From: "Edelman, Benjamin"
To: "McGinn, Kathleen" <kmcginn@hbs.edu>
Subject: RE: Ben/FRB
Date: Tue, 07 Nov 2017 15:50:21 +0000
Importance: Normal

Thanks for continuing to think about this, and for meeting with Joe. Glad he's favorably inclined.

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As to the Microsoft disclosures --

My work with Microsoft began in September 2003, when I was beginning my second year of law school.

My final work for Microsoft was in October 2015. I've done no further work for Microsoft, nor been paid anything, since then.

As you'd expect given the 12+ year time period, the work covered a variety of subjects. Some of the subjects are subject to confidentiality restrictions, including attorney-client privilege and attorney work product. However, I have publicly stated that my work included detecting various advertising fraud affecting Microsoft advertisers and affecting Microsoft itself, and I have spoken at Microsoft-sponsored events on that subject.

When I began writing about Google antitrust/competition issues, I realized that some people might think the work for Microsoft was closely related. It wouldn't be easy for me to convince them that my work for Microsoft wasn't related to Google, particularly because I wasn't at liberty to say what the Microsoft work was about. But in any event, writing about Google competition concerns, while advising a competitor, there was a plausible basis for readers to want to know about the relationship, so I made it my practice to disclose the Microsoft work when discussing Google competition issues. The style and substance of my disclosures changed as disclosure norms changed, and as I learned more about what readers wanted to know. I did not include such disclosures on every single work product pertaining to Google; an article on some aspect of Google far from Microsoft, such as a subject other than antitrust/competition, seemed to less obviously call for such a disclosure. Nonetheless, my disclosures were numerous, as listed below.

Representative disclosures:

1. Senate testimony, July 10, 2008 - alerting the reader in the first paragraph that the final page has disclosures, and on the final page mentioning "I serve as a consultant to Microsoft on subjects unrelated to that at issue here" (among other disclosures).
2. Working paper about competition in ad auctions. First circulated, January 2010. First-page footnote discloses my work with Microsoft.
3. Online article about Google Toolbar privacy problems, July 26, 2010 – presenting an unavoidable distinctively-colored box at top of page explaining that I "serve as a consultant to various companies that compete with Google" and hyperlinking to a list of such companies (on my bio), among other disclosures.
4. Online article about certain Google trademark practices, November 30, 2010 – same disclosure format and substance as July 26, 2010
5. Law review article about Google search bias, 2011. First-page footnote discloses consulting clients adverse to Google, with hyperlink to details.
6. HBR.ORG post about tensions between Google and Microsoft, February 3, 2011 – providing both my standard HBR.ORG disclosure "adviser to various companies that compete against major platforms" (posted on all my HBR.ORG articles; each author can only have one such statement which must remain verbatim identical across all articles on the HBR.ORG platform) as well as a second disclosure (in large type at bottom of the article) that I "He count[] Microsoft among [my] consulting clients (though on matters unrelated to issues discussed here)."

7. Online article about certain Google tactics raising antitrust concerns – January 12, 2012 – same disclosure format and substance as July 26, 2010
8. HBR article about dominant platforms, 2014. Footnote indicates that I "advise] numerous companies that rely on or compete with Google and some of the other platforms mentioned here."
9. Online article about certain other Google tactics raising antitrust concerns – February 13, 2014 – same disclosure format as July 26, 2010; but expanded substance based on guidance I received as to Blinkx, namely in summarizing the substance of the work for other clients so that readers can assess the relationship between that work and my writings about Google
10. Online article about certain other Google tactics raising antitrust concerns – May 13, 2014 – same disclosure format and substance as February 13, 2014
11. Online article about certain other Google tactics raising antitrust concerns – October 13, 2014 – same disclosure format and substance as July 26, 2010
12. Online article about regulatory response to Google actions raising antitrust concerns – April 1, 2015 – same disclosure format and substance as February 13, 2014
13. JCLE article about Google and competition, June 2015. First-page footnote discloses work for companies adverse to Google.
14. JMR article about Google search result format, 2016. First-page footnote discloses my ongoing work for Microsoft (which was true as of time of drafting article and submission, though in fact was no longer true as of date of publication). (This is the sixth example the FRB lists on pages 6-7 of its final 2017 report about me.)
15. Practitioner article about Google competition concerns, 2017. Indicates "He has no current clients adverse to Google with respect to the practices discussed herein," which was true at the time and is true now. (This is the first example the FRB quotes.)

Broadly, I think these disclosures are "exceptional" in that: 1) they began years before any HBS policy required such disclosures, and 2) these disclosures are typically prominent, indeed unavoidable, at top of page and with distinctive color to emphasize the text and draw readers to it, specifically not required by HBS policies which accept disclosures in article footers or otherwise in places that are easily overlooked.

As you might expect in such a long list and long period, there are some glitches. Here's what I found in preparing the list above – all issues I didn't even know about until this effort:

a. My October 13, 2014 article seems to have erred in copying 2010 template disclosure rather than updated February 13, 2014 disclosure language. I think that was simply an error, copying from the wrong version. Notice the May 13, 2014 and April 1, 2015 articles using the expanded disclosure.
b. My January 2010 working paper described the Microsoft work as "previous." Indeed, I posted the paper during a lull in work for Microsoft. When we revised the paper, I failed to revise the disclosure footnote.

One could also critique the Google-related articles on which I didn't mention work for Microsoft or other competitors. There are some such articles. There was a principled basis for my finding a disclosure unnecessary, but some people would draw the line differently. My intuition and my practice followed the "directly related" principle from the COI policy – which I took not to indicate that every Microsoft project would be directly related to every Google article, but that some combinations would raise concerns, and hence that reflection and judgment would be needed to assess when disclosure was in order.

As to the FRB's six examples of disclosures purportedly deficient: At least two of the examples are seriously flawed. #4 is a paper unrelated to either Google or Microsoft, and therefore doesn't call for disclosure even on the most far-reaching version of the principles the FRB articulates. #6 includes a disclosure so can't be cited as evidence of lack of disclosure. Then there are some disclosures that are a mixed case. #1 says "no **current** clients adverse to Google" (emphasis added), which through the principle of negative imputation exactly indicates one or more prior clients adverse to Google. #5 appeared on my web site, where long-time readers have seen numerous prior disclosures, including those linked above, arguably further dulling the need for a disclosure on this specific piece. There's room to discuss #1 and #5, but #4 and #6 are clearly mistakes by FRB. As to all of the FRB's examples, the main weakness, of

course, is that the Microsoft work was historic, not ongoing; and to a lesser extent that the Microsoft work was not directly related to Google.

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I don't think I have the "principles and procedures" document. Here is the FRB's July 6, 2017 letter to me. I see the reference to an attachment, a "principles and procedures" document. That letter and attachment were sent to me via filetransfer.hbs.edu, which keeps materials only for a limited period, and now I'm only able to see the filenames, not download or redownload the actual files. Nonetheless, I can see that i was sent a file called FRB_28April2015_Final.pdf. I do not know whether I read it at the time, but I didn't keep a copy. I could request that Jean send me a new copy, I suppose, or you or others could request it too. There may be principles I've failed to cite or rely on, not to mention procedures, to my detriment.

-----Original Message-----
From: McGinn, Kathleen
Sent: Monday, November 06, 2017 4:13 PM
To: Edelman, Benjamin <bedelman@hbs.edu>
Subject: Two unrelated issues

Hi Ben,

Issue 1: Paid work for Microsoft. Do you mind telling me the years you had any paid work with Microsoft, and pointing me to the pubs disclosing your work with Microsoft? You respond to the FRB that your last payment from Microsoft was Oct '15 and during the period you were being paid, your related pubs had "exceptional disclosures." It would be helpful for me to be able to discuss dates and pubs if you're comfortable with that information being shared in the big room.

I hope you're doing well. Brian and I met with Joe B today — he's quite a fan of yours.

All my best,
Kathleen

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Do you have a copy of FRB's "principles and procedures"? They referred to it in their letter to you — I think this is their July 6, 2017 letter to you, but it's not dated.