple

pages of small print legalese that consumers cannot reasonably be expected to actually read and fully comprehend. The Commission recently settled a case involving Sears.com and Kmart.com, where consumers visiting the web sites agreed to allow the installation of software on their computers to track their “online browsing.”³ In fact, the software tracked almost all internet usage, including not only browsing history, but also the text of secure web pages such as banking account statements, online drug prescription records, video rental transactions, and even the sender, recipient, subject line, and size of web-based email messages. Given the nature and extent of the information collected, the disclosure that their “online browsing” would be tracked was woefully inadequate.

Second, any company that collects and/or stores consumer data for behavioral advertising should provide reasonable security for that data and retain it only as long as necessary to fulfill a legitimate business need. The protections should be based on the sensitivity of the data, the nature of the company’s business operations, and the reasonable protections that are available.

Third, companies should obtain affirmative consent from consumers for any material changes to existing privacy policies with regard to data collection. A company must keep any past promises made, even if it decides to change its policies at a later date. Therefore, a company must obtain affirmative express consent from affected consumers before using previously collected data in any manner materially different from the policy in place when the data was collected. This principle would also apply in the situation of a corporate merger to the extent that the merger materially changes the way that the companies collect, use, and share data.

Finally, companies should collect sensitive data for behavioral advertising only after they

³ *Sears Holdings Management Corp.*, FTC Dkt. No. C-4264 (final consent order approved Sept. 9, 2009).

obtain affirmative express consent from consumers to receive such advertising. We recognize that there is no universal definition of “sensitive data.” However, the input we received from commenters and during our behavioral advertising workshop revealed a consensus that there are some types of data collection that merit heightened protection. Clear examples include financial data, data relating to children, health information, precise geographic location information, and social security numbers, although there may be others depending on context. There may even be some types of information that are so sensitive that they should never be used for behavioral advertising. We encourage industry members and other stakeholders to develop specific standards to address this issue. We are cautiously optimistic that self-regulation will suffice to bring order to this practice, but we caution that much more work needs to be done to stop problematic practices in this area. We are keeping a close watch here, because failure to tighten industry standards may invite legislation from Congress or further regulation or enforcement actions from the Commission.

I also want to briefly address a few issues specifically relevant to telemarketers. The Do Not Call Registry has been enthusiastically embraced by consumers since it was introduced in 2003, and there are currently over 191 million telephone numbers on the Registry.⁴ As you probably know, when the Do Not Call Registry was established, registrations were set to expire after five years. However, due to changes implemented by the Do No Call Improvement Act of 2007, registrations are now permanent and do not expire after any particular length of time. In light of this change, the Commission is taking steps to ensure the continued accuracy of the Registry. We are making efforts to keep up with technology and ensure that abandoned numbers

⁴ See Press Release, FTC Approves Two Reports to Congress on the National Do Not Call Registry (Jan 4, 2010), available at: <http://www.ftc.gov/opa/2010/01/donotcall.shtm>.

are eliminated from the Registry, while ported numbers – including cell phone numbers, and Voice over Internet Protocol (VoIP) numbers – are not. We will also continue to bring enforcement actions against those who attempt to circumvent the registry. To date, the FTC and Federal Communications Commission have collected penalties totaling more than \$22 million from Registry violators, and consumers are reporting dramatic reductions in the number of unwanted telemarketing calls that they receive.⁵

In addition, as a result of amendments to the Commission’s Telemarketing Sales Rule (TSR) that took effect on September 1, it is now illegal to make prerecorded commercial telemarketing sales calls – otherwise known as robocalls – to consumers, unless the telemarketer has received permission in writing from the consumers who wish to receive such calls. Violators face penalties of up to \$16,000 per call. Consumers have made it clear that there are few things that annoy them more than unwanted telemarketing calls, especially where there isn’t even a live person on the other end of the phone.

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To conclude, I want to say that I recognize that we are living in difficult economic times. Not only are many consumers struggling, but so are many businesses and sellers who have to work harder than ever to maintain their livelihood. The current economic climate poses some unique regulatory challenges. At the same time that many consumers are especially vulnerable – seeking to avoid foreclosure, desperate for training or work opportunities, turning to dietary supplements because they no longer have health insurance and can’t afford their prescriptions – there is a greater temptation for some to cross the line between responsible and illegal behavior

⁵ *See id.*

to try and extract as big a piece as possible from a seemingly shrinking pie. The FTC will continue to act aggressively to protect consumers who need our help the most, including those who fall victim to mortgage foreclosure and economic stimulus scams, those who search for health cures, and those who perhaps have no idea as to the type and extent of information that is being collected about them online.

The Commission tries to stay on the leading edge of technological and industry developments to make sure that our enforcement efforts remain effective and relevant. I look forward to working with you as our regulatory and enforcement programs continue to evolve.