

**Promotion Marketing Association, Inc.
2010 PMA Marketing Law Conference**

Opening Keynote Address of FTC Commissioner Julie Brill¹

truthful and substantiated claims when promoting the “green” attributes of their products and services.

The Commission last revised these Guides in 1998. Twelve years later, you can’t watch television or go to the grocery store without seeing advertising claims for products

product meets certain criteria developed by the marketer itself. There is plenty of room for consumer confusion in this area.

We therefore propose a new section to the Guides, to remind marketers that certifications and seals are considered endorsements and should meet the criteria for endorsements set forth in the FTC's Endorsement Guides, which I will discuss later. For example, it is deceptive to represent that a product or service has been endorsed or certified by an independent third-party organization if that is not the case. In addition, the use of a certification or seal may, *by itself*, imply a general environmental benefit claim, which is extremely difficult to substantiate. So, marketers should include clear and prominent language to effectively limit the claim to the particular environmental attributes that *can* be substantiated.

Third, **newer claims** in the marketplace. Our consumer perception evidence indicated confusion and a potential for deception with respect to newer claims such as "made with renewable materials" and "made with renewable energy." We therefore propose revising the Guides to recommend that advertisers *qualify* these claims by providing clear information about the precise contours of the environmental benefits being touted.

Those are just a few highlights of our proposed revisions. Our goal is to provide improved, *evidence-based* guidance to help advertisers navigate the tricky waters of green advertising. We are now seeking comment on all of the issues raised in the revised Guides. The comment period is open until December 10, and I hope that many of you will weigh in.

Endorsement Guides & ReverbSettlement

Let me turn to another set of Guides we recently revised: the Commission's Guides on Endorsements and Testimonials in Advertising.³ Just over a year ago, the FTC announced final revisions to the Endorsement Guides. This was the first update to the Endorsements Guides since 1980 and, needless to say, the world of advertising has changed a lot in the past 30 years. Online advertising is an entirely new medium, and it is evolving at an incredibly rapid pace. Today, we are seeing endorsements and testimonials in new contexts – particularly on social networks and in blogs – that did not exist a decade ago, and that consumers still do not necessarily think of as "advertising." It was certainly time to update the Guides to make clear how our traditional rules of the road apply in these new online spaces.

Some of the revisions we announced seemed to set Madison Avenue and the blogosphere buzzing. It's true that the revised Endorsement Guides contain some new ideas; they also extend settled advertising pr

The Commission's first enforcement action after the revisions to the Endorsements and Testimonials Guide was the *Reverb* settlement, announced at the end of August.⁴ Reverb is a public relations agency that was hired to promote video games. In exchange for its services, Reverb often received a percentage of the sales of each game. One promotional strategy the company used was having its employees pose as ordinary consumers and post positive reviews of the games at the online iTunes store – without disclosing that the reviews came from paid employees working on behalf of the

collection and retention of such information, and to protect it through reasonable security measures. We thought about privacy policies, privacy practices, and various self-regulatory regimes all through the lens of Fair Information Practices.

During this time frame – in the late 1990’s – the FTC, the states, and many consumer advocates called on Congress to enact the Fair Information Practices principles into law. While Congress did not enact overarching privacy legislation at that time, it did include some of the Fair Information Practices principles in other laws. Most notably, the Gramm-Leach-Bliley Act incorporated a “Notice and Choice” model for financial institutions: consumers were to be given a complex notice once a year that they would be presumed to read and understand, and then make an “informed” choice.

Then, in the early 2000’s, the FTC shifted its privacy framework to a “Harm-

The Harm model of privacy regulation also faces challenges in today's advanced technological environment. With its focus on quantifiable or tangible harms to consumers, the Harm model may not adequately address other, less quantifiable harms that are nonetheless real, such as those that can result from the exposure of sensitive information relating to medica

importantly, it underwrites so much of the free content available to consumers online.

- x and, as I just alluded to, the distinction between personally identifiable information and non-personally identifiable information is blurring.

So, where do we go from here? Our Report is

provide guidance for legislators and policymakers as they tackle these challenging issues. We will be inviting public comments on the report, and I want to encourage you to give us your views when the time comes.

C. Enforcement

In addition to our policy work, the Commission has been – and continues to be – active in the enforcement arena in the privacy space. We continue to bring privacy enforcement actions involving new technologies. For example, we recently concluded our first data security case against a social networking company – Twitter – in which we alleged that the company deceived consumers

- the information and controls provided by the self-regulatory program, or they can't easily utilize it, the program simply won't be effective.
- x Second, we will look for a robust enforcement mechanism, which is a key component to any successful self-regulatory program.
 - x And third, we will look for broad participation. Many major industry groups are on board already, which is a very good thing, but it remains to be seen whether less than full participation could lead to consumer confusion.

Conclusion

And with that, I'd like to thank you for allowing me to share my thoughts about some of the work we are doing at the Commission involving cutting edge marketing issues. It's been a pleasure to speak with you this morning.