



# Federal Trade Commission

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**National Advertising Division Annual Conference  
New York, NY**

**Remarks of Jessica L. Rich<sup>1</sup>  
Director, FTC Bureau of Consumer Protection**

**September 30, 2013**

While it just may be coincidence that the government's fiscal year ends today, this morning gives me the opportunity both to say hello in my new capacity as Bureau Director and to look back on one of the more active years for national advertising – at least as far I can remember. I don't believe we've ever had a year more replete with "big cases" and "big projects" – all of which, we hope, helped clarify the principles that govern national advertising.

I am thrilled to be here at NAD and thank the NAD and Lee Peeler for inviting me. The FTC has long had a focus on national advertising cases, and this year we continued with this tradition. From litigation to studies to guidance, we accomplished an enormous amount and we are by no means done.

Over the next two days, you will hear about several of these initiatives in greater depth, and I do not intend to steal anyone's thunder – and I couldn't steal Mary Engle or Lesley Fair's thunder if I tried. But I do want to highlight some of this year's activities and give you a sense of where we are going as we enter our next fiscal year.

I'm going to focus today primarily on advertising. But I'll also briefly address the Commission's privacy work. I know privacy is of great interest to this crowd. It's also near and dear to me, having spent much of my FTC career building our once small – now quite significant – privacy program.

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<sup>1</sup> The views expressed here are my own and do not necessarily represent the views of the Federal Trade Commission or any Commissioner. Special thanks to Phyllis Marcus for assisting in the preparation of these remarks.

In all of the FTC's work, you will see the recurring theme of applying the bedrock principles governing deception and unfairness to new products and services, new technologies, and new media. That's how our primary law, Section 5 of the FTC Act, was designed to be used and that's how we all make sure that compliance and enforcement keep pace with the many new and exciting products and services that the market continues to create.

## **I. Advertising**

The big picture in the FTC's advertising program is that you'll continue to see a strong focus on deceptive health and safety claims; we're ramping up enforcement against deceptive environmental claims; and we're engaging in a number of projects to bring our standards and guidance in line with new technologies and the marketplace today. That's the big picture, but let me drill down a bit.

### **A. Drip Pricing**

I'll start with the issue that has come to be known as "drip pricing." Last year, the FTC took on the issue of companies that advertise only part of a product's price and reveal other charges later as the customer goes through the buying process.

We launched this effort following the conference we held on drip pricing in May 2012. At the conference, then-Chairman Leibowitz asked consumers to share their experiences with drip pricing. Consumers responded in droves. We heard, in particular, about the mandatory and sometime hidden fees hotels charge for amenities such as newspapers, use of onsite exercise or pool facilities, and Internet access.

Afterwards, FTC staff looked at online reservation websites and discovered that some hotels failed to include these fees in the reservation prices they quoted to consumers. So in November of last year, we sent letters to 22 hotel companies warning them to include in their quoted total price any unavoidable and mandatory fees, such as "resort fees," that consumers are charged to stay at the hotel.<sup>2</sup> I'm pleased to report that the vast majority of the hotels that received the warning letters modified their online reservation sites and now include mandatory resort fees in total price quotes. But this is an area we'll continue to monitor in the coming year.

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<sup>2</sup> See Fed. Trade Comm'n Press Release, *FTC Warns Hotel Operators that Price Quotes that Exclude 'Resort Fees' and Other Mandatory Surcharges May Be Deceptive* (Nov. 28, 2012), <http://www.ftc.gov/opa/2012/11/hotelresort.shtm>.

## B. Food Marketing

Another area of focus has been food marketing. The Commission has done two reports examining food marketing to children – how much money is spent on it, how food is advertised to kids across different media and contexts, the nutritional quality of the foods marketed to kids, and industry standards governing food marketing to children.<sup>3</sup>

The concern here, of course, relates to the increase in kids' obesity, and how marketing of food to kids, and the nutritional quality of the foods being marketed, can be improved to help alleviate the problem. The FTC reports discuss how food companies use integrated marketing campaigns – combining traditional media with packaging, in-store promotions, sweepstakes, digital media, and popular TV and movie characters – to market foods that are all-too-often high in calories, sugar, fat, and sodium.

The reports call on all companies that market food or beverages to children under age 12 to adopt meaningful, nutrition-based standards for all forms of marketing for their products. The reports also cite progress that has been made among leaders in the industry. In particular, they cite the work of the Children's Food and Beverage Advertising Initiative – known as the CFBAI and launched by the Council of Better Business Bureaus – for taking important steps to change the mix of food and beverage advertising messages directed to children under 12, and to encourage healthier eating and better physical fitness.

The CFBAI will launch uniform nutrition criteria to take effect December 31 for all of its pledge companies, which now number 17 and account for the vast majority of ad spending on food marketed to children. One media company, The Walt Disney Company, has committed not only to limit character licensing and cross-promotions to more nutritious foods, but also to limit ad placement during children's programming to such foods. This is all good news – we're seeing improvements in both what is marketed to kids and how it's marketed.

There's still some room for improvement, however. The Commission would like to see the CFBAI more closely align its nutritional guidelines with the U.S. Dietary Guidelines for Americans. Also, some major food, candy, and baked goods companies have not yet joined this effort, and media companies are lagging behind everyone else.

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<sup>3</sup> See Fed. Trade Comm'n, *A Review of Food Marketing to Children and Adolescents: Follow-Up Report* (Dec. 2012), <http://www.ftc.gov/os/2012/12/121221foodmarketingreport.pdf>; Fed. Trade Comm'n, *Marketing Food to Children and Adolescents, A Review of Industry Expenditures, Activities, and Self-Regulation: A Report to Congress* (July 2008), <http://www.ftc.gov/os/2008/07/P064504foodmktngreport.pdf>.

But there's some promising news on the childhood obesity front. Last month, the Centers for Disease Control and Prevention reported that 19 U.S. states and territories experienced decreases in obesity among low-income preschoolers; another 20 states and Puerto Rico held steady at their current rates.<sup>4</sup>

### **C. Deceptive Health Claims**

That brings me to the topic of deceptive health and safety claims. Policing these claims – which include claims that dietary supplements, over-the-counter drugs, or foods cure diseases or improve your health when they don't; claims that weight loss programs make you lose weight when they don't; or claims that any product or service achieves a health or safety result when they're not supported by evidence – is one of the Commission's top priorities.

One notable case we've brought that may ring a bell focuses on health claims made for pomegranate juice. The pomegranate has occupied much of the Commission's time over the past few years, and promises to keep us busy in the coming year.

In January 2012, the Commission upheld an Administrative Law Judge's decision that the marketers of POM Wonderful juice and POMx supplements deceptively advertised their products and did not have adequate support for claims that the products could treat, prevent, or reduce the risk of heart disease, prostate cancer, and erectile dysfunction, and that they were clinically proven to work.<sup>5</sup>

The Commission ordered the POM defendants, as fencing-in relief – that is, relief designed to prevent future violations of a similar nature – to have two well-designed, well-conducted, double-blind randomized controlled clinical trials to support any claim that a food, drug, or dietary supplement is effective in the diagnosis, cure, mitigation, treatment, or prevention of any disease.

The POM defendants have appealed the Commission's ruling to the DC Circuit, and filed their briefs last month. You can assume that this winter we will actively be litigating this appeal.

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<sup>4</sup> CDC VitalSigns, *Progress on Childhood Obesity* (Aug. 2013), <http://www.cdc.gov/VitalSigns/pdf/2013-08-vitalsigns.pdf>.

<sup>5</sup> *In the Matter of POM Wonderful LLC*, Docket No. 9344 (Jan. 10, 2013), <http://www.ftc.gov/os/adjpro/d9344/130116pomopinion.pdf>.

## D. Green Marketing Claims

Another important area for the Commission, as I mentioned, is environmental claims. A growing number of American consumers are looking to buy environmentally friendly, “green” products – from building supplies and clothing, to recycled paper and biodegradable trash bags. Companies have responded with “green” marketing touting the environmental benefits of what they’re selling. But sometimes, what companies think green claims mean, and what consumers understand, are two different things.

The FTC’s Green Guides – which are not law but guidance as to how the Commission is likely to interpret the law in this context – are designed to help marketers avoid making environmental claims that mislead consumers.<sup>6</sup> Last year, the Commission updated the Green Guides to address current practices and claims being made in the marketplace.<sup>7</sup> We addressed claims such as “free of” chemicals, biodegradable, recycled, recyclable, and many others. This process took into account literally thousands of consumer and industry comments, as well as information gathered from three public workshops and a study of how consumers understand green claims.

We’ve also been hard at work enforcing the law against deceptive green claims – making sure that such claims are truthful and based on solid scientific evidence. For example, in February of last year, the Commission entered into consent agreements with five marketers of replacement windows that we alleged had made unsupported energy efficiency and money-savings claims – in some cases, claiming that consumers could cut their energy bills in half by using replacement windows alone.<sup>8</sup>

Among other things, the settlements require the marketers to substantiate energy savings claims that include the words “up to.” For example, if they claim consumers will save “up to” a certain amount of money or achieve energy savings “up to” a certain amount, they must have

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<sup>6</sup> 16 C.F.R. Part 260.

<sup>7</sup> See Fed. Trade Comm’n Press Release, *FTC Issues Revised “Green Guides:” Will Help Marketers Avoid Making Misleading Environmental Claims* (Oct. 1, 2012), <http://www.ftc.gov/opa/2012/10/greenguides.shtm>.

<sup>8</sup> See Fed. Trade Comm’n Press Release, *Window Marketers Settle FTC Charges That They Made Deceptive Energy Efficiency and Cost Savings Claims: Companies Must Have Scientific Evidence Before Making Marketing Claims* (Feb. 22, 2012), <http://www.ftc.gov/opa/2012/02/windows.shtm>.

competent and reliable scientific evidence to substantiate that all or almost all consumers are likely to achieve the maximum claimed savings.

In October, the Commission also entered into settlements with two companies that deceptively claimed that their interior paints contained “zero” volatile organic compounds (VOCs) – ingredients that are potentially harmful to your health and the environment. In fact, while the companies’ uncolored “base” paints may contain no VOCs, after tinting, their paints contained measurable levels of these compounds.<sup>9</sup>

Similarly, in July, three mattress manufacturers agreed to stop making unsupported claims that the mattresses they sell were “free of” harmful VOCs, as well claims that the mattresses were chemical free, lacked odor, or certified as organic.<sup>10</sup>

## **E. Online Disclosures**

Now, of course, this fiscal year at the FTC has not been all about vacations, home improvements, food, and drink. We’ve spent a lot of time thinking not just about *what* is being marketed to consumers but also *how* items are marketed, especially in the mobile arena.

### **1. Dot.Com Disclosures**

In March of this year, the FTC issued an update to its Dot.Com Disclosures guide, first issued in May 2000. The revised guide takes into account the expanding use of smartphones with small screens and the rise of social media marketing.<sup>11</sup> In this updated document, we set forth a set of key principles for marketers:

- (1) The same consumer protection laws that apply to commercial activities in other media apply online and in the mobile marketplace.

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<sup>9</sup> See Fed. Trade Comm’n Press Release, *Sherwin-Williams and PPG Settle FTC Charges That They Misled Consumers to Believe Their Paints Were Free of Potentially Harmful Volatile Organic Compounds* (Oct. 25, 2102), <http://www.ftc.gov/opa/2012/10/sherwinwilliams.shtm>.

<sup>10</sup> See Fed. Trade Comm’n Press Release, *Three Companies Barred from Advertising Mattresses as Free From Volatile Organic Compounds Without Scientific Evidence to Back Up Claims* (Jul. 25, 2013), <http://www.ftc.gov/opa/2013/07/mattress.shtm>.

<sup>11</sup> Fed. Trade Comm’n, *.com Disclosures: How to Make Effective Disclosures in Digital Advertising* (Mar. 2013), <http://www.ftc.gov/os/2013/03/130312dotcomdisclosures.pdf>.

- (2) When practical, advertisers should incorporate relevant limitations and qualifying information into the underlying claim, rather than having a separate disclosure qualifying the claim.
- (3) Required disclosures must be clear and conspicuous, and we provide guidance as to how this should be done on mobile devices. For example, when a space-constrained ad requires a disclosure, the disclosure should be incorporated into the ad whenever possible.
- (4) Finally, if a disclosure is necessary to prevent an advertisement from being deceptive, unfair, or otherwise in violation of a Commission rule, and it's not possible to make the disclosure clearly and conspicuously, then the ad shouldn't be disseminated.

These tenets sound familiar, because they are based on longstanding FTC advice about disclosures in any form of advertising. So far, so good, right? Well, not so fast.

Our staff recently reviewed a large set of weight-loss ads making “disclaimers of typicality” – that is, disclaimers accompanying testimonials that do not represent experiences that consumers can generally achieve with the advertised product. Of these, only a bare minimum had disclosures that were even arguably “conspicuous.” And this problem is not limited to weight-loss ads. Overall, we are observing that many advertisers aren't taking basic steps to ensure that their disclosures are clear and conspicuous. You should expect this to be an area of increased law enforcement activity in the coming year.

## **2. Search Engine Letters**

Which brings me to the next piece of online advertising guidance we recently updated. In June, we sent letters to search engines updating – and reiterating – the guidance we published in 2002 on distinguishing paid search results and other forms of advertising from natural search results.<sup>12</sup>

We sent the letters in part because, in recent years, paid search results have become less distinguishable as advertising. We urged the search industry to make this distinction clear.

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<sup>12</sup> See Fed. Trade Comm'n Press Release, *FTC Consumer Protection Staff Updates Agency's Guidance to Search Engine Industry on the Need to Distinguish Between Advertisements and Search Results* (Jun. 25, 2013), <http://www.ftc.gov/opa/2013/06/searchengine.shtm>.

The letters went to seven general-purpose search engines, as well as 17 of the most heavily trafficked search engines that specialize in the areas of shopping, travel, and local business. The letters reiterated that:

- (1) Consumers ordinarily expect that natural search results are included and ranked based on relevance to a search query, not based on payment from a third party;
- (2) Including or ranking a search result in whole or in part based on payment is a form of advertising; and
- (3) To avoid the potential for deception, consumers should be able easily to distinguish a natural search result – via visual cues and text labels – from advertising a search engine delivers.

### **3. Native Advertising Workshop (Dec. 4, 2013)**

Our work surrounding online disclosures will continue this winter, with a December 4 workshop looking specifically at the practice of “native advertising.”<sup>13</sup>

Native advertising refers to making promotional content look and feel like surrounding articles – so much so that consumers may mistake it for editorial content. Our workshop will examine the ways in which consumers recognize and understand native advertising in digital media and whether consumer expectations (and the potential for deception) differ depending on the context in which the paid content is presented.

We also will explore the contexts in which paid content should be identifiable as advertisements and best practices for effectively differentiating native advertising from editorial content in digital media, including on mobile phones. As always, we encourage your active participation.

## **II. Privacy Issues**

We have many other initiatives underway on national advertising, but I want to take a little time to discuss privacy too. Privacy is obviously a huge priority for the Commission. As

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<sup>13</sup> Fed. Trade Comm’n Press Release, *Native Advertising Workshop on December 4, 2013 Will Explore the Blurring of Digital Ads With Digital Content* (Sept. 16, 2013), <http://www.ftc.gov/opa/2013/09/nativeads.shtm>.



many of you have likely observed, we promote strong privacy protections using all of the tools in our toolbox – enforcement, workshops, studies, reports, and consumer and business education.

We have a robust agenda for the coming year, which break into four basic – and in many ways, overlapping – categories.

#### **A. Big Data**

First, we are focusing on the phenomenon of collecting and analyzing huge data sets, known as Big Data. Big Data can of course drive valuable innovation – for example, it can be used to determine what medical treatments are most effective, and cost-effective, across a large population.

However, the pooling of vast stores of data raises obvious consumer privacy concerns, such as the risk of data breaches, or the risk that companies will make inferences about us that may not be true. Although NSA and Snowden involve government use of data, they’ve done a lot to raise awareness about these concerns.

Our activities on the Big Data front will include release of report on data brokers by the end of year, and stepped up enforcement of the Fair Credit Reporting Act (FCRA).<sup>14</sup> The FCRA sets out procedures governing the use of data to make decisions about whether to give consumers credit, a job, or insurance. It covers some of the practices of greatest concern when it comes to Big Data and remains a highly effective tool.

For example, just last month, the Commission obtained a \$3.5 million penalty from Certegy, a company that advises merchants on whether to accept consumers’ checks, based on their past financial history.<sup>15</sup> Our complaint alleged that Certegy violated the FCRA by failing to have appropriate dispute procedures and failing to maintain accuracy of the information it provided to merchants. This resulted in consumers’ (many of them elderly) being denied the ability to write checks and obtain essential goods and services.

#### **B. Mobile Technologies and Connected Devices**

A second area of focus is mobile technologies and connected devices. On November 19, we’re holding a workshop on the Internet of Things, the phenomenon in which you can connect

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<sup>14</sup> 15 U.S.C. §§ 1681-1681x.

<sup>15</sup> Fed. Trade Comm’n Press Release, *Certegy Check Services to Pay \$3.5 Million for Alleged Violations of the Fair Credit Reporting Act and Furnisher Rule* (Aug. 15, 2013), <http://www.ftc.gov/opa/2013/08/certegy.shtm>.

remotely to your fridge, your bank account, your thermostat, or your car – for example, to figure out what groceries to buy on your way home or control the temperature in your car before you get in.<sup>16</sup> The workshop will explore the privacy and security issues related to this increased connectivity for consumers.

We've also got investigations underway. We are looking at the privacy and security of different types of apps. And last month, we announced our first "Internet of Things" case involving a video camera designed to allow consumers to monitor their homes remotely.<sup>17</sup> Our complaint alleged that TRENDnet marketed its SecurView cameras for purposes ranging from home security to baby monitoring, and claimed in numerous product descriptions that they were "secure." In fact, the cameras had faulty software that left them open to online viewing, and in some instances listening, by anyone with the cameras' Internet address. This resulted in hackers posting 700 consumers' live feeds on the Internet.

### C. Privacy of Sensitive Information

A third area of focus – always a special concern in privacy – is providing strong protections for sensitive data: health information, financial data, and kids information. You can see this in our data security program, where we're litigating against Wyndham, which involves payment data,<sup>18</sup> and Lab MD, which involves private health information.<sup>19</sup> And we're making a strong push to educate companies on the changes made to the COPPA Rule, which became effective in July.<sup>20</sup>

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<sup>16</sup> Fed. Trade Comm'n Press Release, *FTC Seeks Input on Privacy and Security Implications of the Internet of Things* (Apr. 17, 2013), <http://www.ftc.gov/opa/2013/04/internetthings.shtm>.

<sup>17</sup> Fed. Trade Comm'n Press Release, *Marketer of Internet-Connected Home Security Video Cameras Settles FTC Charges It Failed to Protect Consumers' Privacy* (Sept. 4, 2013), <http://www2.ftc.gov/opa/2013/09/trendnet.shtm>.

<sup>18</sup> Fed. Trade Comm'n Press Release, *FTC Files Complaint Against Wyndham Hotels For Failure to Protect Consumers' Personal Information* (June 26, 2012), <http://www.ftc.gov/opa/2012/06/wyndham.shtm>.

<sup>19</sup> Fed. Trade Comm'n Press Release, *FTC Files Complaint Against LabMD for Failing to Protect Consumers' Privacy* (Aug. 29, 2013), <http://www1.ftc.gov/opa/2013/08/labmd.shtm>.

<sup>20</sup> See 16 C.F.R. 312 and 78 Fed. Reg. 3972 (Jan. 17, 2013); see also Fed. Trade Comm'n Press Release, *FTC Strengthens Kids' Privacy, Gives Parents Greater Control Over Their Information By Amending Children's Online Privacy Protection Rule* (Dec. 19, 2012), <http://www.ftc.gov/opa/2012/12/coppa.shtm>.

On the topic of COPPA, I hope that you are able to stay for Wednesday's CARU conference, at which my colleague Kandi Parsons will talk about the new COPPA landscape.

#### **D. Privacy Principles**

And the final (fourth) area is that we are continuing to encourage companies to implement the three basic principle in our privacy report – that is:

- (1) privacy-by-design – addressing privacy and security in at all stages of product or service development,
- (2) transparency – telling consumers in truthful and easy-to understand terms how you company is collecting and using consumer data, and
- (3) streamlined choice – easy-to-exercise choice for practices that would come as a surprise to consumers, in light of the context of their relationship with a company (or indeed *lack* of relationship).<sup>21</sup>

I think of these principles together as an exhortation – to both consumers and businesses – to simply *Expect Privacy*. Consumers expect, and should be able to expect, basic privacy and security protections. Such protections are good for consumers, but they are also good for businesses because they build the essential trust that is needed for the marketplace to flourish.

Privacy protections also should take into account reasonable consumer expectations. *Expect Privacy*.

### **III. Self Regulation**

And truly finally, since I am here at an NAD conference, I can't leave without saying a word about self-regulation.

We have long supported BBB's self-regulatory initiatives as an important complement to the FTC's law enforcement, policy, and educational initiatives. Over the years, the FTC has emphasized that when implemented in tandem, self-regulation and government oversight provide valuable efficiencies and benefits.

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<sup>21</sup> Fed. Trade Comm'n Report, *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers* (March 2012), <http://ftc.gov/os/2012/03/120326privacyreport.pdf>.

In fact, well-constructed industry programs with certain hallmarks – (1) clear requirements, (2) widespread industry participation, (3) active monitoring, (4) effective enforcement, (5) procedures to resolve conflicts, (6) transparent and independent processes, and (7) responsiveness to changing markets and consumers – offer some clear advantages over government regulation alone.

They can be more prompt, flexible, and responsive than when we only enforce through statutes and regulations. They also can be better tailored to reach to particular categories of marketing or particular categories of businesses.

In a nutshell, strong self-regulatory programs provide important guidance to industry, alleviate some of the FTC's burden in monitoring for law violations, and develop workable standards that we all can draw on in future policy and enforcement efforts. And, of course, the FTC is here to serve as a regulatory back-stop when self-regulation fails to bring about compliance.

I would be happy to take your questions. Thank you.