

Regulating Emerging Media

Forms:

Key Issues in Advertising for the FTC in 2010

Stacey Ferguson
Staff Attorney
Federal Trade Commission

Loeb & Loeb LLP
Advanced Media and Technology Group
Free CLE Webinar
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Administrative Reminders

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- You can ask questions throughout the presentation by using the chat feature that is on the lower left hand corner of your screen. We'll also have Q&A at the end of the presentation.
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Overview

- The views expressed are my own and not necessarily those of the FTC or any individual Commissioner
- FTC Advertising Law 101
- FTC Endorsement and Testimonial Guides
- Online Behavioral Advertising



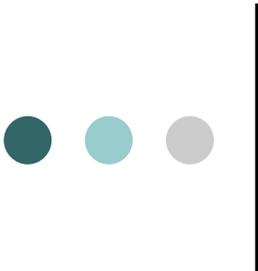
FTC Advertising Law 101

- Ads must be truthful and substantiated
- Ads are deceptive if they are likely to mislead consumers about something important to decision to use/purchase
 - Express and implied claims can mislead
- Ads are evaluated as a whole
- Ads are interpreted from standpoint of reasonable consumer
 - Ad may have more than one reasonable interpretation



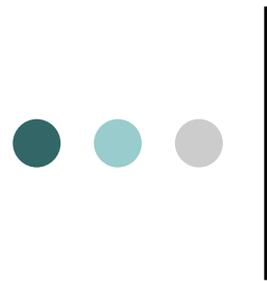
What is an Endorsement?

- Any advertising message that consumers perceive to represent the personal views of the speaker.
- The views expressed by the endorser may be identical to those of the sponsoring advertiser.
- Endorsement can include: verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization.



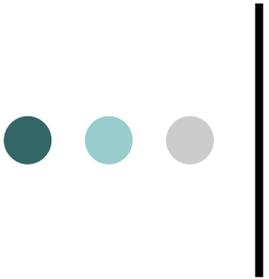
What are the Guides?

- Administrative interpretations intended to provide the basis for voluntary compliance with the law by advertisers and endorsers.
- There are **no fines** for violating the Guides.
- Practices inconsistent with the Guides may result in corrective action under the FTC Act by the Commission.
- Whether a particular endorsement or testimonial is deceptive will depend on the specific factual circumstances of the advertisement at issue.



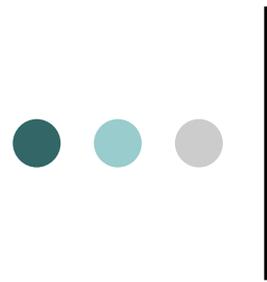
Background on the Guides

- Up until last year, the FTC Guides Concerning Use of Endorsements and Testimonials in Advertising (16 CFR § 255) had not been revised since 1980, when they were issued.
- In 2007, Commission initiated review of the Guides.
- In November 2008, proposed revisions to the Guides were published for comment.
- Comment period ended in March 2009.
- Final Guides were issued on October 5, 2009.
- Effective Date: December 1, 2009



The Revised Guides: Principal Changes

- Requiring disclosure when advertiser has paid for study touted in ad
- Deletion of “results not typical” safe harbor
- Addition of examples of disclosing material connections in social media marketing

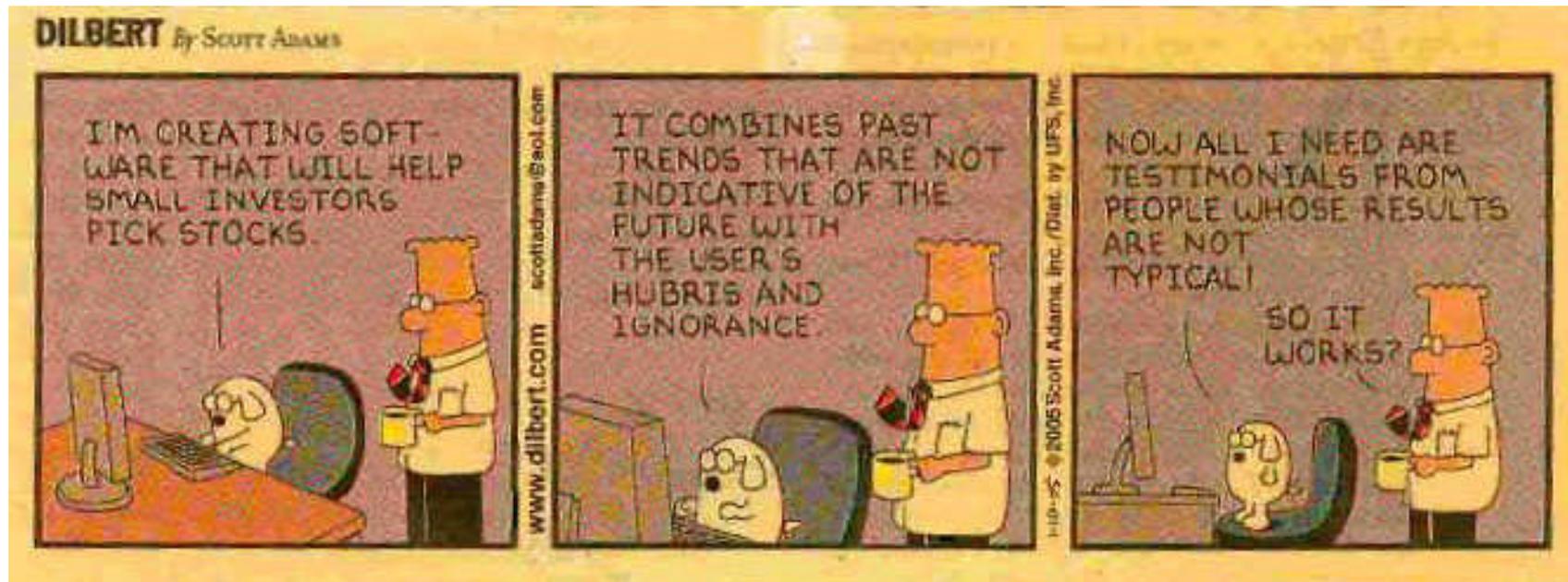


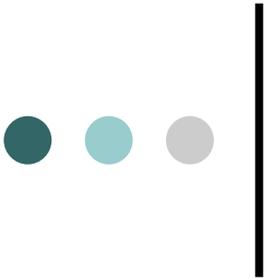
Sponsorship of Studies

- Old Guides: No need to disclose when advertiser paid for study cited in ad (on theory that substantiation requirements would be sufficient to prevent deception)
- Revised Guides: Knowing advertiser paid for study may affect weight consumers give to study results, so study sponsorship should be disclosed

- ● ●

Generally Expected Results ...Typicality

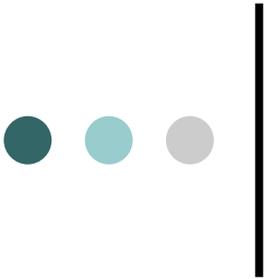




Endorsements: Typicality

- An advertisement:
 - employing an endorsement;
 - reflecting the experience of an individual or a group of consumers;
 - on a central or key attribute of the product or service;

will be interpreted as representative of what consumers will generally achieve with the advertised product in actual, albeit variable, conditions of use.



Endorsements: “Results Not Typical”

- Unless the advertiser possesses and relies upon adequate substantiation for this representation, the ad should either:
 - A. Clearly and conspicuously disclose what the generally expected performance would be in the depicted circumstances; or
 - B. Clearly and conspicuously disclose the limited applicability of the endorser’s experience to what consumers may generally expect to achieve.
- **Revised Guides eliminate option B**

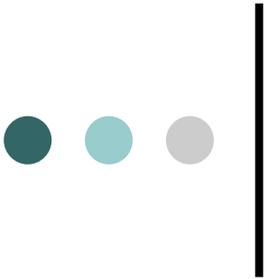
Social Media Marketing





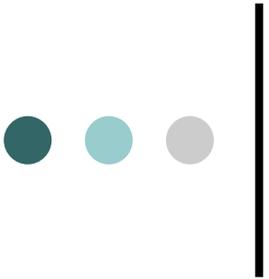
Advertising in Social Media

- Social Networking sites have developed into a medium for advertisers to reach targeted audiences
- Same advertising rules apply regardless of medium or venue
- But application of rules to social media may be less obvious than application to traditional media
- Updates to Endorsement & Testimonial Guides should help



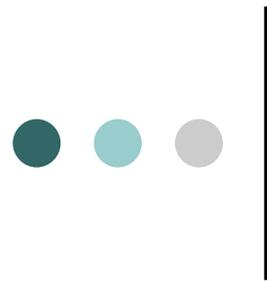
When Does a Consumer Become an Endorser?

- Answer: When – viewed objectively – the consumer is being sponsored by the marketer
- Consider: Is speaker acting independently (in which case there's no endorsement); or is speaker acting on behalf of advertiser/agent such that speaker's statement is an “endorsement” that's part of an overall marketing campaign?



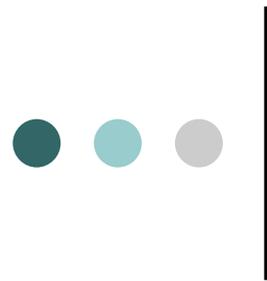
When Does a Consumer Become an Endorser?

- Some factors to consider:
 - Did advertiser compensate speaker?
 - Did advertiser provide product for free?
 - What are terms of any agreement b/t advertiser/speaker?
 - What is length of relationship b/t advertiser/speaker?
 - Did speaker previously receive free products?
 - What is value of free products received?



Product Promotion by Consumers

- The FTC **is not** concerned with *genuine* consumer promotions or product reviews.
- These types of product promotion are not likely to present issues under Section 5 of the FTC Act, prohibiting unfair or deceptive acts or practices.
- The FTC **does** have concerns when consumers are speaking on behalf of marketers and that fact is not disclosed.



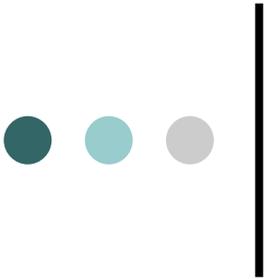
The Bottom Line

- Old laws still apply in these new settings
- Truth-in-advertising standards are the same -- endorsers must disclose material connections to advertisers – these standards apply to all types of marketing, including:
 - **Viral, Stealth, Guerilla, Buzz, Blog Marketing, Flog Marketing, Blog Advertising, Viral Video, and Social Networking Sites.**



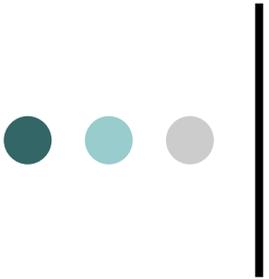
Endorsement and Testimonial Guides

- Advertisers and consumer endorsers, such as bloggers, must pay attention to the revised rule regarding endorsements and testimonials, which have been updated to include examples relating to social media marketing.



Endorsement & Testimonial Guides

- Endorsement Guides require disclosure of a connection between a seller and an endorser that might materially affect the weight or credibility of the endorsement
- A material connection is one that isn't reasonably expected by the audience
- Examples of such connections include:
 - Seller is compensating endorser
 - Endorser is employee or business associate of seller
 - Endorser is related to seller



Application of Endorsement Guides to Word of Mouth Marketing

- Consumers wouldn't normally expect that another consumer has been compensated to talk to them about a product
- Consumers may reasonably give more weight to another's views -- based on the assumption that speaker is independent from the seller -- than they would if they knew the speaker was being compensated



Application of Endorsement Guides to Blogging

- The proposed guidelines require bloggers to disclose not only when they are paid by a company, but also when they receive a free product.
- Blogs that promote products are consumer endorsements. To the extent they're paid for, they come under jurisdiction of FTC.



Financial Ties Should Be Disclosed

- Under the FTC Endorsement Guides, financial tie between seller and agent should be disclosed



Free Products

- Free products can be considered compensation
- May be fact-specific: what is the expectation of a positive endorsement?
- What is the connection between the advertiser and the endorser?

Blog Product Review

Chief Family Officer: Review & Giveaway: Hallmark Encouragement Cards - Windows Internet Explorer

http://www.chieffamilyofficer.com/2009/09/review-giveaway-hallmark-encouragement.html

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TUESDAY, SEPTEMBER 08, 2009

Review & Giveaway: Hallmark Encouragement Cards

 I was sent some **Hallmark encouragement** cards to check out, and they're terrific! What a quick and easy way to cheer someone up or just let them know you're thinking of them. Some have sound, some are funny, and some are just plain sweet. Many of the cards are from the **Edge of Motherhood** line, and are specifically designed for mothers who want to send a pick-me-up to another mom.

One great thing about these cards is that they're really affordable. The every day cards I got are a mere 99-cents each, and the sound cards are just \$2.99. Some of the cards have a fabulous little feature on the back: a little headshot of the writer plus a little blurb about them. I've never seen that before, but it's a nice touch. (The web site sizes and prices are different from what's on the back of the cards I received.)

ABOUT THIS SITE

 My name is Cathy, and I'm an attorney, wife and mom. I'm also the CFO of our family. I write daily about family finances, parenting, and cooking, and post reviews and links to great deals at **CFO Reviews**.

Learn more about CFO and read the Best of CFO.

Contact me at cfoblog [at] gmail [dot] com.

Please read this disclaimer/disclosure.

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http://www.hallmark.com/

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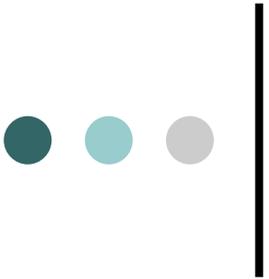
Message Boards

- Employee relationship must be disclosed
- Advertiser should have policies in place and train its employees regarding acceptable social media practices



Street Teams

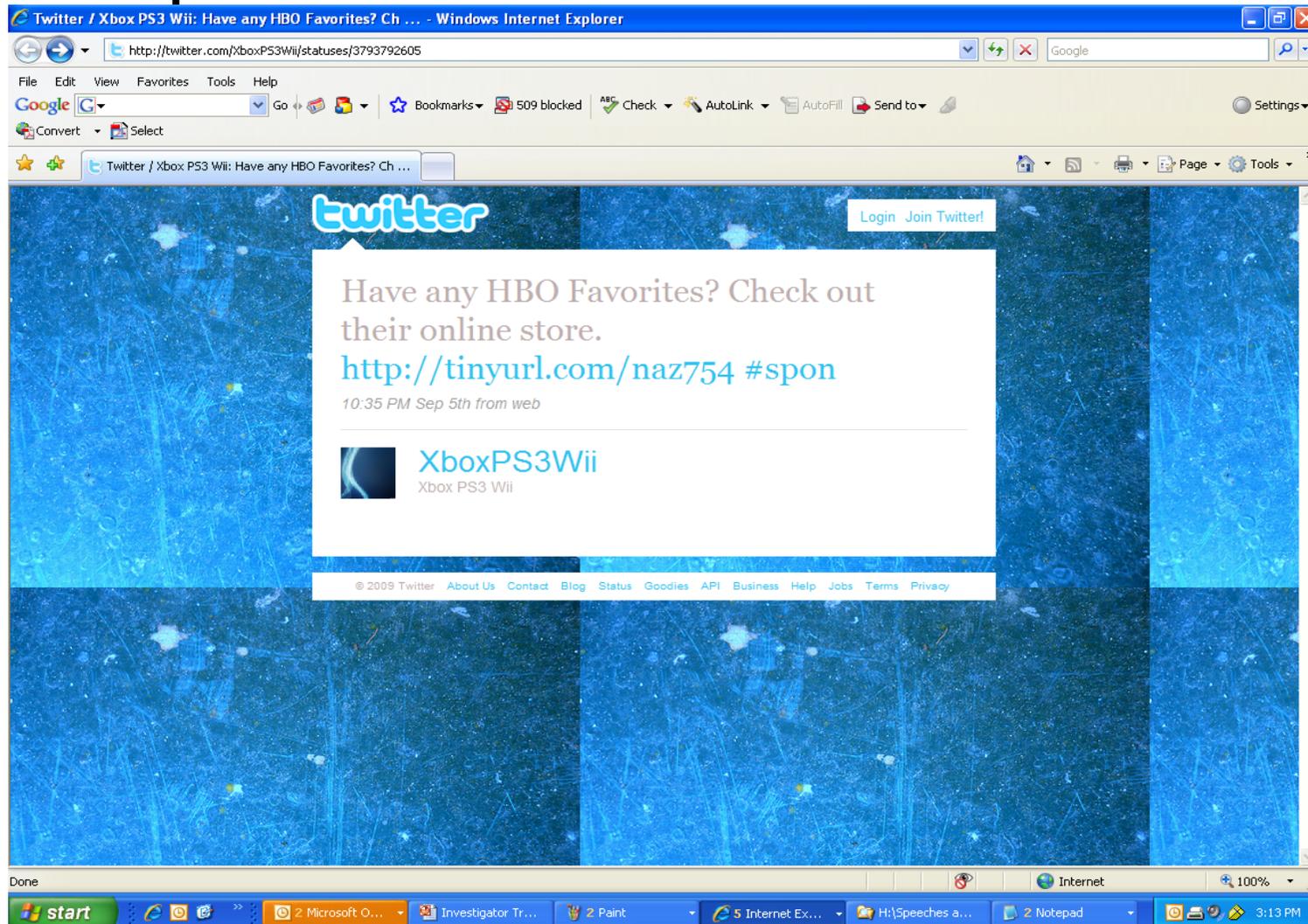
- A marketing program to promote the advertisers' products
- Something of value is being provided in exchange for promotion of the product
- Disclosure is required, and the advertiser should take steps to ensure disclosures are being provided



How Should Material Connections Be Effectively Disclosed?

- Disclosure should be part of the message so it can't be missed. E.g.:
 - Acme Co. provided this product for me to review
 - XYZ Co. sent me to Adventureland to experience their theme park
 - On Twitter: #paid, #ad

Sponsored Tweet

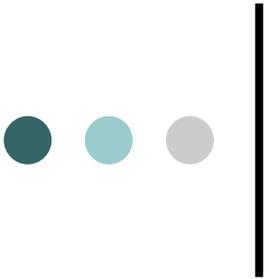


The image shows a screenshot of a Windows Internet Explorer browser window displaying a Twitter page. The browser's address bar shows the URL <http://twitter.com/XboxPS3Wii/statuses/3793792605>. The page content features the Twitter logo and a navigation bar with "Login" and "Join Twitter!" links. The main content is a tweet from the user "XboxPS3Wii" (Xbox PS3 Wii) posted at 10:35 PM on Sep 5th from a web browser. The tweet text reads: "Have any HBO Favorites? Check out their online store. <http://tinyurl.com/naz754> #spon". Below the text is the user's profile picture and name. At the bottom of the browser window, the Windows taskbar is visible, showing the Start button and several open applications: Microsoft Office, Investigator Tr..., Paint, Internet Explorer, and Notepad. The system clock indicates the time is 3:13 PM.

Sponsored Tweet?



The image shows a screenshot of a Twitter post displayed within a Windows Internet Explorer browser window. The browser's address bar shows the URL <http://twitter.com/RayJGordon/status/3868604951>. The Twitter post itself features the Twitter logo in the top left, followed by a "Login Join Twitter!" link. The main text of the tweet reads: "Apple's new iPod Nano is not evolutionary... it's revolutionary! a truly portable video platform with great capacity in a tiny from factor." Below the text, it indicates the tweet was posted "43 minutes ago from web". The user's profile information shows a profile picture of Ray Gordon, the name "RayJGordon", and the real name "Ray Gordon". At the bottom of the browser window, the Windows taskbar is visible, showing the Start button and several open applications including Microsoft Office, Investigator Tr..., Paint, Internet Explorer, and Notepad. The system clock in the bottom right corner shows the time as 3:16 PM.



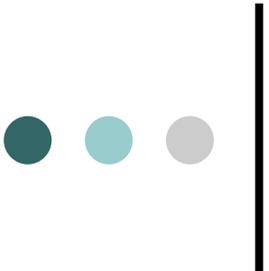
When Is Marketer Liable for Endorser's Statement?

- If endorser makes false or unsubstantiated claims for product, advertiser is potentially liable. To limit potential liability:
 - Advertiser should ensure its endorsers receive guidance/training re need to ensure statements are truthful/substantiated
 - Advertiser should monitor sponsored bloggers and take steps to halt continued publication of deceptive claims when discovered



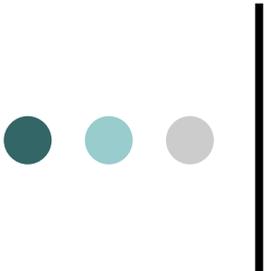
Things to Remember

- Consumers have a right to know when they are being pitched a product – advertising must be identified as advertising
- Material connections must be disclosed; Know your target audience and tailor disclosures appropriately
- Policy and training will be essential
- Misleading and unsubstantiated claims are still unlawful
- Both advertisers and consumer endorsers being sponsored by the advertiser are potentially liable



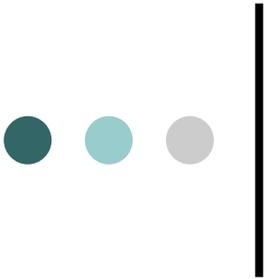
Online Behavioral Advertising: Background

- **Online Profiling:** FTC began looking at online profiling in late 90s.
- Held a workshop in 1999 on online profiling, and subsequently issued a report to congress.
 - Formation of NAI; and
 - Recommendation that Fair Information Practices that should be included in any legislation.
- **Tech-Ade:** FTC revisited the issue at our Tech-Ade hearings in 2006, where we explored this area further and noted some of the advancements in the world of online profiling



Online Behavioral Advertising: FTC Town Hall

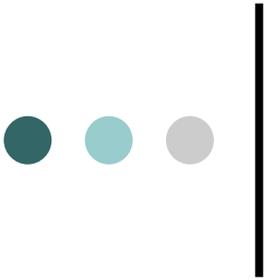
- **Town Hall:** As a result of Tech-Ade hearings, as well as privacy concerns associated with the Google --DoubleClick merger, FTC held Behavioral Advertising Town Hall in November 2007.
 - **We discussed:**
 - **Benefits of OBA:** Relevant advertising, reduction in unwanted ads, free online content.
 - **Risks of OBA:** Largely invisible practice. Not all consumers understand what cookies are. Sensitive data could fall into the wrong hands. People don't want to get advertisements based on the collection of their sensitive information. Also could be used for price discrimination, etc.



Online Behavioral Advertising: Public Comments

○ Comments

- We received 63 comments on a set of proposed self-regulatory principles from 87 stakeholders, including industry, academics, consumer advocates, and of course consumers.
- Comments addressed issues such as:
 - Distinction b/t PII and Non-PII
 - First-party OBA
 - Contextual Advertising

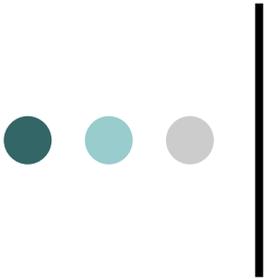


Online Behavioral

Advertising: Self-Regulatory

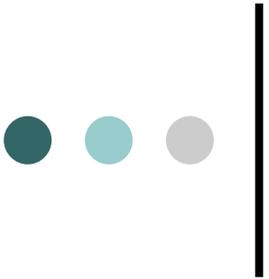
Principles

- In February 2009, the FTC staff issued a report, “Self-Regulatory Principles for Online Behavioral Advertising,” summarizing and responding to the main issues raised by the comments received. It also sets forth revised principles.
- The key issue concerned how online advertisers can best protect consumers’ privacy while collecting information about their online activities.



Online Behavioral Advertising: Self-Regulatory Principles

- Definition: the tracking of a consumer's online activities ***over time*** – including the searches the consumer has conducted, the web pages visited, and the content viewed – in order to deliver advertising targeted to the individual consumer's interests.



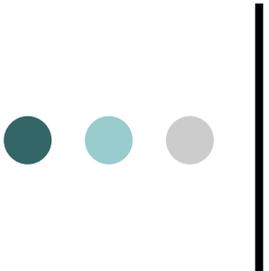
Online Behavioral Advertising: Self-Regulatory Principles

- Principles:
 - (1) Transparency and Consumer Control;
 - (2) Reasonable Security, and Limited Data Retention, for Consumer Data;
 - (3) Affirmative Express Consent for Material Changes to Existing Privacy Promises; and
 - (4) Affirmative Express Consent to (or Prohibition Against) Using Sensitive Data for Behavioral Advertising.



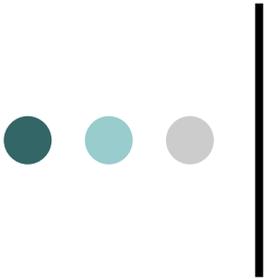
Online Behavioral Advertising

- Issues we continue to monitor:
 - We are concerned with the **anonymity** issue.
 - Still a distinction in industry between PII and non-PII.
 - Because of leakage, statements like these are not always accurate.
 - The techniques being used to **circumvent consumer choice**.
 - Third party cookies acting as first party cookies.
 - Flash cookies.



Online Behavioral Advertising: Sears Case

- Sears offered an incentive to customers to download software that would essentially monitor all of their internet activity.
- Initial statements said they would “confidentially track your web browsing.” In fact much more significant tracking than that.
- The end user license agreement (EULA) did not cure the initial misrepresentation.
- Company settled charges. In addition to destroying information previously collected, if Sears advertises or disseminates any tracking software in the future, it must clearly and prominently disclose the types of data the software will monitor, record, or transmit, prior to installation and separate from any user license agreement. Sears must also disclose whether any of the data will be used by a third party.



Online Behavioral Advertising: Privacy Roundtables

- The FTC is hoping to take a fresh look at privacy by evaluating existing frameworks, both regulatory and self-regulatory, and figuring out how best to tackle the ever-growing practice of data collection and use.
- Roundtable No. 1 - December 7, 2009.
 - Discussed benefits, risks, consumer controls, business incentives, and whether self-regulation is working or whether regulation is needed.
- Roundtable No. 2 – January 28, 2010.
 - At Berkeley. The first panel will focus on privacy and technology, where we will discuss the ways in which technology has helped to advance consumer control on the Web, as well as ways that technology has been used to circumvent consumers' choice.



Conclusion

- Social networks have changed the way in which consumers interact with each other and with advertisers.
- The FTC continues to monitor the social media landscape and will use its authority under Section 5 and other statutes to bring law enforcement actions where it sees fit.
- FTC enforcement will likely focus on advertisers.
- Following its ongoing “Exploring Privacy Roundtable Series,” the FTC will determine how best to protect consumer privacy while supporting beneficial uses of the information and technological innovation.



Questions?

- Contact Stacey Ferguson at sferguson@ftc.gov
- Or visit www.ftc.gov