



December 3, 2009



## In This Issue

[Be Sure You Understand the Impact of the FTC's New Endorsement and Testimonial Guides](#)

[Vonage Settles Fraud Charges for \\$3 Million](#)

[Congress Weighs Pros and Cons of Online Privacy Law](#)

[Facebook and Zynga Sued for Ad Scams](#)

[City of Dallas Sued Over Strict Sign Ordinance](#)

## Be Sure You Understand the Impact of the FTC's New Endorsement and Testimonial Guides

**Listen Up Here: BNA Presents "The FTC's New Endorsement and Testimonial Guides." To register, click [here](#).**

**Show Up Here: Electronic Retailing Association's Spotlight Session. For more information, click [here](#).**

**Read "Business No Longer Typical For Brands And Bloggers" by clicking [here](#).**

[back to top](#)

## Vonage Settles Fraud Charges for \$3 Million

Vonage Holdings Corp. announced on November 9 that it would pay \$3 million to settle an investigation by 32 state attorneys general into its advertising and business practices.



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### UPCOMING EVENTS

December 3, 2009  
Fast Forward 2011: PMA's Second Annual Digital Summit

Topic: "What the Recent FTC Guidelines Mean for Advertising and Marketing"

According to Texas Attorney General Greg Abbott, the Internet telephone company failed to clearly state in its ads that customers needed a high-speed Internet connection for its service to work. It is alleged that Vonage made customers pay activation, cancellation, and return shipping fees for equipment even when those customers – in particular senior citizens – were not aware of the need for high-speed Internet and couldn't use the service as a result. AG Abbott also alleged that after some customers tried to cancel the service, Vonage continued to send them monthly bills or debited funds from their checking accounts.

Vonage said in a statement that while there was no finding of any violation or wrongdoing by the company, it has promised to give refunds to affected customers, and to change its business practices as part of the settlement. The company also said it had created a reserve in the second quarter of 2009 for the amount of the payment to the states and the customer refunds.

The state of Wisconsin initiated a complaint against Vonage in November 2007. It later became a multi-state inquiry.

**Why it matters:** The state consumer protection laws vary widely but at their core, prohibit advertisers from failing to provide disclosure of a material fact about a product or service. According to the state attorneys general, Vonage's ads created the misimpression that its service would work without high speed Internet access, which amounted to a failure to disclose a material fact.

[back to top](#)

## Congress Weighs Pros and Cons of Online Privacy Law

**In a hearing by the House Subcommittees on Commerce, Trade, and Consumer Protection and Communications, Technology, and the Internet, lawmakers addressed both online and offline data collection, and questioned whether businesses are collecting too much data about consumers without their knowledge or consent.**

"We have moved from an era of privacy keepers to privacy peepers and data mining reapers," Representative Ed. Markey (D-Mass.) said at a hearing about data collection. Markey reiterated prior statements that consumers should be able to opt out of behavioral targeting online. "They should have the right to

Speakers: [Linda Goldstein](#), Manatt Phelps & Phillips and Randall Rothenberg, President, Interactive Advertising Bureau

Google Headquarters  
New York, NY  
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December 7, 2009  
ERA Spotlight Session

Topic: "Endorsements and Testimonials"

Speakers: [Linda Goldstein](#) of Manatt Phelps & Phillips, Rich Cleland of the FTC and Julie Coons of the Electronic Retailing Association as moderator

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December 8, 2009  
BNA Audioconference

Topic: "The FTC's New Endorsement and Testimonial Guides: As of December 1, It is No Longer Business as Usual for Brands and Bloggers"

Speakers: [Anthony DiResta](#) of Manatt, Phelps & Phillips, Jim Dudukovich, Coca-Cola North America, and Paul Rand, Zocalo Group

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December 14, 2009  
ERA Spotlight Session

say no," he said.

Witnesses at the hearing included privacy advocates Chris Hoofnagle of Berkeley Center of Law & Technology and Pam Dixon of the World Privacy Forum, as well as the ad group WPP.

Representative Rick Boucher (D-Va.), who is expected to introduce a privacy bill shortly, questioned whether legal protections could change people's attitude toward behavioral targeting or tracking users' Internet habits to deliver ads that are targeted to their preferences and interests. Referring to a recent study showing that two-thirds of Americans opposed tailored ads, Boucher asked Hoofnagle whether that percentage would drop if users had more control over the collection and use of their data.

But Hoofnagle said that new laws might not change people's attitudes because many consumers already mistakenly believe that sites with privacy policies are not permitted to share data. He also said the debate over whether to have consumers opt in or opt out of data collection was misplaced. In fact, he said, neither option protects consumers. "It is easy to trick people into opting in. It is easy to manipulate people into not opting out." Instead, he said, companies should be limited in how long they could keep consumer data.

Representative Mike Doyle (D-Pa.) questioned whether data collection injures consumers. Describing a scenario in which a person who likes to ski is wrongly targeted as a fisherman and, as a result, receives ads related to fishing, he asked, "What's the harm?"

Dixon replied that some companies can use data for purposes that can have a negative impact on consumers. For instance, she said, some companies place people who dispute charges into "bad customer" databases. But she did not point to any particular harm caused by behavioral targeting.

Lawmakers also discussed how to balance the advantages of data collection against the importance of giving consumers control over information that companies collect. "The collection, use, and dissemination of consumer information provide many benefits to consumers, businesses, and the marketplace," Representative Henry Waxman (D-Calif.) said in a written statement. "But they raise legitimate concerns about whether consumers have adequate control over personal information that is shared."

Topic: "Endorsements and Testimonials"

Speakers: [Linda Goldstein](#) of Manatt, Phelps & Phillips, Rich Cleland of the FTC, Jonathan Gelfand of Product Partners, LLC and Julie Coons of the Electronic Retailing Association as moderator

Hilton Long Beach & Executive Meeting Center  
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December 17, 2009  
ERA Spotlight Webinar  
Session

Topic: "Endorsements and Testimonials"

Speakers: [Linda Goldstein](#) of Manatt Phelps & Phillips, Rich Cleland of the FTC, Jonathan Gelfand of Product Partners, LLC and Julie Coons of the Electronic Retailing Association as moderator

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December 21, 2009  
National Constitution  
Conferences Webinar

Topic: "FTC Regulation of Advertising and Marketing"

Speaker: [Jeff Edelstein](#)

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January 21-22, 2010  
6th Annual Film, TV & New  
Media Law Conference

Topic: "Brand Integration"

**Why it matters:** For the last couple of years, online privacy – and behavioral targeting – have been perennial topics in Congress. However, with Democratic majorities in both houses and a Democratic president, there’s a greater likelihood that a privacy bill will make it into law sometime in the next few years. Companies with a stake in this issue should keep tabs on what is happening on the Hill in this area and do what they can to protect their interests.

[back to top](#)

## Facebook and Zynga Sued for Ad Scams

**A class action lawsuit filed in federal court in Sacramento alleges that Facebook and game developer Zynga facilitated a scheme in which customers were served misleading ads that encouraged them to provide their telephone and credit card numbers, which were then billed for fraudulent charges.**

Players of "Farmville," "Mafia Wars," and other Facebook games claim they were misled by ads that promised them virtual cash to use in video games in exchange for their credit card and cell phone numbers. Lead plaintiff Rebecca Swift alleges that she provided her cell phone number to a Zynga advertiser in exchange for a code redeemable for "Yocash," virtual money to use in the Zynga game "Yoville." Instead, Swift alleges, her cell phone was charged three times for \$9.99 without her knowledge or permission. Swift alleges that in another instance she agreed to participate in a free trial for a green tea herbal supplement for more "Yocash." She provided a Zynga advertiser with her credit card number, and says she tried to cancel the trial before it ended. Nonetheless, Swift says she was charged more than \$165 for the green tea supplements and was unable to get a refund.

According to the complaint, at least 10 percent of Facebook's revenue is generated from users' participation in the "special offers," and Zynga has made between \$33 and \$84 million from unwitting Facebook gamers who responded to the misleading ads. It cites a speech by Zynga CEO Mark Pincus, in which Pincus allegedly admits he got the company off the ground by doing "every horrible thing in the book to just get revenues right away."

After a flood of public criticism, this month, Zynga banned all special offers promoted through its games and Facebook also tried to bar the misleading ads,

Deals"

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Topic: "Trademark Rights  
for the Entertainment  
Lawyer: Use of Trademarks  
in Creative Works"

Speaker: [Mark Lee](#)

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January 26-27, 2010  
American Conference  
Institute's 23rd National  
Advanced Forum on  
Advertising Law

Speaker: [Linda Goldstein](#)

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New York, NY  
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January 26-27, 2010  
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Speaker: [Terri Seligman](#)

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according to the complaint. But the complaint claims that neither company has offered to reimburse customers for the money they lost.

**Why it matters:** The case underscores the importance of reviewing and monitoring the practices and policies of third parties who provide services to a Web site or its customers, because the actions of third parties may expose Web sites and other “host” companies to lawsuits, adverse publicity, and the wrath of unhappy customers.

[back to top](#)

## City of Dallas Sued Over Strict Sign Ordinance

**A year-old sign ordinance passed by the City of Dallas that places strict limits on the amount and placement of ads in city storefront windows is facing a court challenge. The Institute for Justice, a Washington, D.C.-based civil liberties law firm, has sued Dallas over the 2008 ordinance, alleging that it violates the constitutional free speech rights of business owners trying to advertise products and prices.**

Businesses “rely heavily on these signs to communicate with their customers. Dallas’ law has cut off that means of communication for them,” said Matt Miller, executive director of the Texas chapter of the Institute for Justice.

The institute is requesting an injunction to bar implementation of the ordinance on behalf of five small-business owners in the Dallas area, including two Fast Signs franchisees who say they have lost business as a result of the city's sign crackdown.

Dallas City Attorney Tom Perkins countered that the city's ordinance, which bans signs on the upper two-thirds of windows and limits total sign coverage to no more than 15 percent of a window and 25 percent of a wall, is clearly constitutional. "The city allows property owners to convey their legitimate commercial messages. There are some limitations, but the ordinance is content-neutral," he said.

Perkins said federal law allows cities to regulate signs for safety and aesthetics. He said that Dallas passed the ordinance with the explanation that it would help deter crime. So many storefront windows were cluttered with signs, police couldn't see inside, the city argued.

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But the ordinance also plainly targeted the appearance of convenience stores, liquor stores, and small businesses, which tend to have more signage than more upscale businesses, particularly in poorer neighborhoods.

**Why it matters:** Dallas's sign ordinance raises several interesting legal questions. Although the city attorney argues that, on its face, the ordinance is content-neutral, its practical impact is greater on certain types of businesses in certain neighborhoods.

[back to top](#)

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