

*From Health Claims to Big Data:
FTC Advertising and Privacy Priorities for Today's Marketplace*

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Good morning. It's great to be here. I come from a long line of FTC officials and staff who have spoken at this conference, so I am in good company and I hope I can add to your understanding of what the FTC does and why.

As you may know, the FTC's consumer protection mission has three main components – fighting fraud, reducing deceptive advertising, and protecting consumers' privacy. I'm going to discuss two of these three areas today – advertising and privacy – so I'll be covering a lot of ground.

Our priorities in these areas focus on what is going on in the marketplace today. In advertising, you won't be surprised to hear that we are seeing a wide swath of deceptive health claims – sometimes touting cures for serious diseases, and often hawking fraudulent weight-loss products – that are either patently false or not supported by scientific evidence. We also are seeing more and more false or unsubstantiated environmental claims. And one tough nut we are having trouble cracking is clear and conspicuous disclosures; companies that need to make disclosures (or qualifications) to avoid deception are either not making them, burying them in mouse-print, or placing them far from the claims they relate to.

In privacy, we have three main areas of focus right now – again reflecting the consumer protection challenges we're seeing in today's marketplace: Big Data, Mobile and Connected Devices, and Safeguarding Sensitive Data.

In all of these areas, our efforts include enforcement, consumer and business education, policy initiatives, and strong reliance on industry self-regulation to encourage compliance and best practices.

I. Advertising

I'll talk first about advertising and, in particular, the areas I just mentioned – false or unsubstantiated disease claims, weight loss fraud, green claims, and buried disclosures.

A. Disease Claims

We've brought or resolved a number of cases this year targeting a host of products that claim to treat or prevent diseases and other health conditions – for example, cactus juice claiming to reduce pain, inflammation, and respiratory problems; and vitamin packs claiming to prevent or cure diabetes.

You may be thinking – “oh, my company would never do that” – but sometimes companies with really good names step over the line too. Just last week, the Commission filed a complaint challenging advertising claims for *Gerber's* Good Start Gentle infant formula. Gerber advertised its formula as a way to reduce the risk of developing allergies. “You want him to have your smile, not your allergies,” one ad read. We alleged that Gerber didn't have sound scientific evidence to back up this claim.

We also challenged another aspect of Gerber's ads – that its use of a prominent gold seal suggested its product had FDA approval. Although Gerber *did* petition FDA to allow the claim that use of its formula reduced the risk of eczema, FDA said that if Gerber wanted to make that claim, it would need to qualify it. In other words, it needed to make clear to consumers that there was little scientific evidence to support the claim.

But Gerber's gold seal said "1st & Only, Meets FDA Qualified Health Claim" – essentially using the term "qualified" to say the opposite of what the FDA intended. The Commission alleged that parents would likely interpret the word "qualified" to communicate that Gerber's formula qualified for or received approval for a health claim from the FDA. The case is pending in federal court in New Jersey.

B. Weight-Loss Fraud

Next is weight-loss fraud. Americans spend billions on the weight-loss industry, and where there is strong consumer interest, fraud often follows. Bogus weight-loss cures are a pernicious and continuing problem for American consumers, and the FTC continues to take action to prevent this deception from becoming even more widespread.

In January, the Commission announced Operation Failed Resolution – four law enforcement actions against *Sensa*, *L'Occitane*, *LeanSpa*, and *HCG Diet Direct*. Whether it was by sprinkling a powder on your food, rubbing cream on your skin, or swallowing a supplement, the Commission alleged that each of the companies made deceptive claims that their products would cause significant weight loss and body slimming. The companies paid a total of \$34 million dollars to resolve the FTC's allegations.

Since announcement of those cases, the Commission has targeted the latest so-called weight-loss miracle – green coffee bean extract. The Commission's case against *NPB Advertising* alleges that the defendants piggybacked on a *Dr. Oz* show that promoted Pure Green Coffee extract, marketing the supplement through a website featuring footage from *Dr. Oz*, supposed consumer endorsements, and purported clinical proof that dieters could lose weight rapidly without changing their diet or exercise.

In the Commission’s second green coffee bean extract case, *Applied Food Sciences*, the defendant trumpeted a clinical trial purporting to prove the slimming effects of the product. The problems with the study were replete: the study’s lead investigator repeatedly altered the weights and other key measurements of the subjects, changed the length of the trial, and misstated which subjects were taking the placebo vs. the green coffee bean extract. Despite receiving conflicting data, neither the researchers nor the defendant ever verified the authenticity of the study. Our settlement in the case requires the company to pay \$3.5 million and to have appropriate substantiation for any future weight-loss claims.

Finally, just last month, the Commission sued two catalog companies (*Norm Thompson Outfitters* and *Wacoal America*) for claims that their caffeine-infused shapewear would slim your body and reduce cellulite. It’s hard not to laugh when you hear “caffeine-infused” shapewear – and, indeed, these cases made David Letterman – but weight loss is difficult and people are looking for solutions, as evidenced by the fact that the companies are paying \$1.5 million in refunds to purchasers of the products. This is, again, an example of companies with good names stepping over the line.

Given the continuing onslaught of miracle pills and potions claiming dramatic weight loss and slimming, the Commission will continue its efforts in this area.

C. Cognitive Benefit Claims

Another area of focus in the coming year is cognitive benefit claims. According to the Pew Research Center, nearly half of adults in their 40s and 50s have both a parent age 65 or older, and are either raising a young child or financially supporting a grown child.

As members of the “sandwich generation,” many consumers juggle caring for dependents with worries about aging parents.

Companies are tapping into this trend, and we are increasingly seeing claims for products offering cognitive and memory benefits for individuals at both ends of the age spectrum. The FTC’s *i-Health* case involved just such a product – BrainStrong Adult – whose television commercials featured a woman who forgets why she walked into a room. Through a voice-over, her dog tells the audience she is there to find her sunglasses, which are sitting on top of her head. Another voice-over then asked, “Need a memory boost? Introducing BrainStrong Clinically shown to improve adult memory.”

Unfortunately, the Commission alleged that i-Health’s clinical study did not substantiate its claims to improve memory and prevent cognitive decline. The order in this case requires the company to have sound results from human clinical testing before making these claims in the future.

On the other end of the spectrum, *Your Baby Can Read* targeted parents who wanted to give their babies an intellectual edge. The \$200 program claimed to teach babies as young as nine months old to read — with their skills advancing to books like *Charlotte’s Web* by ages three or four. In late August, the Commission announced a resolution of our litigation in the case. The settlement prohibits claims about reading, cognitive ability, or school performance unless they are true and supported by sound evidence. It also bans the defendants from using the term “Your Baby Can Read” as part of any product name or logo. We have a number of investigations of cognitive products in the pipeline.

D. Green Marketing

The next area where we're seeing problems is green marketing. In recent years, marketers have inundated consumers with a virtual tsunami of these claims – recyclable, biodegradable, made from renewable energy, certified green or just plain eco-friendly. To help companies avoid deception in this growing marketplace, the FTC issued revised Green Marketing Guides in 2012. Since then, we've taken action against companies making false or unsupported green claims for a variety of products – including plastic and paper household goods, mattresses, and house paints.

Most recently, the agency settled three cases against plastic lumber manufacturers that made overblown recycled and recyclable claims. We also settled cases against five plastics companies that made false or unsubstantiated biodegradable claims, and just tried a case against a sixth before an administrative law judge.

But litigation is not our only strategy, as I mentioned. We are using all of the tools in our toolbox. For example, we just sent warning letters to sellers of oxo-degradable trash bags. Additionally, we are working on two studies to test how consumers understand organic and pre-consumer recycled content claims. The results should allow us to provide clearer advice to businesses seeking to steer clear of deceptive claims.

E. Clear and Conspicuous Disclosures

Finally, I want to address a stubborn problem that continues to concern us – disclosures in ads that aren't clear and conspicuous. To try to make inroads here, the Commission recently announced *Operation Full Disclosure*, in which our staff contacted

over sixty companies, including twenty of the hundred biggest advertisers in the United States, to alert them to problems with disclosures in their ads.

When I talk about disclosures, I mean information needed to prevent an ad from being deceptive. It is well established that disclosures must be clear and conspicuous. To accomplish that, advertisers should use direct and unambiguous language and make the disclosure stand out. Consumers should not have to go looking for it. If a disclosure is hard to find, tough to understand, buried in unrelated details, or obscured by other elements in the ad, it is not clear and conspicuous. This is true not just in print, but online and on mobile. We have an excellent guidance piece on this – *Dot Com Disclosures*.

Operation Full Disclosure identified a number of recurring problems in the TV and magazine ads reviewed. These included using disclosures that contrasted poorly against the ad's background or were buried in unrelated text. In TV ads, the disclosures often did not remain on the screen long enough for consumers to read them and sometimes were accompanied by distracting visuals. In print ads, the disclosures often were presented in small print, way at the bottom of the ad and away from the claim they were supposed to modify.

The response to our outreach thus far has been extremely positive. Many companies have committed to improving their in-house ad review process and undertaking additional training. Our warning letters appear to have served as a reminder of an issue that had slipped out of focus. Expect more work in this area – we want to bring this issue back to the forefront of advertisers' minds.

II. Privacy

Now I'll address privacy. Our privacy program, like advertising, seeks to address the consumer protection challenges we see in today's marketplace. And, indeed, there are many more challenges to privacy than there were even a few years ago.

Today, data collection is both ubiquitous and invisible. Almost everyone carries a smartphone, uses social networks, and browses and shops through various devices. Consumers are tracked as they walk down the street, shop in stores, drive in their cars, and even as they monitor their health or exercise using health apps. And many companies that consumers have never heard of have access to all of this data.

To protect consumers amidst this perfect storm of data collection, our privacy program focuses on three inter-related themes: Big Data, Mobile and Connected Devices, and Safeguarding Sensitive Data.

A. Big Data

First is Big Data. Big Data can drive valuable innovation across many fields – medicine, education, transportation, manufacturing, and yes, advertising. But it also raises privacy concerns for consumers – vast collection and storage of their data, often without their knowledge or consent; the risk that detailed profiles will fall into the wrong hands, enabling identity theft and other harms; the release of sensitive information consumers regard as private; and, of course, the potential use of this information by employers, insurers, creditors, and others.

These concerns aren't really new. But the increased capabilities among companies to collect, combine, analyze, and make inferences from data raises these concerns to a

new level. Our central message here is that the fundamental privacy principles still apply. Indeed, they are more important than ever as data practices become more complex and potentially confusing to consumers.

Tell the truth. Keep your promises. Give consumers choices about data uses that wouldn't be obvious to them – and present these choices at a time and place that they can see, understand, and act on them, not buried in a privacy policy. Don't collect and keep more information than is needed. Secure consumers' data, especially if it's sensitive.

This year, we've emphasized these principles through both policy initiatives and enforcement. On the policy front, we've held public workshops on various Big Data developments, to discuss how to adapt basic privacy principles to emerging business models. Last year, it was the Internet of Things. Earlier this year, we held a series of seminars on Mobile Device Tracking in retail stores Alternative Scoring Models, and Health Apps. And just two weeks ago, we held a workshop examining Big Data's effects on low income and underserved populations. We plan to issue reports addressing all of these issues in the coming months.

In May, we also released a report on data brokers. The report details the findings of a study we conducted of nine brokers representing a cross-section of the industry – including their sources of data, their clients, and the detailed natures of the data they collect, store, and sell. It also details how data brokers develop inferences about people and put them into categories – for example Urban Scramble and Mobile Mixers, which characterize low income, minority consumers; Thrifty Elders; Financially Challenged; Bible Lifestyle; Leans Left, and many other such categories.

The concern here is that consumers have no idea this is happening, even as companies use this data to make business decisions about consumers. Our report highlighted the need for much greater transparency and consumer choice in this area.

We're also using law enforcement to address the concerns raised by Big Data. You may not realize this but the original privacy law in this country – the Fair Credit Reporting Act – is a Big Data law. Passed in the 1970s to address the treasure trove of data being collected – invisibly and without accountability – by the credit reporting industry, it governs the use of Big Data to make some of the most important decisions there are – whether to give consumers credit, jobs, or insurance.

Recently, for example, we announced settlements with two companies that advise stores on whether to accept consumers' checks, based on their financial history. Our complaints alleged that *TeleCheck* and *Certegy* failed to have appropriate procedures to maintain the accuracy of consumer data and correct errors. The companies each paid a \$3.5 million penalty to settle the charges. We've also obtained settlements with substantial penalties against data brokers *Spokeo*, *Instant Checkmate*, *InfoTrack*, and *Filiquarian* for selling data to landlords without complying with the FCRA's accuracy and privacy requirements.

B. Mobile Technologies and Connected Devices

A second area of focus for our privacy program is mobile technologies and connected devices. In the past few years, this area has become one of the main priorities at the FTC – in privacy and more generally. If you've heard about our cases against *Apple*, *Amazon*, and *Google* related to kids' in-app purchases; against *T-Mobile* and

AT&T for mobile cramming; and against *AT&T* (again) related to its “unlimited data” claims, these cases are all about applying basic consumer protection rules to the mobile platform.

Clearly, the marketplace is moving to mobile, and consumer protections need to move with it. Mobile technologies also raise special consumer protection challenges due to the always-with-you, always-on nature of mobile devices; the ability of these devices to track your location and connect to each other; and of course the small screen or, sometimes, no screen, that makes disclosures to consumers ever more challenging.

On the policy front, in addition to the Internet of Things workshop, we’ve issued several recent reports about kids’ apps, mobile privacy disclosures, and mobile payments. Notably, our kids’ apps reports showed that most of the apps surveyed collected personal information from kids’ devices – including unique device ID, precise geo-location, and telephone number – and shared it with third parties without telling parents.

We’ve also brought law enforcement actions challenging violations occurring in the mobile ecosystem. For example, we announced a settlement with mobile messaging app *Snapchat* for misrepresentations to consumers about the disappearing nature of the photo and video messages sent through its service. We also settled a case against *Goldenshores Technology*, the maker of a popular flashlight app. We alleged that the app promised it would collect data from users’ devices for certain internal housekeeping purposes, but failed to disclose that the app transmitted the device’s location and device ID to third parties, including mobile ad networks.

In addition, over the past year, we brought a series of cases against *Aaron's* rent-to-own stores for installing invisible tracking software on rented computers that captured consumers' keystrokes, location, and account information and emails, and even took pictures of them in their homes. We also challenged the data security practices of a video security company, *TRENDnet*. It sold web-based computer systems to consumers for purposes ranging from home monitoring to baby monitoring. However, its poor security procedures allowed hackers to access the cameras' live feed online – quite the opposite of the security consumers were looking for.

C. Safeguarding Sensitive Data

Finally, our third area of focus in privacy is safeguarding sensitive consumer data – that is, kids', health, financial, and precise geolocation information.

Protecting sensitive data isn't really a new priority – it's a bedrock privacy principle that goes back to the earliest debates about privacy and will be with us for years to come. But in today's marketplace, the stakes are even higher for sensitive data as it's captured all day long and then used and shared in ways consumers would never expect.

Our work to protect sensitive data includes 55 enforcement actions against companies that failed to implement reasonable security protections – including such diverse companies as *Microsoft*, *TJX*, *Lifelock*, *HTC*, *CVS*, *RiteAid*, *Fandango*, and *Wyndham*. Many of these cases involved, not just consumers' financial data, but health information, account IDs and passwords, and other sensitive data. With today's relentless news of massive breaches, it's clear that, even as the threats to data are increasing, many companies still haven't implemented basic security protections. We see

the same problems again and again in our investigations – failure to address well-known vulnerabilities or gaps revealed by prior breaches, collection and storage of sensitive data well beyond what’s needed for business purposes, poor training and oversight of employees and service providers, and failure to test protocols before going live.

Given the risks to consumer data and the serious consequences, data security enforcement remains a critical FTC priority. The Commission also unanimously supports new federal legislation to enhance our authority in this area. The legislation should give us additional tools in this area, such as the ability to seek penalties for violations.

Finally, the Commission has a special interest in protecting the privacy of our kids, who may not have the judgment to avoid dangers online and may share information about themselves or their families. Much of our work in the mobile area, which I already discussed, protects kids and teens, since they are particularly high users of mobile technologies. We also enforce the Children’s Online Privacy Protection Act, which requires notice and consent to parents before information is collected from kids under 13.

To date, we’ve brought 25 cases to protect kids’ privacy, including two announced just last month against the mobile app for *Yelp* and the gaming app *TinyCo*. In the *Yelp* case, we alleged that the company allowed kids to register and provide information on their site without parental consent, even when the kids put in date of birth information showing they were kids. In the *TinyCo* case, we alleged that the company operated numerous apps directed to kids but failed to obtain parental consent before collecting kids’ email addresses. In some cases, the email addresses allowed kids to incur charges

within the games. The settlements imposed civil penalties of \$450,000 against Yelp and \$300,000 against TinyCo. Protecting kids' privacy remains a Commission priority.

Conclusion

That's our agenda for advertising and privacy in a nutshell. As you can see, we are extremely busy and expect to remain so in the coming year. Thanks for your attention this morning.