



Federal Trade Commission

**National Advertising Division Annual Conference
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**Remarks of Jessica L. Rich¹
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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.

¹ 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.² 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.

² 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,

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

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.⁹

Similarly, in July, three mattress manufacturers agreed to stop making unsupported

- (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.¹²

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.

¹² 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*

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.”¹³

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

¹³ 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).¹⁴ 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.¹⁵ 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

¹⁴ 15 U.S.C. §§ 1681-1681x.

¹⁵ 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>.

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).²¹

I think of these principles together as an exhortation – to both consumers and businesses – to simply *streamline and be secure*
