Promotion Marketing Association, Inc.
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Opening Keynote Address of FTC Commissioner Julie Brill[1]

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Introduction

Good morning. I'm very pleased to be here with you today to help kick off this conference. I've been here before, and always enjoyed it. Of course, this is my first time here as a Commissioner. This morning I'd like to provide my thoughts on important efforts underway at the FTC involving marketing issues on the cutting edge.

I'll first discuss the Commission's review of its Guides for the Use of Environmental Marketing Claims – otherwise known as the "Green Guides." I'm sure you have heard about the proposed revisions to the Green Guides that we announced in early October. Today, I'll talk about why the FTC has undertaken this important project, and provide a few highlights of the proposed revisions.

Next, I'll touch briefly on the recent revisions to the Commission's Endorsement and Testimonial Guides, and the FTC's recent enforcement efforts under these Guides.

And last, I will discuss the Commission's ongoing work in the privacy arena, including our upcoming and highly anticipated report. As you may know, privacy is a topic that I have spent considerable time thinking about and working on throughout my career, and I am particularly excited to be a part of the important efforts underway at the FTC.

Proposed Revisions to the "Green Guides"

Let's start with the Green Guides. Environmental marketing claims provide useful information to consumers – but only when the claims are true. Ensuring that the claims are truthful is particularly important in this area, because these claims are essentially "credence claims."[2] Consumers often cannot determine for themselves whether a product, package, or service is, in fact, "recyclable," "made with renewable energy," or possesses another environmental attribute that is being promoted. The Green Guides therefore play a very important role in advising marketers about how to make

[1] The views presented here are my own and do not necessarily represent those of other Commissioners or of the Commission as a whole.

[2] On the topic of "credence goods and claims," *see* Muris, The Interface of Competition and Consumer Protection, Fordham Corporate Law Institute's 29th Annual Conf. on International Antitrust Law and Policy (2002), *citing* Darby & Karni, *Free Competition and the Optimal Amount of Fraud,* 16 J. LAW & ECON. 67 (1973).

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 that are "eco-friendly" or "green." The number and variety of these claims is staggering. Thus, the Guides are probably more relevant to today's advertising landscape than ever before.

A great deal of work went into our effort to revise the Green Guides. We conducted three public workshops to explore emerging environmental marketing claims, and more than 450 people participated, including representatives from industry, government, consumer groups, the academic community, and non-profit environmental organizations. We also received 200 public comments during the review process, and we commissioned an extensive consumer perception study to provide additional information on how consumers interpret various types of environmental claims.

What we learned from all of this evidence is that the Green Guides have benefitted consumers and businesses, but they need to be updated to better reflect the types of claims being made, how consumers understand these claims, and the existing evidence supporting such claims.

Broadly speaking, our proposed revisions to the Green Guides are designed to strengthen, add specificity to, and improve the utility of the current guidance. Our proposed revisions also add new guidance on emerging claims that are not addressed in the 1998 Guides. Here are a few highlights of our new proposed Guides.

First, **general environmental benefit claims**. Our study looked at how consumers understand unqualified general environmental benefit claims – such as "environmentally friendly" or "eco-friendly" – and we found that these claims are likely to convey numerous specific and far-reaching environmental benefits. For example, consumers may believe that an "eco-friendly" product is: made from recycled materials, recyclable itself, biodegradable, and non-toxic, among other things.

But very few products – if any – have *all* of the attributes that consumers perceive, and so the claims are virtually impossible to substantiate. Based on this evidence, the Commission proposes strengthening the current guidance to advise marketers not to make unqualified general environmental benefit claims at all. We do, however, also propose offering more guidance on how marketers can adequately qualify these claims to avoid consumer deception.

Second, **certifications and "seals of approval."** It goes without saying that the use of these devices in environmental advertising is pervasive. The problem is that these symbols can be intended to convey any number of meanings to consumers. They can symbolize a certification issued by a third-party, or they might merely represent that the

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 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 & *Reverb* Settlement

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 principles to newer forms of marketing. Many of these important revisions respond to changes in technology and advertising. Some revisions also respond to research on consumer perception of advertising containing testimonials.

[3] 16 C.F.R. Part 255.

I'd like to highlight four key revisions in the Endorsement and Testimonial Guides that I think all advertisers should keep in mind.

First, payments by advertisers to bloggers and other endorsers in new social media must be disclosed. Now, it has always been the law that a material connection between the endorser and the marketer must be disclosed. Examples of material connections include when an endorser has been paid or given something of value to tout the marketer's product, or an ad features an endorser who is a relative or employee of the marketer. The Endorsement Guides have long required disclosure of material connection if consumers would not reasonably expect such a connection. The reason for this requirement is obvious – a material connection between the endorser and advertiser is important information for consumers who are trying to evaluate the endorsement.

Second, the revised Endorsement Guides contain new examples of situations in which payments by an advertiser to a celebrity endorser must be disclosed. The new examples include a celebrity discussing a product in a promotional way during a talk show interview or on Twitter. In short, if the celebrity is being paid to speak publicly about the product, and consumers would not otherwise expect that an advertiser paid for the endorsement, the payment should be disclosed.

Third, the revised Guides now clarify that both advertisers and endorsers may be liable for failing to disclose material connections, and for false or unsubstantiated claims made through endorsements. These principles apply in the context of traditional advertising as well as in newer contexts such as talk show interviews and social networks. The revised Guides encourage advertisers to take a proactive approach with respect to endorsements – by implementing policies and practices to inform their endorsers of their rules, monitor their endorsers, and take steps to correct any deceptive claims or undisclosed material connections. Of course, liability will always be determined on a case-by-case basis, considering all the relevant facts and circumstances.

Finally, the Guides now provide that advertisements that feature a consumer endorser – and that convey a message that the consumer's experience with the advertised product or service is "typical" – must clearly and conspicuously disclose what *other* consumers can generally expect to experience, if that is different from the featured consumer's experience. And, the Guides make clear that disclaimers such as "Results Not Typical" no longer provide a safe harbor.

The Commission made this modification after analyzing relevant consumer research, including two studies we commissioned, which demonstrate that consumers believe that they are likely to achieve results similar to those portrayed in testimonials, and disclaimers such as "Results Not Typical" do not correct this misimpression. So, advertisers now have two options: they can either have adequate proof to back up the claim that the results depicted in an ad are typical, *or* they can disclose, clearly and conspicuously, the generally expected performance of the product or service under the circumstances depicted in the advertising.

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 game developers. We alleged that this information would have been material to consumers reviewing the iTunes posts in deciding whether or not to buy the games.

The *Reverb* settlement confirmed what we said when we announced the revised Guides – that our well-settled truth-in-advertising principles apply to new forms of online marketing. We expect – and the law demands – the same transparency in online marketing as in offline marketing.

I think the revisions to the Commission's Endorsement Guides provide important new and expanded guidance to advertisers across the vast array of marketing media, including new media like social networks and blogs. I trust that industry has taken the new Guides to heart and put them into practice. Of course, we will be watching to make sure that is the case.

Privacy

A. Where We Are and How We Got Here

Now let's turn to privacy. I believe that we are truly at a turning point on the issue of privacy here in the United States. For some time now, there has been an intense dialogue – in Washington and beyond – about the appropriate framework for privacy regulation and self-regulation. Advances in technology have challenged our traditional privacy models and caused many of us to re-evaluate those models. At the FTC, we have been actively engaged in this dialogue on many levels – holding public workshops, testifying on proposed legislation, and making policy through our law enforcement actions. Very soon, we will release a report on our "re-think" of the FTC's approach to privacy, which we hope will spur further dialogue.

In order to understand where we are *now* on privacy issues, I think it is important to understand where we have been. Over the past 15 years, we have seen two schools of thought about the appropriate framework for privacy regulation. First, starting in the mid-1990's, the FTC and others looked at privacy issues through the lens of the Fair Information Practices – the "FIPs" principles of Notice, Choice, Access and Security. This approach called for businesses to provide consumers with notice and choice about how their personally identifiable information would be used, to engage in reasonable

[4] *In the Matter of Reverb Communications, Inc., et al.* FTC File No. 0923199, *see press release, available at* http://www.ftc.gov/opa/2010/08/reverb.shtm.

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-based" model. This approach focused on harmful privacy practices that present risks of physical security or economic injury to consumers. The top concerns became data security and data breaches, identity theft, children's privacy, spam, spyware, and the like. The FTC and the states brought numerous law enforcement actions addressing these concerns. New data security enforcement tools were created, and others were enhanced. Over the past decade, the vast majority of states enacted breach notification laws, and federal regulators adopted the Safeguards Rule under the GLB Act. Congress passed the Fair and Accurate Credit Transactions Act of 2003, which addressed identity theft in a number of ways, including requiring the FTC to promulgate a "red flags" rule and giving consumers a new right of access to their credit reports for free, on an annual basis, allowing consumers to monitor their reports for suspicious activity, as well as for accuracy.

But in today's technologically advanced environment, these older privacy protection models simply aren't keeping pace. Today, the rapidly evolving Internet and other electronic technologies create much more sophisticated opportunities for companies to gather, use, and retain consumer information. Rich ecosystems of data now exist, and richer ones will be created, paving the way for some very sophisticated forms of advertising.

These technological developments pose real challenges for our traditional approaches to privacy. For example, the Notice and Choice model, as it is often deployed today, places too great a burden on consumers. Privacy policies have become complex legal documents designed more to shield companies from liability than to meaningfully inform consumers about information practices. Companies issuing these legalistic notices are not necessarily behaving deceptively or unfairly; rather, they are simply responding to the current design of the Notice and Choice framework. Yet it is just not realistic to expect consumers to read and understand these very complex documents and make choices – often without really understanding all the ways in which their information might be used in the future. And it's just not practical to expect consumers to review, let alone understand, these notices on some of the newer Internet-accessible devices such as mobile phones.

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 medical conditions, children, or sexual orientation, to name just a few examples. Also, at its core, the Harm model is fundamentally reactive. As Dan Solove has pointed out, it addresses and corrects privacy and data security breaches after they have been discovered.[5] The Harm model is not a proactive framework designed to encourage companies to include privacy as part of the fundamental design of how they offer products and services to consumers.

Another problem with both the Notice and Choice model and the Harm model is that they rely on a theoretical distinction between personally identifiable information and non-personally identifiable information. Research over the past 5 years has demonstrated that smart technologists can manipulate data that have been stripped of personal identification, and turn the data back into information that is associated with specific individuals. Thus the distinction in our current privacy models – and in many of our current privacy laws – between Personally Identifiable Information and non-Personally Identifiable Information seems increasingly out of touch.

In light of these challenges to our traditional approaches, many observers have called for a re-examination of these models. We at the FTC have answered that call.

B. Roundtables and Upcoming Report

Over the past year, the Commission has explored – in a very transparent way – a broad array of privacy issues raised by emerging technology and business practices. Through a series of public roundtables as well as public comments, we have obtained input from a wide range of stakeholders on existing approaches, developments in the marketplace, and potential new ideas. We are now working to finalize our report on what we have learned and where we think we should go from here.

Several key themes have emerged from our public process. Here is a snapshot of some of these themes:

- the collection and use of consumer information – both online and offline – is both massive and far more extensive than many consumers know.
- consumers lack both the understanding and the tools in today's environment to make truly informed choices about the collection and use of their data.
- even in today's environment of ubiquitous social networking, privacy is important to consumers.
- the collection and use of consumer information provides significant benefits: it provides consumers with personalized advertising and other services, and,

[5] Daniel J. Solove, *Identity Theft, Privacy, and the Architecture of Vulnerability*, 54 Hastings L.J. 1227, 1232-45 (2003).

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

- 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 in the final stages of development, and I expect that it will address several major issues, including the following:

First, "**privacy by design**." This is the idea of building privacy and security into commercial technologies and information practices from the outset – proactively – as opposed to after the fact. Examples include providing reasonable security for consumer data that is collected, limiting collection and retention to those data that are truly necessary, and implementing reasonable procedures to promote data accuracy. The value here, of course, is that when companies implement good practices on the front end, the heavy burden on consumers to navigate complicated privacy policies and effectuate their choices will be alleviated.

Second, **transparency**. We're looking at ways to facilitate better consumer understanding of privacy practices by improving transparency about commercial data practices. I for one believe – and many others agree – that we need better privacy notices that are shorter, more comprehensible, and more consistent, so that consumers can truly understand companies' practices and make useful comparisons.

Third, **consumer choice**. Our roundtables generated a lot of discussion about ways to streamline privacy notices and choices for consumers so that they can focus on the issues that really matter to them. One view, which I share, is that notices should be focused on "unexpected" uses of consumer data, rather than on uses that consumers reasonably expect, such as giving their address to a shipping company in connection with an online product order. This type of streamlining could benefit both consumers and businesses.

A related issue is **when** to communicate privacy information to consumers. I am of the view that choices are more meaningful if they are presented in real time – at the moment consumers are providing their data, or at the moment their data is being collected behind the scenes.

And of course, no discussion of consumer choice – at least in the online environment – would be complete without acknowledging the strong interest in some type of centralized "**Do Not Track**" mechanism that would give consumers a modicum of meaningful control over the extent to which their online behavior is tracked. Personally, I very much would like to see a Do Not Track mechanism developed and implemented.

We will more fully explore these and other issues in our report, which we anticipate releasing soon. The intent of the report will be to offer a framework for future efforts by industry to develop best practices and improve self-regulation, as well as to

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 about its privacy practices and failed to safeguard consumers' personal information. We also took action against Sears last year, settling charges that the company tracked consumers' activities across the web without providing adequate disclosures.

C. Self-Regulatory Initiative

Now, I'd like to spend a couple of moments talking about the current state of industry self-regulation. The Commission has always supported self-regulation in the privacy area, and as long as industry demonstrates a meaningful commitment to self-regulation, I expect we will continue to do so. Given the fact that we do not currently have comprehensive national privacy legislation in the U.S., self-regulation now serves as a complement to the work being done by the FTC, other federal agencies, and the states.

On the whole, however, I personally have not been satisfied with the industry's efforts to date with respect to self-regulation – particularly in the area of behavioral advertising. Since coming to the FTC, I have called for more robust regulatory mechanisms, including universal icons and universal placement, that would alleviate consumer confusion about how they can exercise choice with respect to behavioral advertising. I have also called for more stringent protection for particularly sensitive data, such as information pertaining to medical conditions, children, and sexual orientation. And I am particularly concerned about the future uses of legacy data – that is, the vast amounts of data currently being collected.

As you may know, a group of the major advertising trade associations recently announced a self-regulatory program designed to allow consumers to opt out of online behavioral tracking by participating industry members. We do not have all the details yet and, importantly, the consumer interface is not operational. But the effort is a positive step. Although I have been disappointed with self-regulatory efforts to date, I am encouraged to see a substantial segment of the industry making an effort to address this issue. Of course, the proof will be in the proverbial pudding. When the program is fully implemented, the Commission will be looking closely at this initiative, to see how well it performs on at least three dimensions.

- First, we will examine the program to see how easy it is for consumers to understand and use. This will be critical, because if consumers don't understand

the information and controls provided by the self-regulatory program, or they can't easily utilize it, the program simply won't be effective.

- Second, we will look for a robust enforcement mechanism, which is a key component to any successful self-regulatory program.
- 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.