



October 27, 2009



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Special Focus: The FTC and Social Media

As we reported on [October 7, 2009](#), the Federal Trade Commission released its long-awaited revisions to its Endorsement and Testimonial Guides which will go into effect on December 1, 2009. The Guides have generated a lot of discussion and raised many questions.

This week we asked Manatt partner Tony DiResta, a former regional FTC Director and the current General Counsel of the Word of Mouth Marketing Association (“WOMMA”) and WOMMA blogger (*see* “[DiResta the Law](#)”) to shed some light on the social media aspects of the Guides.

Editors: Why did the FTC believe it was necessary to apply the Guides to social media platforms?

DiResta: The FTC noted in its analysis of new media that by the year 2011, the amount of money to be spent on social media marketing will be \$3.7 billion. Furthermore, there are two underlying themes in the agency’s analysis. One is that the use of social platforms by consumers for commercial purposes is pervasive and widespread. The other is that the impact of social marketing is persuasive to consumers.

In addition, from a 30,000 foot perspective, I believe the FTC “gets it” when it comes to the changing paradigm in advertising and marketing. In a Web 1.0 or traditional media



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environment, the role of the marketer was to disseminate communication to a passive consumer. Now, with Web 2.0, consumer-generated media, the consumer is no longer passive; he or she has control of the information. As such, the role of marketer is not just to “advertise to” but to “engage with” the consumer. Accordingly, while the new regulatory principles are substantially similar to the old ones (with respect to disclosures of “material connections,” for example), I believe the FTC concluded that it was time to apply these settled principles to emerging technologies.

Editors: As a practical matter, what are the responsibilities for the brands? Don’t they lose control of the content once the message gets into the hands of bloggers or consumers?

DiResta: The FTC has made it clear that with respect to “sponsored” communications that constitute “advertising messages,” the advertiser or brand is responsible for the activities of the agents or representatives of the message. Although the content is, indeed, lost once the message gets into the hands of the ultimate speaker, the FTC has directed that advertisers or brands adopt policies and practices that (1) *educate or train* the ultimate speaker about what disclosures are necessary and to be sure that whatever claims are made are substantiated, and (2) *monitor* those communications.

Editors: What are the key considerations for disclosing a “material connection?”

DiResta: The questions presented by the requirement are essentially twofold. First, what does the reasonable consumer need to know that can influence the weight he or she gives to the ad? Second, are the disclosures “clear and conspicuous” or “meaningful and adequate?”

Obviously, a “one size fits all” approach doesn’t work. The consideration and relationships between the advertiser and speaker will be different and each social media platform presents its own unique space that must comply with the “clear and conspicuous” standard.

Editors: What is the role of self-regulation now?

DiResta: The FTC recognized the role of self-regulation, citing with approval to the Code of Ethics and Standards of Conduct adopted by WOMMA. As the agency pointed out, effective self-regulation must be backed up with effective law enforcement. Thus, I see a significant role of self-regulation by filling in voids and ambiguities presented by the Guides. On a related note, I’m looking forward to hearing Lee Peeler’s perspective on this when he joins me on a panel discussing the Guides at WOMMA’s Annual Summit in Las Vegas on November 18. Lee is President and CEO of the National Advertising Review Council. I’m also looking forward to hearing what David Vladeck, Director of the FTC’s Bureau of Consumer Protection, has to say at the Promotion Marketing Association Law Conference in Chicago on November 5.

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UPCOMING EVENTS

November 5-6, 2009
31st Annual Promotion
Marketing Law Conference
Topic: "The Battle of the
Brands"

Moderator: [Chris Cole](#)
Fairmont Hotel
Chicago, IL

[for more information](#)

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November 5-6, 2009
31st Annual Promotion
Marketing Law Conference
Topic: "Sweepstakes &
Contests: Lend Me Your Ear
and I'll Sing You a Song..."

Speaker: [Linda Goldstein](#)
Fairmont Hotel
Chicago, IL

[for more information](#)

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November 5-6, 2009

31st Annual Promotion
Marketing Law Conference
Topic: "Who's Sorry Now:
Defending against FTC, State
AG's, and Class Actions"

Speaker: [Clayton Friedman](#)
Fairmont Hotel
Chicago, IL

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November 18-20, 2009

Firms Settle Charges Over EU-U.S. Privacy Program

On October 6, the Federal Trade Commission announced settlements with six U.S. companies charged with misleading consumers by falsely claiming they were in compliance with a program permitting data transfers from the European Union to the United States.

The settlements resolved six separate administrative complaints charging the companies with misrepresenting that they held up-to-date certifications under the EU-U.S. Safe Harbor framework. In fact, each of the defendants had allowed its certificate to lapse. The defendants are World Innovators, Inc., Expatedge Partners, LLC, Onyx Graphics, Inc., Directors Desk LLC, Progressive Gaitways LLC, and Collectify, LLC.

Under the proposed settlements, the companies are prohibited from misrepresenting the extent to which they participate in any privacy, security, or other compliance program sponsored by a government or any third party.

The agency's actions are a sign that it is stepping up its enforcement efforts in the privacy arena. In the past, privacy advocates had expressed concerns that the safe harbor program had not been adequately policed or enforced. The Commission has announced only one previous enforcement action under the nine-year-old program – a July settlement of charges against Javian Karnani, who was accused of falsely claiming to participate in the safe harbor program.

The safe harbor framework is a voluntary program administered by the Department of Commerce in consultation with the European Commission. It was launched in 2000 to ensure that U.S. businesses could have uninterrupted transfers of personal information from Europe to the United States. The program was designed to address the EU Data Protection Directive (95/46/EC), which generally bans data transfers to non-EU countries that lack "adequate" levels of privacy protection. The United States is not among the handful of countries deemed adequate by the EU.

To participate in the program, a company must self-certify annually to the Commerce Department that it complies with a defined set of privacy principles, such as offering consumers the opportunity to opt out of having their personal information disclosed to third parties. Failure to comply can result in an enforcement action by the FTC.

Roughly 1,700 U.S. companies have been certified to the safe harbor program. Only companies within the jurisdiction of the FTC or Transportation Department may join. Financial services companies are not eligible, nor are insurance companies, telecommunications carriers, nonprofits, or organizations under the jurisdiction of the Agriculture Department.

Why it matters: The FTC's announcement helps bolster confidence in the safe harbor program, which had been criticized for its lack of enforcement. The cases may also indicate that the FTC plans to be more aggressive on privacy issues in general. Companies

4th Annual Word of Mouth
Marketing Association Summit
Topic: "FTC Developments"

Speaker: [Anthony DiResta](#)

Paris Hotel

Las Vegas, NV

[for more information](#)

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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

Digital Sandbox Networking

Event Center

New York, NY

[for more information](#)

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December 14, 2009

ERA Spotlight 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

Hilton Long Beach &

Executive Meeting Center

Long Beach, CA

that participate in the program are advised to review their compliance.

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FTC to Focus on Kid Ads, Green Marketing

David Vladeck, the new Director of the Federal Trade Commission's Bureau of Consumer Protection, recently informed attendees of the National Advertising Division Annual Conference that the Commission is reviewing advertising and marketing on a number of fronts, particularly advertising to children.

According to Vladeck, the agency plans to focus efforts this year and next on food marketing to kids and adults, online marketing, endorsements and testimonials, green marketing, and privacy matters. It is also aiming for better coordination with other agencies, especially the Food and Drug Administration.

Vladeck says kid food marketing is a focus because of the rise in obesity, cardiovascular disease, and diabetes. "Progress has been made because of self-regulatory initiative from the Council for Better Business Bureaus but more needs to be done," he said. Earlier this month, he said the FTC served notice to get approval from the Office of Management and Budget to conduct a major food marketing study that will allow a direct comparison of marketing spend, profile data, and market data between the new study and one done two years ago.

The FTC also plans a multimedia ad campaign directed at kids between the ages of 8 and 12, including a game that teaches core ad literacy concepts that will be made available online and on mobile devices. In-school curricula developed with Scholastic Magazine will address why, where, and how commercial messages are constructed and placed, Vladeck said.

"The distinction between ads and other content is often blurred to the point that even older kids may not get when they are being pitched," he said. "The goals are to teach kids to be aware of ads, analyze and understand them, and the benefits of being an informed consumer." He added that the effort focuses on three key questions: "Who is responsible for these ads?" "What does the ad say?" "What does it want me to do?"

Vladeck said the FTC is also focusing on environmental marketing claims. He said the agency has launched a green initiative that includes a review of its own Green Guides and law enforcement around false or deceptive green claims. Revised Green Guides are expected to be issued next year.

The FTC is also working with the FDA and the Office of Consumer Litigation of the Department of Justice to enforce rules around marketing of conventional food products, dietary supplements, and over-the-counter drugs, Vladeck said.

Why it matters: Vladeck's speech puts marketers on notice regarding planned areas of focus over the next 18 months, including kid food and drink, online marketing,

[for more information](#)

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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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January 21-22, 2010

6th Annual Film, TV & New
Media Law Conference

Topic: "Brand Integration
Deals"

Speaker: [Jordan Yospe](#)
Millennium Biltmore Hotel
Los Angeles, CA

[for more information](#)

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January 26-27, 2010

American Conference
Institute's 23rd National
Advanced Forum on
Advertising Law

Speaker: [Linda Goldstein](#)
New York Marriott Downtown
New York, NY

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endorsements and testimonials, environmentally themed marketing, and privacy matters.

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Two-Thirds of Americans Disapprove of Online Tracking

Roughly two out of three Americans disapprove of online or behavioral tracking by advertisers, according to a new survey from professors at the University of Pennsylvania and the University of California, Berkeley. Moreover, that percentage goes up once people find out about the various ways in which advertisers track their online usage.

The professors say they think that the study released earlier this month is the first independent, nationally representative telephone survey on behavioral advertising.

Behavioral advertising, which uses software to track Internet surfing so advertisers can better target individual consumers, is currently on the hot seat, with privacy advocates urging Congress and the Federal Trade Commission to regulate online tracking. Representative Rick Boucher (D-Va.) has announced his intention to introduce privacy legislation shortly. David Vladeck, Director of the Bureau of Consumer Protection for the FTC, has also said that the agency plans to look closely at data privacy issues. Marketers defend behavioral tracking, arguing that advertising supports free online content. In July, the major advertising trade groups proposed a set of self-regulatory measures that they hoped would stave off regulation, including a notice to consumers that they were being tracked.

Behavioral tracking-related research to date has been mostly company-financed or Internet-based, which survey experts say is not representative of all Americans. As a result, this latest study has received widespread attention.

The study's authors hired a survey company to interview 1,000 adult Internet users. The 20-minute interview included such questions as "Please tell me whether or not you want the Web sites you visit to give you discounts that are tailored to your interests." The results were later adjusted to reflect Census Bureau patterns in categories like sex, age, population density, and telephone usage.

Two-thirds of respondents were averse to tailored ads in general. Then the respondents were told about different ways that companies tailor ads: by following what someone does on the company's site, on other sites, and in offline places like stores. After being informed of tracking techniques, respondents' aversion to behavioral tracking went up even more. An additional 7 percent said tailored ads were not OK when they were tracked on the site, 18 percent said it was not OK when they were tracked via other Web sites, and 20 percent said it was not OK when they were tracked offline.

Respondents were less put off by customized discounts and news, with 49 percent saying

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

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tailored discounts were OK, and 42 percent saying customized news was OK.

Interestingly, the researchers did not find a significant difference in responses broken down by age, with 55 percent of respondents between the ages of 18 and 24 objecting to behavioral advertising.

The survey also asked nine true-or-false questions to ascertain how knowledgeable Americans were about privacy protection. Only one question, regarding sweepstakes, was answered correctly by more than half of respondents.

Finally, the survey asked if there should be a law that gave people the right to know everything a Web site knew about them. Sixty-nine percent of respondents said yes. Ninety-two percent also supported a hypothetical law that required Web sites and advertisers to delete all information about an individual upon request.

“I don’t think that behavioral targeting is something that we should eliminate, but I do think that we’re at a cusp of a new era, and the kinds of information that companies share and have today is nothing like we’ll see 10 years from now,” said one of the study’s authors. He said he would like “a regime in which people feel they have control over the data that marketers collect about them. The most important thing is to bring the public into the picture, which is not going on right now.”

Why it matters: The survey seems to give privacy advocates ammunition to push for greater regulation of online behavioral tracking. Now more than ever, online marketers should work to put in place self-regulatory rules that address the concerns of advocates and lawmakers, as well as take steps to explain to consumers how behavioral targeting actually works.

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Promotion Marketing Association's 31st Annual Promotion Marketing Law Conference

November 5–6 /Chicago, IL

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Word of Mouth Marketing Association Annual Summit

November 18–20 /Las Vegas, NV

Topping the agenda for WOMMA's upcoming Annual Summit in Las Vegas is a keynote address by Chuck Harwood, Assistant Deputy Director, Bureau of Consumer Protection, of the Federal Trade Commission, followed by a roundtable panel discussion of ethics, endorsements and disclosure. Roundtable panelists include Manatt partner and WOMMA General Counsel, Tony DiResta.

Click [here](#) to register

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