Federal Trade Commission

CONSUMER PROTECTION ISSUES AT THE FTC:
THE YEAR BEHIND US, THE YEAR AHEAD

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at the

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I am pleased to be here today to talk about some of the recent consumer protection developments at the Federal Trade Commission. The agency has had a very busy and productive year, and I would like to discuss what I consider to be some of the highlights. I plan to cover three topics: recent rulemakings in the consumer financial protection area; the preliminary staff privacy report and my initial impressions about a do-not-track mechanism; and a couple of interesting (at least for me) issues that have arisen in our advertising cases.

I. Protecting Consumers in the Financial Marketplace

Although the worst of the economic recession may be behind us, the aftershocks are going to continue for the foreseeable future. Unfortunately, as consumers try to dig themselves

[1] The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisor, Beth Delaney, for her invaluable assistance in preparing these remarks.

out of debt and salvage their homes, there will be those who will try to capitalize on such financial vulnerability by deceptive or unfair conduct. Some of the Commission's recent rulemakings should help to reduce these activities.

A. Debt Relief Services Amendments to the Telemarketing Sales Rule

First, this past fall, the Debt Relief Services Amendments to the Telemarketing Sales Rule took effect.[2] This new rule, among other things, prohibits companies that sell debt relief services over the telephone from charging fees before settling or reducing a consumer's credit card or other unsecured debt. More specifically, this advance fee ban specifies that fees for debt relief services may not be collected until: the debt relief service successfully settles or changes the terms of at least one of the consumer's debts; there is a settlement agreement, debt management plan, or other agreement between the consumer and the creditor that the consumer has agreed to; and the consumer has made at least one payment to the creditor as a result of the agreement negotiated by the debt relief provider.

I had serious concerns about how the debt relief services industry was operating. One concern was the advance fee component. Almost all companies offering debt relief demanded and were paid a substantial amount, if not all, of their fees for their services up-front – before any services were rendered. Another concern stemmed from the business model itself – before the company tries to settle the debt, the consumer must stop paying the creditor and instead try to save a lump sum that the company will offer to the creditor as a settlement. A third concern related to the fact that despite having paid high fees to debt relief service providers, many consumers drop out of this type of program before any debts are actually settled.

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[2] FTC Press Release, *FTC Issues Final Rule to Protect Consumers in Credit Card Debt*, (July 29, 2010), *available at* http://www.ftc.gov/opa/2010/07/tsr.shtm.

I do think that this type of business model skews incentives. Because debt relief services companies were paid up-front, they had an incentive to exaggerate the benefits they would deliver and an incentive to downplay or omitkews in2se debt ns035pf thtenefconsequeivestenefconsun2se derd

[3] *Katharine Gibbs School v. FTC*, 612 F.2d 658 (2d Cir. 1979).

guidelines for private vocational and home study schools that are still in effect today. However, notwithstanding the Guides, the Commission determined that abuses in this industry warranted further action, and to that end, in 1974, it published for comment and public hearing a proposed Trade Regulation Rule. The Commission issued its final rule, "Proprietary Vocational and Home Study Schools," in December 1978, which as the Statement of Basis and Purpose ("SBP") stated, was promulgated to "alleviate currently abusive practices against vocational and home study school students and prospective students."[4] The SBP explained that at issue were unfair and deceptive advertising, sales, and enrollment practices engaged in by some of the schools. After being promulgated, the Rule was immediately challenged – twelve petitions were received

[4] Proprietary Vocational and Home Study Schools, Statement of Basis and Purpose, 43 Fed. Reg. 60,795 at 60,796 (Dec. 28, 1978).

[5] *Katharine Gibbs*, 612 F.2d at 662.

[6] *Id.*

specificity, the court also found that the Commission failed to have a rational connection between some of the Rule's requirements (for example, the refund provision) and the prevention of specifically described unfair and deceptive practices.[7]

I think the Commission has learned much since its rulemaking experiences in the 1970s, and I am impressed by the caliber of the rules that we promulgate. As a survivor of those early days, however, I must admit that I find it important to keep holding the agency's feet to the fire in perfecting and honing our abilities in building a rulemaking record. Put differently, I think a rule is only as strong as the rulemaking record supporting it.

B. Mortgage Advertising Practices Rule and Mortgage Assistance Relief Services Rule

The agency also has been very active on rulemaking proceedings related to the activities that occur throughout the "life-cycle" of a mortgage loan – for example, practices related to mortgage loan advertising and marketing as well as practices related to the offering of services to modify existing mortgages. These rulemaking proceedings were required by the Omnibus Appropriations Act of 2009,[8] and any rule resulting from these proceedings will apply only to entities within the FTC's jurisdiction under the FTC Act, which excludes banks, thrifts, and federal credit unions, among others.

As the first step in this rulemaking process, in June 2009, the FTC issued two Advance Notices of Proposed Rulemaking ("ANPR"): one relating to mortgage acts and practices

[7] *Id.* at 664.

[8] Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, § 626, 123 Stat. 524 (Mar. 11, 2009).

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[9] Advance Notice of Proposed Rulemaking: Mortgage Acts and Practices, 74 Fed. Reg. 26,118 (June 1, 2009); Advance Notice of Proposed Rulemaking: Mortgage Assistance Relief Services, 74 Fed. Reg. 26,130 (June 1, 2009); FTC Press Release, *FTC Begins Rulemaking to Address Unfair and Deceptive Mortgage Practices* (May 29, 2009), *available at* http://www.ftc.gov/opa/2009/05/decepmortgage.shtm.

[10] Notice of Proposed Rulemaking: Mortgage Acts and Practices – Advertising Rule, 75 Fed. Reg. 60,352 (Sep. 30, 2010); FTC Press Release, *FTC Proposes Rule to Ban Deceptive Mortgage Ads* (Sep. 22, 2010), *available at* http://www.ftc.gov/opa/2010/09/nprm.shtm.

[11] The proposed MAPS Rule would also allow the states to bring actions for civil penalties for violations of the rule.

[12] Notice of Proposed Rulemaking: Mortgage Assistance Relief Services, 75 Fed. Reg. 10,707 (Mar. 9, 2010).

[13] Final Rule: Mortgage Assistance Relief Services, 75 Fed. Reg. 75,092 (Dec. 1, 2010). *See also*, FTC Press Release, *FTC Issues Final Rule to Protect Struggling Homeowners from*

rating.

The MARS Rule also prohibits mortgage assistance relief companies from making any false or misleading claims about their services, including claims about the likelihood of consumers getting the results they seek; the company's refund and cancellation policies; or the

[14] Other prohibited misrepresentations include: the company's affiliation with government or private entities; the consumer's payment and other mortgage obligations; whether the company has performed the services it promised; whether the company will provide legal representation to consumers; the availability or cost of any alternative to for-profit mortgage assistance relief services; or the cost of the services.

[15] FTC Press Release, *FTC to Host Public Roundtables to Address Evolving Consumer Privacy Issues*,

forward.[18] Public comment periods followed each of the roundtables.[19]

The roundtables and public comment process culminated in the December 2010 issuance of a preliminary staff report entitled, "Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers."[20] As indicated by its title, the preliminary Report proposes a new 0004.rb-(.),A icasa Consum01/priv; by also suggestse: relim trackectira of9(certacy data, su eaasle, irntseadlisearchecties abrowsectieotevitiessecy ord r), Try Reposa tacycata list ch qIsstitssork fic comme

[18] FTC Press Release, *FTC Releases Agenda for Final Roundtable on Consumer Privacy*, (Mar. 10, 2010), *available at* http://www.ftc.gov/opa/2010/03/privacy.shtm.

[19] Public comments *available at* http://www.ftc.gov/os/comments/privacyroundtable/index.shtm.

[20] FTC Press Release, *FTC Staff Issues Privacy Report, Offers Framework for Consumers, Businesses, and Policymakers* (Dec. 1, 2010), *available at* http://www.ftc.gov/opa/2010/12/privacyreport.shtm (hereinafter "Report").

[21] FTC Press Release, *FTC Extends Deadline for Comments on Privacy Report Until February 18,* (Jan. 21. 2011), *available at* http://www.ftc.gov/opa/2011/01/privacyreport.shtm.

privacy protection, I think that is unnecessary. A privacy notice that is opaque or fails to disclose material facts (such as the fact that consumer information may be shared with third parties) is deceptive under Section 5. That is particularly true if the sharing of the information may cause tangible harm. To the extent that privacy notices have been buried, incomplete, or otherwise ineffective – and they have been – the answer is for the FTC to enhance efforts to enforce the "notice" model, not to replace it with a new framework. Moreover, I do not believe that Section 5 liability could be avoided by companies' eschewing a privacy notice altogether. Not only would that be competitive suicide, but it may also be deceptive in that it would entail a

[22] The duty to disclose "material" facts would be triggered when the information was collected, used, or shared in a manner that "is likely to affect the consumer's conduct or decision with regard to a product or service." *See* FTC Policy Statement on Deception, *appended to Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174, 175 (1984). In some cases, disclosure would not have to be express. For example, using consumer information to provide order fulfillment would be disclosed by virtue of the transaction itself. *See also* Report at vi, 41, 52-53.

[23] Letter from the Federal Trade Commission to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation, United States Senate, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction, *reprinted in In re Int l Harvester Co.*, 104 F.T.C. 949, 1070 (1984).

[26] Tanzina Vega and Verne Koptytoff, *In Online Privacy Plan, the Opt-Out Question Looms*, New York Times, Dec. 5, 2010, *available at* http://www.nytimes.com/2010/12/06/business/media/06privacy.html?ref=tanzinavega.

[27] *Id. See also id.* ("Small publishers, however, rely heavily on ad networks and tailored

[28] Opinion of the Commission, *In re Daniel Chapter One and James Feijo*, Docket No. 9329 (Dec. 24, 2009), *available at*

I believe that corrective advertising continues to be a remedy that the Commission should consider in national advertising cases. When evaluating whether corrective advertising would be appropriate, there are three factors that I think are important.

First, has the advertising of the problematic claims been of such an extent and duration that it has created an impression in the public mind that can only be corrected requiring the company to engage in remedial advertising? For example, a couple of years ago, I dissented from the Commission's settlement with Airborne Health, Inc., the maker of a popular effervescent tablet marketed as a cold prevention and treatment remedy, in part because the order did not include a requirement for corrective advertising.[37] In that case, to resolve a Section 13(b) challenge in federal court, Airborne agreed to pay up to $6.5 million in consumer redress to settle charges that it did not have adequate evidence to support its advertising claims. I dissented because I was concerned that the Stipulated Final Order allowed the defendants to deplete their existing inventory of paper cartons and display trays – packaging that contained the problematic representations. I believe that "run-out provisions" like this should not be included in the Order – once defendants sign the Order, they should not be allowed to continue to perpetuate misperceptions about their product by exhausting their inventory of deceptive packaging. In addition to striking the run-out provisions, I also believed that the only way to effectively remove lingering misperceptions from the product's extensive advertising campaign would have been to require the defendants to engage in corrective advertising.[38]

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[37] FTC Press Release, *Makers of Airborne Settle FTC Charges of Deceptive Advertising; Agreement Brings Total Settlement Funds to $30 Million*, (Aug. 14, 2008), *available at* http://www.ftc.gov/opa/2008/08/airborne.shtm.

[38] *See, e.g.*, *Novartis Corp. v. FTC*, 223 F.3d 783 (D.C. Cir. 2000); *Warner-Lambert*, 562 F.2d 749; *In re Eggland s Best, Inc.*, 118 F.T.C. 340 (1994).

[39] *See, e.g.*, Analysis of Proposed Consent Order to Aid Public Comment, *In re The Dannon Company* (Dec. 15, 2010), *available atTT2 1 Tf 7.3 0n 15, 2010),*

Products, as well as other health-related claims about other products, unless such representations were true, non-misleading and, at the time they were made, respondents possessed and relied upon competent and reliable scientific evidence that substantiated the claims.[41]

On appeal, respondents argued, among other things, that the Initial Decision improperly required double-blind, placebo-controlled studies as substantiation, even though the Food Drug and Cosmetic Act ("FDCA") itself did not require such studies for structure/function claims for dietary supplements, which are allowed by the Dietary Supplement Health and Education Act (DSHEA), a 1994 amendment to the FDCA.

The Commission's Opinion noted that under the FDCA, a "structure/function" claim is defined simply as one that describes "the role of a nutrient or dietary ingredient intended to affect the structure or function in humans."[42] The Opinion went on to explain that the Respondents' representations that the Challenged Products would treat or cure cancer, prevent or shrink tumors, and ameliorate the side effects of radiation and chemotherapy did not simply describe the "role" that those four products would play in affecting the structure or function in humans, and accordingly, they were not merely "structure/function" claims under the DSHEA.[43] The Opinion also recognized that DSHEA expressly provides that even compliant "structure/function" claims are permitted only if they are "truthful and not misleading" and the

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[41] The order also contained a provision that provided that respondents were not prohibited from making claims that were permitted by the FDA under labeling standards or approved drug applications, or regulations promulgated by the FDA pursuant to the Nutrition Labeling and Education Act of 1990 ("NLEA").

[42] Commission Opinion at 16, *citing* 21 C.F.R. § 101.93(f) (2009).

[43] *Id.*

manufacturer "has substantiation" that such claims are true.[44] Thus, the Opinion noted that the DSHEA amendment to the FDCA was not inconsistent with the FTC case law as applied by the ALJ. Indeed, even if the FDCA had departed from the FTC Act and its relevant case law, Respondents offered no authority that it would be binding on the Commission.

A second recent example illustrating an FTC/FDA intersection was the issuance of warning letters to four marketers of caffeinated alcohol drinks.[45] In the warning letters, marketers were informed that consumer safety is among the highest priorities of the FTC and that safety concerns have, in the past, contributed to the Commission's decision to take action against alcohol marketers. In the particular instance of caffeinated alcoholic beverages, the FTC had become aware of a number of recent incidents suggesting that alcohol containing added caffeine may present unusual risks to health and safety.

Simultaneous with the FTC's action, the FDA announced that it was sending letters to the same four companies, warning that, as used in their products, caffeine is an "unsafe food additive" under the FDCA. Our warning letters highlighted this very finding, pointing out to the marketers that the FDA's warning that caffeine is an "unsafe food additive," as used in their products, was a relevant consideration in the FTC's analysis of whether the marketing of caffeinated alcohol products is deceptive or unfair under the Federal Trade Commission Act. The letter also informed the marketers that historically the FTC has accorded significant weight to FDA findings regarding product safety and efficacy.

I think the language used in the warning letters illustrates one manner in which FDA

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[44] *Id. citing* 21 U.S.C. § 343 (r)(6)(B) (2009).

[45] FTC Press Release, *FTC Sends Warning Letters to Marketers of Caffeinated Alcohol Drinks*, (Nov. 17, 2010), *available at* http://www.ftc.gov/opa/2010/11/alcohol.shtm.

findings and standards can be extremely helpful. In the areas where our jurisdiction is co-extensive, the FDA's determination one way or another on any particular issue is not binding on the Commission, however, it can be used very effectively to inform our decision to bring an action.

A third example of this intersection – and another illustration of how the FDA regulatory

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[46] In cases where the company has made unsubstantiated claims about other health benefits, (other than disease prevention or reduction claims), the revised provisions require competent and reliable scientific evidence for substantiation and "competent and reliable scientific evidence shall consist of at least two adequate and well-controlled human clinical studies of the Covered Product, or of an Essentially Equivalent Product, conducted by different researchers, independently of each other, that conform to acceptable designs and protocols and whose results, when considered in light of the entire body of relevant and reliable scientific evidence, are sufficient to substantiate that the representation is true."

Finally, for other health benefit claims – namely ones that were not at issue in the present case – the revised order provisions require "competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true. For purposes of this provision, competent and reliable scientific evidence means tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield accurate and reliable results."

The Analysis to Aid Public Comment ("AAPC") does a good job of explaining the reasoning behind this provision: "respondent cannot claim that a covered product reduces the likelihood of getting a cold or the flu unless the FDA has issued a regulation authorizing the claim based on a finding that there is significant scientific agreement among experts qualified by scientific training and experience to evaluate such claims, considering the totality of publicly available scientific evidence. The AAPC goes on to explain that, as noted in the Commission's Enforcement Policy Statement on Food Advertising, "[t]he Commission regards the 'significant scientific agreement' standard, as set forth in the NLEA and FDA's regulations, to be the principal guide to what experts in the field of diet-disease relationships would consider reasonable substantiation for an unqualified health claim."[47] Thus, although the Enforcement Policy Statement does not say that the only way a food advertiser can adequately substantiate a disease risk-reduction claim is through FDA authorization, the consent order provision requiring FDA pre-approval before respondent makes a reduced cold or flu likelihood claim for its covered products in the future will facilitate compliance with and enforcement of the order and is reasonably related to the violations alleged.

Thanks for your time and attention today.

[47] Enforcement Policy Statement on Food Advertising (1994), *available at* http://www.ftc.gov/bcp/policystmt/ad-food.shtm.