

Keynote Remarks of Commissioner Terrell McSweeney¹
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Thank you, Ed, and thank you very much to the BAA for inviting me to speak at this conference – it's a pleasure to be here today.

When it comes to the FTC's consumer protection mission as applied to marketing and advertising, the agency has the same underlying interest as all of you in the room here – we want to ensure that advertising is a positive economic force that helps consumers find and purchase the products and services that they want and need. And in order for this to happen, consumers need to have complete and truthful information from advertisers – a goal that should be shared by companies and brands that want to cultivate consumer trust and loyalty.

Both the ANA and the FTC have been around for more than 100 years and it's been remarkable to see the accelerating pace at which advertising techniques have evolved. Understandably, the changing marketplace poses new challenges to advertisers. Instead of being able to focus on just a few traditional media channels with predictable audiences – like television, radio, newspapers, and magazines – companies are now faced with countless options as to where they can spend their advertising dollars. And while advertisers are now able to obtain more detailed data than ever before about individual consumers and their habits and preferences, they are trying to capture the attention of potential shoppers who are spending time on platforms where they may not interact with advertisements in the same ways as they have in the past – on social media, on mobile apps, and on streaming music and video services. Competition for consumers' attention is fierce when they have an essentially unlimited number of options to choose from for their news, entertainment, and social communication.

So it's not surprising that we have seen a tremendous amount of effort and resources funneled into advertisements in digital media, including online native advertising and influencer marketing via social media platforms. FTC enforcement efforts have kept up with this migration, applying the same bedrock consumer protection principles that apply no matter what marketing channel we're examining. It makes no difference whether you're a brick and mortar store or solely an online merchant. It makes no difference if you're sending out direct mail, using telemarketing calls, sending out Tweets, or using YouTube videos to promote your product. Regardless of what type of business you are and what form your advertisements take, you have to tell the truth in your ads and disclose information that is material to consumers, including disclosing that they are actually ads if that fact is not obvious.

Many of the FTC's recent advertising cases boil down to the same basic problem: lack of disclosure. I cannot emphasize enough how critically important it is for advertisers to be open and transparent with consumers. Our cases have dealt with alleged lack of disclosure in a number of different contexts. I know that you already heard a lot about native advertising and

¹ The views expressed in this speech are my own and do not necessarily reflect those of the Commission or any other Commissioner.

our Lord & Taylor² case from Rich Cleland during the panel right before this lunch. I encourage all of you to read through the native advertising Guide for Businesses³ and the Enforcement Policy Statement⁴ that the Commission recently issued, which provide detailed analysis and guidance on how to make clear and conspicuous disclosures to ensure that native advertisements are not deceptive.

We've also brought several cases challenging the use of reviews that were misrepresented to be the objective opinions of ordinary consumers. If there is any material connection between a reviewer and the marketer of the product or service being reviewed, it must be disclosed. This is because consumers believe that user reviews – whether they appear on a marketer's own website or a third-party site – are the objective personal views of the reviewer. If it turns out that the reviewer has a material connection, it will meaningfully affect the weight and credibility consumers give that review. Material connections include financial relationships – including cash payments, and free products or discounts – an employment relationship, or a familial relationship. We've brought enforcement actions where employees of a marketer or public relations firm have posted reviews that appeared to come from ordinary users, where marketers have paid for individuals to post reviews, and where a marketer touted its positive reviews without disclosing that consumers received \$50 discounts for writing them.⁵ Also, last year we challenged a marketer's use of a "gag clause" prohibiting consumers from posting truthful negative comments or reviews. This marketer threatened to sue and actually did sue several consumers who had complained online or to the Better Business Bureau, and we alleged that this was an unfair practice under the FTC Act.⁶

Product endorsements come in all shapes and sizes, and unfortunately we've seen problems with lack of disclosure of endorsers' material connections in many formats, not just user reviews. We've seen it happen in a company-sponsored blog that appeared to be the personal thoughts of an ordinary consumer,⁷ on affiliate marketer websites,⁸ in Tweets posted by

² *Lord & Taylor, LLC*, No. C-4576 (May 23, 2016), available at <https://www.ftc.gov/enforcement/cases-proceedings/152-3181/lord-taylor-llc-matter>.

³ *Native Advertising: A Guide for Businesses* (Dec. 2015), available at <https://www.ftc.gov/tips-advice/business-center/guidance/native-advertising-guide-businesses>.

⁴ *Commission Enforcement Policy Statement on Deceptively Formatted Advertisements* (Dec. 2015), available at <https://www.ftc.gov/public-statements/2015/12/commission-enforcement-policy-statement-deceptively-formatted>.

⁵ See, e.g., *US v. Spokeo, Inc.*, No. 2:12-cv-05001 (C.D. Cal., Jun. 7, 2012), available at <https://www.ftc.gov/enforcement/cases-proceedings/1023163/spokeo-inc>; *Reverb Communications, Inc.*, No. C-4310 (Nov. 26, 2010), available at <https://www.ftc.gov/enforcement/cases-proceedings/092-3199/reverb-communications-inc>; *FTC v. Genesis Today, Pure Health, and Lindsey Duncan*, No. 1:15-cv-00062 (W.D. Tex., Jan. 26, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/122-3283/genesis-today-pure-health-lindsey-duncan>; *AmeriFreight, Inc.*, No. C-4518 (Apr. 20, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3249/amerifreight-inc-matter>.

⁶ *FTC v. Roca Labs, Inc.*, No. 8:15-cv-02231 (M.D. Fla., Sept. 24, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3255/roca-labs-inc>.

⁷ *FTC v. Lunada Biomedical, Inc.*, No. 2:15-cv-03380 (C.D. Cal., filed May 12, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/132-3067-x150036/lunada-biomedical-inc>.

⁸ See, e.g., *Legacy Learning Systems, Inc.*, No. C-4323 (Jun. 10, 2011), available at <https://www.ftc.gov/enforcement/cases-proceedings/102-3055/legacy-learning-systems-inc-et-al-matter>.

employees of an advertising agency,⁹ in YouTube videos of influencers playing video games,¹⁰ in Instagram posts of fashion influencers promoting a clothing line,¹¹ and when a paid spokesperson promotes a product on *The Today Show*.¹² Any required disclosure must not only be clear and conspicuous, but also easily comprehensible by the target audience. This is important to keep in mind as we see more and more children going online and influencer campaigns directed to younger and younger audiences.

The trend of increasing use of influencer marketing and native advertising is clear, and we hope that companies will take the time to take a look at the extensive guidance materials that the FTC provides on these topics. In addition to the native advertising guidance materials I mentioned earlier, we have very detailed guidance on the use of endorsements and testimonials,¹³ and how to make disclosures generally in digital advertising.¹⁴ Remember that the FTC needs to evaluate the specific facts relating to any particular advertising campaign and individual promotional communication before we can make a determination as to whether they lack necessary disclosures. But if there's a bottom line message I would like you to take away about this topic, is that you should always err on the side of transparency. You're much less likely to run into trouble with the FTC if you are open about your promotional efforts, instead of concealing the fact that you're behind a marketing campaign.

In addition to looking at advertisers' consumer-facing communications, the FTC is also interested in what's going on inside companies' marketing operations that consumers cannot see. As most of you probably already know, the FTC is the nation's primary enforcer of commercial privacy and data security. Why should this concern you as advertisers? Well, a number of reasons. First, all of you collect and store consumers' personal information. This includes not just information like consumer names, addresses, and telephone numbers, but in many cases you may also be in possession of payment card information. And not only that, but many of you are also directly collecting vast amounts of additional information about consumers – for instance, their purchasing patterns as tied to loyalty programs, their online browsing patterns as tracked by online cookies, information collected while they use your mobile apps, or even tracking information collected as they physically navigate through your stores. You have a legal duty to protect and secure these vast amounts of consumer information, both to keep any promises you

⁹ *Deutsch LA*, No. C-4515 (Mar. 31, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/122-3252/deutsch-la-inc-matter>.

¹⁰ *Warner Bros. Home Entertainment, Inc.*, Matter No. 152 3034 (Jul. 11, 2016) (proposed consent), available at <https://www.ftc.gov/enforcement/cases-proceedings/152-3034/warner-bros-home-entertainment-inc-matter>; *Machinima, Inc.*, No. C-4569 (Mar. 17, 2016), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3090/machinima-inc-matter>.

¹¹ *Lord & Taylor, LLC*, *supra*.

¹² *ADT, LLC*, No. C-4460 (Jun. 24, 2014), available at <https://www.ftc.gov/enforcement/cases-proceedings/122-3121/adt-llc-matter>.

¹³ *Guides Concerning the Use of Endorsements and Testimonials in Advertising* (Oct. 2009), available at <https://www.ftc.gov/policy/federal-register-notices/guides-concerning-use-endorsements-testimonials-advertising-16-cfr>; *The FTC's Endorsement Guides: What People Are Asking* (May. 2015), available at https://www.ftc.gov/system/files/documents/plain-language/pdf-0205-endorsement-guides-faqs_0.pdf.

¹⁴ *.com Disclosures: How to Make Effective Disclosures in Digital Advertising* (Mar. 2013), available at <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>.

make about your information security practices, and to enact reasonable data security measures to prevent unauthorized access. No one, including the FTC, is demanding perfect data security from firms; we know that's not possible. But what is required is reasonable security that is appropriate in light of the nature of the business and the sensitivity of the information involved.

And if you are developing a new consumer-facing mobile app, or want to roll out an internet-connected consumer product, please remember that it pays to think about data security from the start. Anything that is connected to the internet is potentially vulnerable to a breach. If your business model embraces security by design – where data security is baked into the product development cycle from the very beginning – you can reduce the risk of a data breach, legal exposure, and lost consumer trust down the road.

The FTC is also keeping an eye on the many different players in the online advertising ecosystem who are collecting and selling information about consumers, and serving targeted ads. Never before have advertisers been able to target consumers as precisely as they can today – because vast troves of consumer data are being collected, compiled, and analyzed, marketers can choose to have ads shown to very specific audiences. While behavioral advertising has clear advantages in being able to connect consumers with more relevant ads, we have some potential concerns about how consumer information is being gathered and used for this purpose.

Much of the online tracking that takes place is invisible to consumers. It wasn't long ago when we were only worried about browser cookies on desktop computers; now information about consumers is collected through numerous other mechanisms. Last year the Commission brought a case against a company whose technology uses sensors to collect the MAC addresses of consumers' mobile devices as they search for wi-fi networks, thereby allowing retailers to track consumers' physical movements through their stores. We alleged that the company failed to honor promises that consumers would be told when this tracking technology was in use at stores, and that consumers would be able to opt out of tracking at the retail locations where the technology was in use.¹⁵

And we recently announced a case against a mobile advertising company that allegedly tracked the locations of hundreds of millions of consumers without their knowledge or consent, to serve them geo-targeted advertising.¹⁶ What was really problematic in this case was that even when consumers had denied apps access to location APIs on their smartphones, InMobi allegedly used information about the wi-fi networks to which the devices were connecting to infer geolocation and serve geo-targeted ads – in other words, the company was specifically circumventing consumers' decisions not to have their location tracked. In addition to violating Section 5 of the FTC Act, we alleged that the company violated the Children's Online Privacy Protection Act Rule (COPPA) because it collected location information from apps that were specifically directed at children under age 13 without parental permission; the company agreed to pay a \$950,000 civil penalty. This COPPA case follows two others we announced last year involving app developers who allegedly allowed advertisers to use persistent identifiers to serve

¹⁵ *Nomi Technologies, Inc.*, No. C-4538 (Sept. 3, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/132-3251/nomi-technologies-inc-matter>.

¹⁶ *US v. InMobi Pte Ltd.*, No. 3:16-cv-3474 (N.D. Cal., Jun. 22, 2016), available at <https://www.ftc.gov/enforcement/cases-proceedings/152-3203/inmobi-pte-ltd>.

advertising to children without obtaining parental consent; those two companies agreed to pay a total of \$360,000 in civil penalties.¹⁷

The FTC also recently held a workshop on the growing practice of cross-device tracking,¹⁸ examining questions such as whether consumers receive notice of such practices and have the ability to exercise meaningful choice about being tracked. As technology provides advertisers with more and more ways to gather information about consumers, we encourage you to always be up front about what information you're collecting, how, and what you're going to do with it. If you're going to track consumers' online activities, including across different devices, this should also be clearly disclosed and we encourage you to offer mechanisms to consumers to easily exercise choice about being tracked.

Likewise, we advise you to exercise caution when you use data analytics and algorithms to sift through the massive amounts of data available to try to target customers more efficiently – as the Commission observed in its recent report on big data,¹⁹ even algorithms that appear to be facially neutral may have a disparate impact on certain groups of people, and can end up excluding underserved groups, perpetuating inequality.

Before I to conclude, I want to take a moment to thank ANA for its commitment to promoting responsible marketing, including its role in establishing the self-regulatory programs of the Advertising Self-Regulatory Council, which are administered by the Council of Better Business Bureaus. The ASRC's self-regulatory programs play a vital role in cleaning up problematic advertising and helping level the playing field for those companies that are abiding by the rules.

An even playing field is what the FTC wants as well, and we're committed to that goal – to serve both consumers and businesses alike. Thank you for your time, and I'm happy to take questions.

¹⁷ *US v. LAI Systems, LLC*, Case No. 2:15-cv-09691 (C.D. Cal., Dec. 17, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3261/lai-systems-llc>; *US v. Retro Dreamer*, Case No. 5:15-cv-02569 (C.D. Cal., Dec. 17, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3262/retro-dreamer>.

¹⁸ FTC Workshop, *Cross-Device Tracking*, Nov. 16, 2015, available at <https://www.ftc.gov/news-events/events-calendar/2015/11/cross-device-tracking>.

¹⁹ FTC Report, *Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues* (Jan. 2016), available at <https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf>.