



Advertising and Promotions Law

ALERT
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FTC Studies Online Targeted Advertising; FTC Issues Final Rule on Affiliate Marketing

FTC Studies Online Targeted Advertising

On November 1 and 2, the FTC hosted a town hall meeting to discuss privacy and online behavioral advertising - the collection of information about a consumer's activities online (including the searches the consumer has conducted, the web pages visited, and the content the consumer has viewed) which is then used to target advertising to the consumer. The FTC examined a similar issue in 2000, but noted that recent technological advances and complaints filed with the FTC by consumer advocacy groups and the New York Attorney General regarding privacy concerns and online behavioral advertising prompted the FTC to hold the town hall meeting.

FTC Commissioner Jon Leibowitz spoke at the meeting and said "I am concerned when my personal information is sold to or shared with third parties - or when my online conduct is monitored across several websites or across different web-based services - especially when there is no effective notice or consent to these practices. And it should really trouble all of us that seemingly anonymous searching and surfing can be traced back to specific individuals - and that not all information that companies have collected about us is secure from data breaches or release."

Commissioner Leibowitz suggested that the parties involved in targeted advertising provide better information about their practices and meaningful choices for consumers and consider using standardized privacy policies and shorter notices. He urged companies to adopt an opt-in approach to online tracking, especially when it comes to sharing consumer information with third parties and shar-

ing it across various web-based services. And he concluded by saying, "It's always great when the competitive marketplace can solve these types of problems, although my sense here is that the market alone may not be able to resolve all the issues inherent in behavioral marketing. So at the Commission, we will listen closely to what online marketers are doing, how they are doing it, and who they are doing it to.... We also will continue to monitor industry behavior - and if we see problematic practices, the Commission won't hesitate to bring cases."

FTC Affiliate Marketing Rule

The FTC issued a final rule relating to the use of consumer credit information obtained from an affiliate for marketing purposes. Under the final rule, a person or company is prohibited from using certain credit information received from an affiliate to market goods or services to a consumer, unless the consumer is given notice, a reasonable opportunity to opt-out, and a simple and reasonable method for opting-out. However, there is an established business relationship exemption from this prohibition.

The rule is issued pursuant to the Fair and Accurate Credit Transactions Act of 2003 which amended the Fair Credit Reporting Act (FCRA). The FCRA regulates credit reporting companies and establishes limits on how credit reporting information can be used.

The final rule applies to any person or company within the FTC's jurisdiction that (1) uses consumer "eligibility

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information" obtained from an affiliate for the purpose of marketing solicitations or (2) provides information to its affiliates for that purpose. "Eligibility information" is defined in the rule as "any information the communication of which would be a consumer report if the exclusions from the definition of 'consumer report' in section 603(d)(2)(A) of the [Fair Credit Reporting] Act did not apply. Eligibility information does not include aggregate or blind data that does not contain personal identifiers such as account numbers, names, or addresses." Eligibility information includes a consumer's own transaction or experience information such as information about the consumer's account history.

"Consumer report" is defined very broadly in the FCRA as "any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for credit or insurance to be used primarily for personal, family, or household purposes, employment purposes, or any other purpose authorized in section 604 of the FCRA." Credit report information includes any type of information credit grantors use as criteria for prescreening or in credit scoring models such as credit limits; loans obtained in the last six months; the number of credit card accounts, mortgages or loans; the type of loans; and the mere existence of an account with a credit card, loan, or mortgage company.

Notice must be provided in writing or, if the consumer agrees, electronically. The opportunity to opt-out must be provided (1) after the consumer has received notice of the

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right to opt-out, and (2) is given a reasonable opportunity to opt-out. A consumer's opt-out election is effective for five years. The final rule contains examples and model forms to facilitate compliance with the notice and opt-out requirement.

(The FTC's affiliate marketing rule should not be confused with the FTC's affiliate sharing rule, which also applies to consumer credit information. In the notice of proposed rulemaking for the affiliate marketing rule, the FTC explained that the affiliate marketing rule applies to how consumer credit information is *used*, while the affiliate sharing rule applies to whether and how consumer credit information can be *shared* among affiliates.)

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