

FEDERAL CIVIL ENFORCEMENT COMMITTEE NEWSLETTER

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Report from the February 3 ABA 2011 Consumer Protection Conference

At the ABA Section of Antitrust Law 2011 Consumer Protection Conference on February 3, FTC Commissioners and other regulators confirmed that they are taking a more aggressive posture on consumer protection enforcement. For example, FTC Commissioner Julie Brill cautioned, "The FTC is willing to wait, but it won't wait too long," in response to a question concerning online privacy self-regulatory efforts. Panel speakers included representatives from the FTC and state attorneys general offices, scholars, economists, industry players, consumer advocates, and other professionals in consumer protection and privacy. This article provides an overview of key takeaways from each panel.

Enforcement in the Online World – A Key Focus in 2011

During the opening panel, FTC Commissioner J. Thomas Rosch offered colorful views on a range of timely consumer protection issues. He called the new [Consumer Financial Protection Bureau](#) "completely unnecessary," expressed reservations about the FTC's proposed [Do Not Track](#) mechanism, and described a "new era of limits" due to tightening government budgets that will force a careful cost-benefit analysis for each case undertaken by the Commission. He further discussed issues once "never imagined" by the

FTC due to the advent of online shopping and behavioral targeting.

While covering a variety of topics, much of the panel discussion focused on the effect of consumer protection initiatives on online tracking activities. Tony West, Assistant Attorney General in the U.S. Department of Justice [Civil Division](#), described an effective working relationship between the Justice Department's [Office of Consumer Litigation](#) and the FTC, including collaboration on several recent Internet fraud cases. Commissioner Rosch noted antitrust issues that may emerge alongside consumer online privacy concerns as online competitors battle for advertising revenue. Specifically, he cited Apple's applications store, Facebook's "friends" feature, and Google's search function as examples of online services that are designed to attract audiences to the exclusion of competing services. Canadian [Privacy Commissioner](#) Jennifer Stoddart spoke about the effect of Canadian privacy views on U.S. companies that operate in Canada, and stated that she anticipates more investigations into the privacy and information practices of technology companies with little or no physical presence in Canada.

Do Not Track Proposal Draws Attention and Questions

The second panel opened with an overview by FTC Commissioner Julie Brill on the Commission's proposed privacy framework and its relevance to Congress and self-regulators. Despite Commissioner Brill's request to focus on less-publicized aspects of the proposed framework, the panel discussion quickly turned to the FTC's Do Not Track proposal. Commissioner Brill noted that the

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FTC, while not requiring a mandate, expects steady self-regulatory progress or identifiable milestones in the absence of a single solution. Other panelists agreed with the milestone approach, but cautioned that the current lack of consensus among consumers and businesses on the meaning of Do Not Track must be addressed to avoid a negative impact on consumer expectations.

Leslie Harris, President and CEO of the [Center for Democracy & Technology](#), spoke broadly about privacy initiatives in the past year. She acknowledged the “bully pulpit” effect of the FTC’s proposed framework, but expressed disappointment that the FTC report lacked a direct call to legislate baseline privacy practices. Harris also described the recent [Commerce Department Privacy Report](#) as “useful” because it acknowledges that a lack of privacy protection hurts businesses on the domestic and international levels. In addressing possible privacy legislation in the current session, the panelists agreed that such legislation may be one area of bipartisan consensus in the year ahead.

Squaring Off on Pfizer

One of the most lively panel sessions became a heavyweight debate between current Director of the [FTC’s Bureau of Consumer Protection](#) David Vladeck, and past Director and current George Washington University Professor [J. Howard Beales III](#). The two joined the panel in discussing the effect of recent FTC rulings on the FTC’s 1972 *Pfizer* decision, which established that an advertiser must possess a “reasonable basis” to substantiate advertising claims. Vladeck opened the session by acknowledging recent FTC efforts to end ambiguity stemming from *Pfizer*, but stated unequivocally that “the demise of *Pfizer* has been greatly exaggerated.”

Professor Beales called a provision within a recent FTC ruling, which requires two clinical trials to support certain health claims, “harmful to consumers” and claimed it will push the specifics out of advertising and reduce the amount of information to

consumers. Other panelists argued that a recent order, which calls for FDA review of certain advertising claims, fosters uncertainty among advertisers as to appropriate substantiation criteria, and suggested an FDA and FTC workshop to educate businesses and practitioners. Director Vladeck, in response to the panel’s concerns, attempted to dispel the notion that the FTC was a “900 pound gorilla” that was simply dictating terms to companies, and cited efforts to avoid protracted litigation as one rationale for the new provisions.

The Verdict’s Out on the Effect of the New Consumer Financial Protection Bureau

The question “*What’s the impact of the new bureau?*” was posed to panelists, which included regulators and industry representatives, throughout a session focusing on the newly-created Consumer Financial Protection Bureau (“CFPB”). Joel Winston, Associate Director in the FTC’s Division of Financial Practices, noted that the FTC will see its power remain largely intact and that enforcement authority is concurrent between the two entities. He noted that “more cops on the beat is a good thing, but not if it’s duplicative” and discussed efforts already underway to coordinate efforts.

Esther Chavez, Assistant Attorney General in Texas, expressed optimism that collaboration between the state attorneys general and the CFPB will eventually mirror information-sharing practices with the FTC. Nessa Feddis, Vice President and Senior Counsel for the [American Bankers Association](#), responded to the enhanced role of the state attorneys general by voicing concern over the number of regulators involved in enforcement, and she warned that compliance burdens may push out smaller banking institutions.

Panelists also offered perspectives on the [Dodd-Frank Wall Street Reform and Consumer Protection Act](#), which imposes new regulatory restrictions and oversight on the financial industry in response to the recent financial crisis. Panelist comments on Dodd-Frank’s “abusive” practices standard focused on the

appropriate counsel to clients. The FTC's Winston noted that Dodd-Frank attempts to place parameters around the standard's definition (*e.g.* exploiting consumers understanding), but acknowledged that the standard remains open-ended. Feddis, in response, stated that she anticipates "a chilling effect" on innovation and improvements as financial service providers may be hesitant to introduce and market innovative financial products.

Keep Close Watch Over Third-Party Partners (Or Risk Liability)

FTC Commissioner Edith Ramirez stated, at the start of a session focusing on third-party conduct, that companies must continuously monitor their third-party partners or risk liability. Her remarks set up a broader discussion on the challenges that companies face in monitoring partners, and steps companies must take to protect themselves. Albert Sheldon, Senior Assistant Attorney General for California, warned that companies cannot be "comfortably ignorant," and will remain responsible for the actions of their third-party vendors. Commissioner Ramirez spoke about third-party data security obligations, and she highlighted factors — including the sensitivity of the information collected, the size and resources of the company, contractual provisions with third parties, and third-party monitoring — that the FTC will consider to determine if a company took "reasonable" steps to monitor third-party partner conduct.

Keith Enright, Macy's Vice President and Chief Privacy Officer, offered a client-side perspective and cited meeting the reasonableness standard outlined by Commissioner Ramirez as a substantial challenge, especially given rapidly changing technology. Enright further noted that security and privacy require a constant application of discipline, yet disciplined enforcement becomes more difficult as partner numbers expand. Shelly Huber O'Callaghan, Vice President and Assistant General Counsel at Dairy Queen, also noted the challenge in

monitoring partners, particularly franchisees, and she cautioned that companies must vet their vendors carefully.

Attorney Ethics in the Social Media Age

Sarah Mathias, FTC Associate General Counsel, Michael Downey of Hinshaw & Culbertson, and Jennifer Lynch, an attorney with the [Electronic Frontier Foundation](#), used a series of hypotheticals to offer timely ethics guidance for attorney practitioners who increasingly use social media to communicate. A hypothetical Facebook conversation between an attorney and a potential client highlighted potential pitfalls involving online solicitation of clients, online disclaimers, and different jurisdictional rules. A second hypothetical addressed obligations to preserve online content, such as forum posts, when there is a reasonable anticipation of litigation. Lastly, the panel discussed the benefits and limitations of online search tools available to government investigators, and offered the takeaway that "if it's open to the public, it's open to the government."

Courts or the NAD? Experience vs. Speed

A company that seeks to challenge the truth and accuracy of a competitor's advertising will take its claim to either federal court or the National Advertising Division ("NAD") of the Better Business Bureau. As both of these advertising challenge venues experience a rise in the number of advertising disputes, along with increasing clashes between the parties over procedural and substantive issues, the final panel discussed trends in comparative advertising challenges and debated the benefits and drawbacks of the two venues. Speed was cited as one advantage of the courts. Specifically, David Mallen, Assistant Director at the NAD, acknowledged that the rise in cases has led to a backlog at the NAD, and David Bernstein with Debevoise & Plimpton stated that companies seeking a speedy resolution "cannot afford to go to the NAD." Among the benefits of the NAD, the panelists described the enormous body of NAD case reports drafted by advertising experts

that result in consistent substantiation requirements and predictable holdings. As a benefit to advertising challengers, Bernstein also noted NAD procedures that, unlike the courts, place the initial burden on the advertiser to substantiate its claim.

Conclusion

The conference panels featuring federal and state regulators left no doubt that zealous

enforcement will be the hallmark of consumer protection activity in the year ahead. As such, the range of panelists and the diversity of topics addressed during the conference provided practitioners with a clear view on enforcement priorities and a roadmap to reduce risk and remain on the right side of compliance with applicable laws.