

Many in the U.S. (and around the world) are engaged in a vigorous debate about who is to blame for rising childhood obesity rates. The only point on which there may be wide agreement is that obesity is a complex problem with many contributing factors. I do not see a

participants – Cadbury Schweppes USA, Campbell Soup Company, The Coca-Cola Company, General Mills, The Hershey Company, Kellogg Company, Kraft Foods, McDonald's, PepsiCo,

guidance to food advertisers, addressing, for example, portion size and depiction of the product within the appropriate overall nutritional framework. It is important that the CARU guides remain a work in progress – providing additional, specific guidance to marketers as the nature of products available for kids and the techniques for promoting products to kids change.

Individual companies and other joint initiatives also are making changes. For example, characters popular with children are being used to promote healthy eating. Nickelodeon’s SpongeBob and Dora the Explorer now appear on packages of carrots and spinach, and Disney has partnered with Imagination Farms to produce the Disney Garden, where favorite Disney characters promote fresh fruits and vegetables. Disney’s new nutritional guidelines for children – announced in October – will govern all of its future character licensing and promotional activities directed at kids. And a new “healthy kids” Disney website went online about two weeks ago, featuring games that teach kids about healthy eating.⁶ Disney has a special ability to reach the youngest children, and that is why these initiatives are so important and encouraging.

For school-age children, the Alliance for a Healthier Generation – a joint initiative of the American Heart Association and the William J. Clinton Foundation – is working with food industry members to replace unhealthy foods with healthy choices in schools. In October, the Alliance announced an agreement with several leading manufacturers – Campbell Soup Company, Dannon, Kraft Foods, Mars, and PepsiCo – to establish nutritional guidelines for

an agreement with the American Beverage Association and major beverage producers PepsiCo, Coca Cola, and Cadbury Schweppes to limit the portion size and calorie content of drinks available to children during the school day.

A number of companies are developing healthier product lines with fewer calories and lower fat levels, particularly saturated and trans fats. And Kraft has taken the extra step of shifting its advertising viewed primarily by children ages 6-11 to its “better-for-you” foods, while at the same time continuing its policy of not advertising in media with a principal audience under age 6.

Over the past few months, I have observed the reactions of interested parties to these voluntary and self-regulatory efforts. Some argue that the efforts are wholly insufficient and fail to even begin to address the serious issues involved. Others argue that industry has no obligation to change its practices and should not be making any changes in its marketing practices towards kids.

I disagree with both positions. These industry initiatives are commendable, and my hope is that they will prompt competition among food marketers and entertainment companies to use their resources to develop healthy and appealing alternatives and to use their creativity to promote effectively those healthier foods and drinks to children and youth. This will not alone solve the problem and it will not happen overnight. But I do not need to tell you that advertising

targeted toward children and adolescents. This report must include an analysis of commercial advertising on television and radio and in print media; in-store marketing, including payments for preferential shelf placement; event sponsorship; promotions on packaging; Internet activities; and product placements in TV programs, movies, and video games. This is a very large undertaking, and the work has begun. The comment period on the “60-day” *Federal Register* notice⁷ (required by the Paperwork Reduction Act) closed on December 21, with 11 comments filed by public interest groups, food industry members and trade associations, the California Department of Health Services, and several individuals. A “30-day” *Federal Register* notice, providing an additional opportunity for comment, will be published in the spring. The Commission staff has also held informal meetings with various associations and their members to obtain background information that will facilitate preparation of the information requests. Our goal is to get the information the Commission needs to provide the thorough analysis that Congress expects of us, through a process that is no more burdensome than necessary.

Endorsement and Testimonial Guides

My second recommended resolution is to take the empty calories – that is unsupported claims – out of advertising. Sometimes those “empty calories” come in the form of product endorsements or testimonials.

The Commission’s Guides Concerning Use of Endorsements and Testimonials in Advertising⁸ have been slated for review. A Federal Register notice seeking comments on the Guides was published yesterday, January 16, 2007.

⁷ 71 *Fed. Reg.* 62109 (Oct. 23, 2006).

⁸ 16 C.F.R. 255.

Since 1992, the FTC has undertaken to review existing regulations and to repeal or reform those that are no longer valid or relevant. In the nearly 15 years since the program beg

research, as well as on the effects on advertisers and consumers if the guides were to be changed.

I encourage you to participate in this review process. The Commission needs to hear from a broad spectrum of interested parties before it determines whether and how best to make changes to these Guides.

Recent Advertising Cases

belts.’”¹³ Both the Commission and the U.S. Court of Appeals rejected the company’s argument that it was simply making a truthful “compare and save” claim.

As stated in the 4th Circuit opinion, the company “wanted to capitalize on the popularity of existing . . . abdominal belts,” knowing “that infomercials for those devices, which it referenced in its advertisements, had claimed that they caused the loss of weight, inches or fat, developed well-defined abdominal muscles, and offered an effective alternative to regular exercise.”¹⁴ While I do not believe that the Commission broke new ground in the *Telebrands* case, or created a novel theory of liability, I do believe the case brings home an important principle – indirect advertising claims can be just as powerful and as deceptive as direct claims. There are many ways to make claims indirectly, but creativity will not substitute for having adequate scientific substantiation.

Spyware

My third recommended resolution is to not succumb to the temptation to spy on consumers. Spyware, an area with enormous implications for privacy and data security, is another FTC priority. Spyware can range, in its most pernicious form, from a keystroke logger to track all of a consumer’s online activity, causing a significant risk of identity theft, to producing a barrage of advertising that the online consumer cannot escape.

The Commission has brought nine enforcement actions involving spyware in the past two years. These actions have reaffirmed three key principles: First, a consumer’s computer belongs to him or her, not the software distributor. Second, buried or fine print disclosures do not work,

¹³ *Id.* at 296-99.

¹⁴ *Telebrands Corp. v. FTC*, 457 F.3d at 359.

just as they have never worked in more traditional areas of commerce. And third, if a distributor puts a program on a consumer's computer that the consumer does not want, the consumer must be able to uninstall or disable it.

The Commission illustrated these principles in our most recent spyware settlement with Zango, Inc., formerly known as 180solutions.¹⁵ Zango provides advertising software programs, or adware, that monitor consumers' Internet use in order to display targeted pop-up ads. The consent order settles allegations that the company installed its advertising software programs on consumers' computers without adequate notice or consent. Zango's distributors frequently offered consumers free programs or software, such as screensavers, peer-to-peer file sharing software, and games, without disclosing that downloading it would also result in installation of Zango's adware. In other instances, Zango's third-party distributors exploited security vulnerabilities in Web browsers to install the adware via "drive-by" downloads. As a result, millions of consumers received pop-up ads without knowing why and had their Internet use monitored without their knowledge. Moreover, the company deliberately made these adware programs difficult for consumers to identify, locate, and remove from their computers so consumers were stuck with them no matter how they tried to get rid of them. The company used its adware to send billions of pop-up ads over several years. As part of the settlement, Zango agreed to disgorge \$3 million in ill-gotten gains derived from its past actions. The company also agreed to injunctive provisions that will protect consumers against these practices in the future.

In another recent case, the Commission persuaded the U.S. District Court for Nevada to

¹⁵ "Zango, Inc. Settles FTC Charges" (Nov. 3, 2006), *available at* <http://www.ftc.gov/opa/2006/11/zango.htm>.

shut down the Media Motor spyware program operated by ERG Ventures, LLC, and its affiliates.¹⁶ The Commission complaint charged that the defendants tricked consumers into downloading malevolent software by hiding the Media Motor program within seemingly innocuous free software, including screensavers and video files. Once insta

The self regulation in your industry is an enormous success story. But what has struck me during my tenure at the FTC is how many people, here and around the world, either do not know about it or, worse, simply do not believe it. In other parts of the world, for example, when I talk about the work of the National Advertising Division (NAD)/ National Advertising Review Council (NARC) arm of the Council of Better Business Bureaus and its importance to the U.S. marketplace and the FTC's work to eliminate deceptive marketing, some of my foreign counterparts look at me in disbelief. They do not believe that businesses can be trusted to self-regulate. It is critical that you continue to prove them wrong.

We welcome the new initiative, announced in September by the NAD and the Council for Responsible Nutrition, to increase monitoring of advertising for dietary supplements. Supplement ads have generated a great deal of Commission enforcement activity over the past decade. It is appropriate that industry now assume a greater share of the responsibility for ensuring truthful, substantiated claims for these products.

The Electronic Retailing Self-Regulation Program (ERSP) – another program established under the auspices of the NARC – has made great strides since its inauguration in 2004. In the first two years of operation, ERSP has issued 125 decisions and has established a compliance rate greater than 90 percent. This is a significant accomplishment for an industry where the term “infomercial” became largely synonymous with “deception.” Of course, the cooperation of broadcasters and the cable television industry is particularly critical to the success of the program. ERSP's advertising review is not limited to ERA members. For non-ERA members, the threat of loss of revenue that will occur if media outlets refuse to disseminate non-compliant advertisements may be even more effective than the threat of referral to the FTC. When I spoke

to the ERA about nine months ago, I noted that while some broadcast and cable companies had chosen to cooperate with the program, others had not. I understand there has been some increased participation since that time, and that is welcome news. Media participation will ensure the ultimate success of this program.¹⁷

One sector that does not appear yet to have benefitted from the self-regulatory programs I have just discussed is advertising targeting the Hispanic population through Spanish-language media. Accordingly, last September, the FTC coordinated a one-day surf of Spanish-language media by 60 law enforcement partners across the U.S. and in five Latin American countries. As a result of the surf, the FTC and its partners sent warning letters to 166 advertisers and 77 media outlets informing them that their advertisements may be deceptive.¹⁸ More than half of the ads uncovered were health related and made dubious claims for weight loss products and “disease cures.” Significantly, more than half of the weight-loss ads contained false Red Flag claims.

¹⁷ The Commission’s Red Flags Initiative provides a good example of how media can step up and take some responsibility for ensuring that deceptive advertising claims are not disseminated. About five years ago, FTC staff conducted a survey of ads for weight-loss products and found that almost half of them included at least one claim that was facially false. In response, we published a guide – appropriately titled *Red Flag Bogus Weight Loss Claims* – describing seven claims for non-prescription weight-loss products that should raise red flags because they are always false. For example, any claim that you can lose substantial weight, e.g., more than two pounds per week, without diet or exercise is false. My predecessor, Chairman Muris, and former Commissioner Leary met with members of the media and asked that they “do the right thing” and refuse to run advertisements that contain “Red Flag” claims. <http://www.ftc.gov/ftc/whistleblowers>

Clearly, this is a segment of the advertising industry where much greater efforts are required.

Technology Developments

Looking towards the future, the FTC is committed to understanding the implications of technology changes on privacy and consumer protection – as they are happening or even before they happen. Last week I was in Las Vegas for the Consumer Electronics Show. Being there, hearing the predictions of what is in store for us in the “Digital Decade,” as Bill Gates called it, and seeing the new devices and innovations that will be a part of our lives, assured me that capitalism is alive and well in our nation and consumers’ demands are setting the course. It also reminded me, though, of the Yogi Berra quote that: “The future ain’t what it used to be.”

I have committed the FTC to preparing for this exciting future, to the extent that any of us can. In November, we gave ourselves a glimpse into the future by convening public hearings on the subject of “Protecting Consumers in the Next Tech-Ade.” We heard from more than 100 of the best and brightest in the tech world about new technologies on the horizon and their potential effect on consumers. With the digitization of media, the mass marketing world is shifting to a micro marketing world, with advertisers able to fine tune their messages for specific micro audiences. In addition, advertising is becoming more interactive, with consumers having greater ability to exercise control over the commercial messages they receive. Interestingly, consumer-to-consumer communications are becoming more important in a kind of “back to the future” trend.¹⁹ Our report on the Tech-Ade conference will be published in the spring. I can assure you,

¹⁹ One area of marketing that is becoming increasingly popular is word-of-mouth marketing, sometimes called “buzz” marketing. The Commission received a complaint from a consumer advocacy group called Commercial Alert asking that the Commission issue guidelines

as one of my resolutions, that we will continue to educate ourselves to ensure that our policies and enforcement agenda remain relevant and supportive of a competitive marketplace – free of over-regulation, but also free of deception that harms consumers and depletes their confidence in
