

## **Keynote Address of Commissioner Edith Ramirez**

### **Association of National Advertisers Advertising Law & Public Policy Conference Washington, DC March 15, 2011**

Good morning, everyone, and thank you very much for your kind invitation to speak to you today. It's terrific to have an opportunity to discuss some of the FTC's recent work in the advertising arena.<sup>1</sup>

I'd like to start by telling you about a recent experience I had as a consumer. A few weeks ago, in the midst of snow, slush, and the freezing cold, I started to feel a little under the weather. Now keep in mind that I'm a Southern California native and that this is my first winter in DC and my first winter on the East Coast since I was in law school. The last thing I wanted was to get sick and reveal to everyone that I can't handle the winters here. So I did what any self-respecting consumer would do — I jumped online to look for a product that would solve my problem. I typed in the phrase “prevents cold and flu,” and lo and behold, I found exactly what I was looking for right at the top of my search results.

One of the first links in my search results described a group of people on the Island of Leonia who never get sick. I was intrigued so I clicked on the link and found some very interesting information. But I also noticed that the site seemed to know a lot about me. For instance, the ads on the margins catered to the fact that I am from Los Angeles, that my office is in the Federal Triangle, and even to the type of car I drive.

Then, I turned to a fascinating story about a blogger who came across a special variety of starfruit that grows only in the rainforests of Leonia. As it turns out, the Leonians have been eating this fruit for centuries and apparently they never get colds or the flu. So, the blogger decided to give the fruit a try. She said that she used to get on average two to three colds every winter, but that after trying the starfruit, a whole winter went by and she didn't get sick once. The blogger even shared her discovery with three of her friends, each of whom attested to the effectiveness of the product on the blog.

As luck would have it, the blog also contained an advertisement for this very special fruit. Imagine my satisfaction when I read that the seller processes the product in the most environmentally-friendly manner, using only renewable energy. In fact, the product is even “MotherEarth” certified.

Well, as I'm sure you've figured out, this scenario is fictional. But it's not at all atypical of what consumers encounter online every day, and it illustrates the issues I'd like to address this

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<sup>1</sup> These remarks are my own and do not necessarily represent the views of the Commission as a whole or any other Commissioner.

morning: online privacy, health-related advertising, endorsements and testimonials, and green marketing.

## **I. Privacy**

As you know, privacy is a hot topic these days, and the FTC, as the federal government's lead enforcer on privacy issues, is at the forefront of the debate. Last December, the FTC issued a preliminary staff report on the issue.<sup>2</sup>

### **A. Preliminary Staff Report**

The report seeks to establish a privacy framework for today's world, in which the only constant is rapid technological change. The purpose of the report is twofold. First, to guide Congress and other policymakers as they develop policies and legislation on privacy, and second, to motivate industry to develop more effective best practices and self-regulatory guidelines. The issue that has received far and away the most attention is Do Not Track, but the report addresses a wide-range of privacy threats, both offline and online.

Before turning to Do Not Track, let me take a few minutes to discuss the main themes and recommendations of the report. Technology now allows vast amounts of data to be collected and shared instantaneously, often in ways that are invisible to consumers. Many consumers have concerns about this amount of collection and sharing. And those concerns are going largely unaddressed by the current method of providing transparency to consumers — long privacy policies. In our public roundtables leading up to the preliminary staff report, we heard a steady refrain: consumers shoulder too heavy a burden in seeking to understand what is happening to their information and in exercising what limited options they have about the collection and use of their data. At the same time, we also heard that consumers benefit from free content and that regulators should take care to preserve those benefits.

These two ideas underlie the report, and they bring me to the first of the report's recommendations: privacy by design. Privacy by design means that companies should build privacy protections into their products and services from the outset. It is far more cost-effective, and better for consumers, for companies to consider privacy when first designing their products and services, rather than retrofitting them to incorporate privacy protections. Privacy by design also means that companies should incorporate good data practices, such as limiting data collection and retention, providing reasonable data security, and ensuring data accuracy.

The report's second recommendation is simplified consumer choice. Consumers should not have to sift through privacy policies that even many seasoned lawyers find confusing. Privacy information should be presented in concise and plain English, and, where possible, on a "just-in-time" basis. Simplifying choice also means eliminating unnecessary information and options. Privacy choice mechanisms should not be cluttered with information about commonly-

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<sup>2</sup> See Preliminary FTC Staff Report, Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers (Dec. 1, 2010), *available at* <http://ftc.gov/os/2010/12/101201privacyreport.pdf>.

accepted practices. Staff has sought comment on what practices fall into this “commonly-accepted” category. And for practices that are not commonly-accepted, the report recommends that consumers be given notice and choice.

This does not mean, however, that comprehensive privacy policies should be eliminated. These policies promote accountability and are useful to regulators and watchdog groups, and therefore, the report advocates improving rather than eliminating them. We hope to see clearer and more standardized privacy policies that can easily be compared. This, in turn, is a predicate for increased competition on privacy. If consumers know how companies are using their information, they can consider privacy when choosing among firms, and firms will have an incentive to compete on the basis of their privacy practices.

The report’s third recommendation is transparency, which is sorely lacking today. The report takes a particularly close look at this issue as it relates to data brokers. There is a growing cadre of information brokers that have no direct interaction with consumers but aggregate vast collections of consumer data from a wide-range of online and offline sources. The report seeks comment on whether consumers should have a right of access to their data as a means of improving transparency and accuracy. The report also asks for feedback about the question of how companies that have no direct interaction with consumers can provide notice to them. I encourage the data broker industry to seek innovative ways to provide notice, access, and opt-out choices to consumers.

## **B. Do Not Track**

Let me turn now to Do Not Track. As you know, the report called for the establishment of a universal choice mechanism for online behavioral advertising. And the day after the release of the report, a majority of the Commission — including myself — endorsed the establishment of a Do Not Track mechanism.<sup>3</sup>

Numerous surveys show some level — often quite high — of consumer discomfort with online tracking, to the extent consumers are aware of the practice.<sup>4</sup> Of course, online tracking is

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<sup>3</sup> See Prepared Statement of the Federal Trade Commission on Do Not Track Before the S. Comm. on Energy and Commerce, 111th Cong. (Dec. 2, 2010), *available at* <http://ftc.gov/opa/2010/12/dnttestimony.shtm>.

<sup>4</sup> See Edward C. Baig, *Internet Users Say, Don’t Track Me*, USA Today (Dec. 14, 2011), *available at* [http://www.usatoday.com/money/advertising/2010-12-14-donottrackpoll14\\_ST\\_N.htm](http://www.usatoday.com/money/advertising/2010-12-14-donottrackpoll14_ST_N.htm); Transcript of December 7, 2009, FTC Privacy Roundtable, Remarks of Alan Westin of Columbia University, at 93-94, *available at* <http://www.ftc.gov/bcp/workshops/privacyroundtables/PrivacyRoundtableDec2009Transcript.pdf>; Written Comment of Berkeley Center for Law & Technology, *Americans Reject Tailored Advertising and Three Activities that Enable It*, cmt. #544506-00113, *available at* <http://www.ftc.gov/os/comments/privacyroundtable/544506-00113.pdf>; Written Comment of Craig Wills, *Personalized Approach to Web Privacy Awareness, Attitudes and Actions*, cmt. #544506-00119, *available at* <http://www.ftc.gov/os/comments/privacyroundtable/544506-00119.pdf>; Written Comment of Alan Westin, *How Online Users Feel About Behavioral Marketing and How Adoption of Privacy and Security Policies Could Affect Their Feelings*, cmt. #544506-00052, *available at*

not new, so why the call now for Do Not Track? I think there are several reasons why the proposal is gaining traction now. First, the methods that companies use to capture information about consumers are becoming more powerful. Some online advertising networks now use tools, like web beacons, to scan in real time what consumers are doing on a website, including what they type or where they place their mouse.<sup>5</sup> Likewise, websites, by using computer “fingerprinting” technology, now gather and combine information about a consumer’s web browser configuration to uniquely identify and track consumers.<sup>6</sup> And there are reports that deep packet inspection may be poised for a comeback.<sup>7</sup> Consumers today are not in a position to control these new tracking tools.

Second, the nature of anonymity is changing. Technological developments are making it possible to identify individuals from ostensibly anonymous data. These developments call into question whether any of us can safely assume we will remain anonymous as we surf the web. And since there are few legal limits on how online profiles about consumers can be used, this is especially unsettling.

When I look at the marketplace today, I see frenzied competition to meet advertisers’ demand for more and more data about consumer behavior and interests. Consumers need a strong counterweight to that pressure to capture and mine information about their moment-to-moment thoughts and actions online. That’s why I support Do Not Track: it is one way to create that counterweight, and to give consumers some say about what information about them is collected and used in the context of online tracking.

The main objection we have heard to Do Not Track is that it would undermine the availability of free online content and services and impede further growth of the Internet. I am very much aware that advertising helps support a great deal of Internet content, and that targeted ads command a premium. I also recognize that online behavioral advertising results in

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<http://www.ftc.gov/os/comments/privacyroundtable/544506-00052.pdf>; Consumers Union, Press Release, Consumer Reports Poll: Americans Extremely Concerned About Internet Privacy (Sept. 25, 2008), available at [http://www.consumersunion.org/pub/core\\_telecom\\_and\\_utilities/006189.html](http://www.consumersunion.org/pub/core_telecom_and_utilities/006189.html); Harris Interactive Inc., Press Release, Majority Uncomfortable with Websites Customizing Content Based Visitors Personal Profiles (Apr. 10, 2008), available at [http://www.harrisinteractive.com/harris\\_poll/index.asp?PID=894](http://www.harrisinteractive.com/harris_poll/index.asp?PID=894); TRUSTe, Press Release, TRUSTe Report Reveals Consumer Awareness and Attitudes About Behavioral Targeting (Mar. 26, 2008), available at [http://www.truste.org/about/press\\_release/03\\_26\\_08.php](http://www.truste.org/about/press_release/03_26_08.php).

<sup>5</sup> See Julie Angwin, *The Web’s New Gold Mine: Your Secrets*, Wall St. J. (Jul. 30, 2010), available at <http://online.wsj.com/article/SB1000142405274870394090457539507351>.

<sup>6</sup> See Julia Angwin & Jennifer Valentino-DeVries, *Race is on to ‘Fingerprint’ Phones, PCs*, Wall St. J. (Nov. 30, 2010), available at <http://online.wsj.com/article/SB10001424052748704679204575646704100959546.html>.

<sup>7</sup> See Steve Stecklow & Paul Sonne, *Shunned Profiling Technology on the Verge of a Comeback*, Wall St. J. (Nov. 24, 2010), available at <http://online.wsj.com/article/SB10001424052748704243904575630751094784516.html>.

personalized ads that many consumers value and prefer. But while I am sensitive to the concern that Do Not Track will undermine the basic business model that underlies much of the Internet, I believe that concern is overstated.

As reflected in recent research sponsored by the Digital Advertising Alliance (DAA), consumers feel more positively towards brands that give them greater transparency and control, such as the ability to opt-out.<sup>8</sup> With the proper incentives, innovative companies can surely find a way to use their respect for consumer privacy as a selling point.

I also do not believe that Do Not Track should be all or nothing. Consumers should be able to make more precise choices about the information that is collected and the kind of targeted ads they are shown. Some consumers may be comfortable receiving ads based on their interest in yoga or hiking, but may not be comfortable with companies collecting or using demographic data about them. A well-designed intermediate option would give consumers more control, while promoting a high level of continued participation in online behavioral advertising.

Whether a Do Not Track mechanism can be accomplished via robust self-regulation is an open question. For the moment, the ball is in industry's court to deploy a Do Not Track tool that obviates the need for legislation.

In my view, industry was too slow in responding to the FTC staff's call in 2008 for more transparency and consumer control with regard to online behavioral advertising. But the recent staff report and the call for Do Not Track clearly grabbed attention. I am encouraged by the response of the major browsers to that call. Microsoft, Mozilla, and Google all use different approaches in their new choice mechanisms,<sup>9</sup> and I'll be watching with interest as they are rolled out.

Progress has also been made by the advertising industry, with support from the ANA. I am pleased that DAA has reported significant growth in the appearance of its Advertising Option Icon in online ad impressions since the icon launched last November.<sup>10</sup> And I commend the

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<sup>8</sup> See Interactive Advertising Bureau, Press Release, Major Marketing/Media Trade Groups Launch Program to Give Consumers Enhanced Control Over Collection and Use of Web Viewing Data for Online Behavioral Advertising (Oct. 4, 2010), *available at* [http://www.iab.net/about\\_the\\_iab/recent\\_press\\_releases/press\\_release\\_archive/press\\_release/pr-100410](http://www.iab.net/about_the_iab/recent_press_releases/press_release_archive/press_release/pr-100410).

<sup>9</sup> See Press Release, Microsoft, Providing Windows Customers with More Choice and Control of Their Privacy Online with Internet Explorer 9 (Dec. 7, 2010), *available at* <http://www.microsoft.com/presspass/features/2010/dec10/12-07ie9privacyqa.mspx>; Mozilla Blog, Mozilla Firefox 4 Beta, now including "Do Not Track" capabilities (Feb. 8, 2011), <http://blog.mozilla.com/blog/2011/02/08/mozilla-firefox-4-beta-now-including-do-not-track-capabilities/>; Google Public Policy Blog, Keep Your Opt-Outs (Jan. 24, 2011), <http://googlepublicpolicy.blogspot.com/2011/01/keep-your-opt-outs.html>.

<sup>10</sup> See Press Release, DMA Launches Enforcement for Online Behavioral Advertising (Jan. 31, 2011), *available at* <http://www.the-dma.org/cgi/disppressrelease?article=1470>.

Interactive Advertising Bureau for announcing that it will now require its members to adhere to its self-regulatory principles for online behavioral advertising.<sup>11</sup>

I am eager to see how all this industry innovation plays out. As for next steps at the FTC, we've received nearly 450 comments in response to the preliminary staff report, including comments from the ANA and other major industry representatives. Review of the comments is underway, and you can expect a final report later this year.

Let me close my discussion of Do Not Track by mentioning an online tracking enforcement action. Yesterday, the Commission announced an administrative complaint and settlement with Chitika, an online advertising network.<sup>12</sup> We alleged that Chitika violated the FTC Act by offering consumers the ability to opt out of the collection of information for targeted advertising, but not telling them that the opt-out lasted only ten days. The Commission's consent order prohibits Chitika from making future privacy misrepresentations. It requires Chitika to insert, in all of the online advertisements it serves, a hyperlink to a mechanism that enables consumers to opt out of tracking by Chitika. And it requires Chitika to destroy any data that can be associated with a consumer that it collected during the time its prior opt-out did not work. *Chitika* reflects the Commission's commitment to using its enforcement authority to ensure that companies give consumers effective notice and choice with respect to online behavioral targeting.

## **II. New Substantiation Provisions In Health Advertising Cases**

Let me now turn to another area of interest to many of you: health-claims in advertising and the new FTC order provisions in this field.

We've seen a spike in "functional foods" — foods that promise targeted health benefits along with basic nutrition. As functional foods have grown in the marketplace, they have also grown in importance in our enforcement docket. This is reflected in the FTC's recent cases against *Nestlé*, *Iovate*, *Dannon*, and *POM Wonderful*.<sup>13</sup> At issue in both *Nestlé* and *Dannon* were foods containing probiotics that were claimed to boost immunity. Nestlé advertised that its BOOST Kids Essentials drink, which came with a probiotic straw, prevented upper respiratory tract infections in kids, and reduced the duration of acute diarrhea. Dannon claimed that its

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<sup>11</sup> See Press Release, IAB, Digital Media's Leading Trade Group Takes Self-Regulation to a New Level (Feb. 27, 2011), available at [http://www.iab.net/about\\_the\\_iab/recent\\_press\\_releases/press\\_release\\_archive/press\\_release/pr-022711\\_codeofconduct](http://www.iab.net/about_the_iab/recent_press_releases/press_release_archive/press_release/pr-022711_codeofconduct).

<sup>12</sup> See *Chitika, Inc.*, FTC File No. 102 3087 (Mar. 14, 2011) (consent order accepted for public comment), available at <http://www.ftc.gov/os/caselist/1023087/index.shtm>.

<sup>13</sup> See *Nestlé HealthCare Nutrition, Inc.*, FTC File No. 092-3087 (consent order), available at <http://www.ftc.gov/os/caselist/0923087/110118nestle.pdf>; *Dannon Co.*, FTC File No. 082-3158 (consent order), available at <http://www.ftc.gov/os/caselist/0823158/110204dannondo.pdf>; *POM Wonderful LLC*, FTC File No. 082-3122 (press release), available at <http://www.ftc.gov/opa/2010/09/pom.shtm>.

Dan Active dairy drink helped prevent colds and flu. And in a major advertising campaign that included TV ads featuring the actress Jamie Lee Curtis, Dannon claimed that one daily serving of its Activia yogurt relieved temporary irregularity.

The *POM Wonderful* case involves claims about the health benefits of antioxidants in POM juice and POM dietary supplements. The FTC's complaint challenges claims that POM products prevent and treat heart disease and prostate cancer, among other things. The Commission also entered into a consent order against dietary supplement manufacturer Iovate Health Sciences, concerning weight loss and other health claims.<sup>14</sup>

In all of these cases, the companies pointed to scientific studies that ostensibly backed-up their health claims, but the Commission alleged that the available science simply did not support them. While the Commission resolved the *Nestlé*, *Iovate* and *Dannon* cases through consent orders, its litigation against POM is ongoing before an administrative law judge.

The consent orders in *Nestlé*, *Iovate*, and *Dannon* contain two new provisions that have generated some controversy. First, these orders prohibit claims that a product will reduce the risk of colds or flu unless they have been approved by the FDA. For other health claims, such as weight loss or the reduction of temporary irregularity, the orders require competent and reliable scientific evidence in the form of at least two independent and well-controlled human clinical studies of the covered product, or of an essentially equivalent product.

Some have argued that these two provisions represent a major shift in how the FTC approaches advertising substantiation. We have heard the charge that the Commission has abandoned the flexible substantiation requirements established in its 1972 decision in *Pfizer*.<sup>15</sup> But reports of the death of *Pfizer* are greatly exaggerated. I would like to dispel the notion that the FTC has heightened the substantiation required by the FTC Act or abandoned the *Pfizer* test.

The Commission retooled its order provisions for two very practical reasons: first, to provide brighter lines and greater clarity for companies that are under order. And, second, to make it easier for the FTC to enforce its orders in civil penalty or contempt proceedings.

The broad "competent and reliable scientific evidence" standard found in the FTC's old orders presented significant enforcement challenges. Too often, companies under order viewed this open-ended language as a license to continue making the same false claims that had brought them to the FTC's attention in the first place, often relying on an outlier study. And it took a great deal of time and resources to prove the order violation.

Using FDA approval as a proxy avoids this problem. Either a claim has been approved by the FDA or it hasn't. We will still no doubt have disputes with companies over the meaning

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<sup>14</sup> See *Iovate Health Sciences USA, Inc.*, FTC File No. 072-3187 (final judgment and order), available at <http://www.ftc.gov/os/caselist/0723187/100729iovatetestip.pdf>.

<sup>15</sup> *In the Matter of Pfizer, Inc.*, 81 F.T.C. 23, 64 (1972).

of a particular advertisement, but we will not spend years litigating whether the FDA has approved a claim.

So, the new order provisions do not represent a shift toward a stricter and more rigid substantiation standard under the FTC Act. Rather, the requirement of FDA approval is simply a form of “fencing-in” relief. Where an advertiser has already been accused by the FTC of making unfounded disease claims and is now subject to an order, it’s reasonable to prohibit the advertiser from making the same type of disease treatment or prevention claims without FDA approval.

It is also worth noting that back in 1994, in its policy statement on food advertising, the Commission made clear that FDA standards would serve as the FTC’s principal guide in examining scientific substantiation.<sup>16</sup> In other words, the gap between what the FTC Act requires and what the FDA requires in the food marketing realm has never been great.

Our complaint against POM Wonderful shows that we are not seeking to ratchet up the substantiation requirements for companies that aren’t under order. The *POM* complaint alleges that the respondents lacked a reasonable basis for their health claims. In other words, the Commission’s complaint advances the same theory of liability that it has asserted for decades — that advertisers must have a reasonable basis for their objective claims. It does not assert that the respondents violated the FTC Act because they did not obtain FDA approval to make these claims.

A similar, practical rationale applies to the second part of our recent orders, which requires two independent well-conducted clinical studies. The Commission, with input from its consulting experts, determined that this was the level of substantiation mandated by *Pfizer* as applied to the weight loss claim in *Iovate* and the medical treatment claims in *Nestlé* and *Dannon*. Companies under order often tell us they just want to know what is expected of them to stay on the right side of the law. In that regard, this provision should be welcomed by advertisers. It offers transparency and clarity to companies as to what the Commission thinks “competent and reliable scientific evidence” means under *Pfizer* for these claims going forward.

Whether and when the Commission will insist on this level of substantiation in future cases may vary — this is very much a case-by-case determination under *Pfizer*. In some cases, a single study may be appropriate if that is what experts in the field would generally require. There are likely to be cases where the covered claims are potentially broad or there is uncertainty about the level of evidence required to substantiate a particular claim. But where experts in the field can agree that two independent clinical trials are needed, the Commission is likely to insist on that level of substantiation.

I expect that these new order provisions will reap benefits for consumers, by facilitating our enforcement of existing orders, and for advertisers, by providing greater guidance to companies under order.

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<sup>16</sup> See FTC, Enforcement Policy Statement on Food Advertising (1994), available at <http://www.ftc.gov/bcp/policystmt/ad-food.shtm>.



### III. Revisions to the Endorsement Guides

I'd now like to address the FTC's recently revised Endorsements Guides. Endorsements and testimonials are appearing in contexts that were unheard of just a few years ago. Today, consumers seek out information about products through a variety of means, including social networks and blogs that are far from traditional forms of advertising.

According to a recent Zogby Interactive poll, 63% of all adults say they visit blogs at least occasionally. Thirty-five percent of adults visit a blog daily. One in five blog readers say they have purchased a product or service advertised on a blog.<sup>17</sup>

Consumer reviews are also increasingly influential. In a Nielsen survey conducted in 2009, 70% percent of the consumers surveyed stated that they trust consumer opinions posted online.<sup>18</sup> As one large Internet marketing company put it, "reviews are the new advertising."<sup>19</sup>

Of course, as online commerce, social media, and user-generated content grow, so does the potential for consumer deception.

In light of these developments, in October 2009, the Commission updated its Endorsement Guides,<sup>20</sup> which had not been revised since 1980. One of the Commission's main objectives was to clarify how the traditional rules governing advertising apply online.

The revised Guides make clear that longstanding endorsement principles apply to the new and consumer-generated media and social media marketing we are seeing. This caused something of an uproar in the blogosphere. Some called the guidelines "preposterous" and an "online witch hunt." Others worried that the FTC would be going after bloggers for failing to make disclaimers on their blog posts or tweets.

The criticism reflected a great deal of misunderstanding about what the FTC was trying to do. The FTC was merely applying principles it had long espoused and enforced to newer forms of online expression. These principles can be summarized very simply: where there is an "endorsement" and there is a "material connection" between the advertiser and the endorser, the connection has to be disclosed.

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<sup>17</sup> See John Zogby, *Blogs An Effective Advertising Medium*, Forbes Blog (Sep. 23, 2010), available at <http://blogs.forbes.com/johnzogby/2010/09/23/blogs-an-effective-advertising-medium>.

<sup>18</sup> See *Global Advertising: Consumers Trust Real Friends and Virtual Strangers the Most*, Nielsen Wire (Jul. 7, 2009), available at <http://blog.nielsen.com/nielsenwire/consumer/global-advertising-consumers-trust-real-friends-and-virtual-strangers-the-most>.

<sup>19</sup> See *12 Statistics on Consumer Reviews*, Search Engine People Blog, available at [www.searchenginepeople.com/blog/12-statistics-on-consumer-reviews.html](http://www.searchenginepeople.com/blog/12-statistics-on-consumer-reviews.html).

<sup>20</sup> See 16 CFR Part 255 (Oct. 15, 2009), available at <http://www.ftc.gov/os/2009/10/091005endorsementguidesfnnotice.pdf>.

This means that payments by advertisers to bloggers and other online endorsers must be disclosed. This includes situations when an endorser has been given something of value to tout a marketer's product. As has always been the case, the Commission's aim is to ensure that the audience understands the reviewer's relationship to the company whose products are being reviewed.

Our enforcement actions also make clear that the focus remains on advertisers. For example, today the Commission is announcing a consent order against a company called Legacy Learning Systems and its owner.<sup>21</sup> Legacy recruited what it called "Review Ad" affiliates to promote the company's popular series of guitar lesson DVDs through endorsements in articles, blog posts, and other online editorial material, in exchange for substantial commissions on the sale of each product. These endorsements generated millions of dollars in sales of Legacy's courses. Although Legacy was in effect paying its affiliates to write positive reviews, it failed to take reasonable steps to ensure that its affiliates were disclosing their financial ties to Legacy. Many did not, and, instead, passed themselves off as ordinary consumers or independent reviewers. The FTC's complaint charges Legacy with two counts of deception — for causing dissemination of their affiliates' deceptive reviews and, relatedly, for failing to employ a reasonable monitoring program to ensure that their affiliates disclosed that they were getting paid by Legacy. Under the settlement, the respondents will have to monitor their affiliate marketers and make sure they are disclosing that they are not independent users or ordinary consumers. In addition, Legacy and its owner must disgorge \$250,000 in ill-gotten gains.

The *Legacy* case follows the Commission's first enforcement action under the new Endorsement Guides against a company called Reverb.<sup>22</sup> Reverb is a public relations agency that was hired by video game developers to promote their games online. The company engaged in deceptive advertising by having employees pose as ordinary consumers posting game reviews on the iTunes store and not disclosing that the reviews came from paid employees working on behalf of the developers. We alleged that this information would have been material to consumers reviewing the iTunes posts in deciding whether to buy the games.

The *Legacy* and *Reverb* settlements confirm that well-settled principles of truthful advertising apply to new forms of online marketing. Advertisers should not pass themselves off as ordinary consumers touting a product, and they should ensure that endorsers make it clear when they have financial connections to sellers.

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<sup>21</sup> See *Legacy Learning Systems, Inc.*, FTC File No. 102-3055 (Mar. 15, 2011) (consent order accepted for public comment), available at <http://www.ftc.gov/os/caselist/1023055/110315llsagree.pdf>.

<sup>22</sup> See *Reverb Communications, Inc.*, FTC File No. 092-3199 (Nov. 26, 2010) (final decision and order), available at <http://www.ftc.gov/os/caselist/0923199/101126reverbdo.pdf>.

#### IV. Revisions to Green Guides

My final topic is “green” marketing, another area of growing importance to consumers. Green claims tend to be “credence” claims — in other words, consumers often can’t determine for themselves if the claims are truthful or substantiated. As a result, the Commission’s Green Guides play an important role in ensuring that consumers can make well-informed decisions about their environmental choices, and that sellers fulfill their promises.<sup>23</sup>

Since the Guides were last revised in 1998, green claims have become a virtual fixture in marketing of all types of products and services. Unfortunately, this explosion of green claims has led to “greenwashing” — the phenomenon by which consumers grow skeptical or even become numb to these types of claims because some marketers have stretched the meaning of green too far.

Against this backdrop, the Commission decided it was time to update its Green Guides. The Commission held three public workshops, elicited comments, and conducted a consumer perception study to see how consumers interpret different types of green claims.

Last fall, we proposed updated guidance in which we suggested that advertisers should qualify general claims to focus consumers on the specific environmental benefits that can be adequately substantiated.<sup>24</sup> The proposal also includes a new section addressing the use of certifications and seals of approval, which emphasizes that they are considered endorsements and should therefore comply with the principles contained in the FTC’s Endorsement Guides. Moreover, we advise marketers to accompany seals or certifications with clear and prominent language limiting implied general environmental benefits to particular attributes that can be substantiated.

The new Guides also include new types of claims that were not addressed before. For instance, the proposed changes incorporate advice about claims regarding the use of the terms “renewable materials” and “renewable energy,” advising marketers to provide specific information about the materials and energy used. The proposed Guides also provide guidance about carbon offset claims, recommending that marketers disclose if the emission reductions that are being offset by a consumer’s purchase will not occur within a certain period of time, and that they avoid advertising an offset if the activity that produces that offset is already required by law.

There were, however, some types of claims, such as claims that a product is “sustainable,” “natural,” or “organic,” that were discussed during this process, but for which the Commission decided not to offer new guidance at this point due to a lack of sufficient information or to avoid duplication with guidance offered by other government agencies.

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<sup>23</sup> See FTC Green Guides (1998), available at <http://www.ftc.gov/bcp/grnrule/guides980427.htm>.

<sup>24</sup> See Proposed Revisions to the Green Guides (Oct. 2010), available at <http://www.ftc.gov/os/fedreg/2010/october/101006greenguidesfrn.pdf>.

Our proposal did include additional requests for comment, and we received over 300 comments. We are now in the process of reviewing them, and we hope to issue our final guides some time later this year.

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Let me close with a final point, in case it is not already obvious. The subjects that have dominated the FTC's recent advertising agenda are quite diverse. But what connects them is that these are the issues that are crucial to consumers today. It is always a challenge for any law enforcer to keep pace with a rapidly-changing marketplace, but there is no question in my mind that in the advertising realm, the FTC is doing just that.

Thank you, and I will be happy to take any questions you may have.