



Federal Trade Commission

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Chairman, Federal Trade Commission
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Washington, D.C.
Luncheon Address
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“Food for Thought: The FTC and Market Influences on Consumer Health”

I. Introduction

I am pleased to be here today. I would like to thank the Food and Drug Law Institute for inviting me to be part of this special event marking 50 years of outstanding programs to educate food and drug professionals. In this constantly evolving field of law, your efforts to keep us all up-to-date are important. And congratulations to those who will be honored today for their roles in FDLI's success.

As the luncheon speaker at the 50th Annual Food and Drug Law Institute Conference, it will be difficult for me to avoid the temptation to use a few food metaphors today. I will, however, do my best to whet your appetite with a little food for thought and proceed with

¹ The views expressed herein are my own and do not necessarily represent the views of the Federal Trade Commission or any other Commissioner.

minimal puns from here on.

This morning you heard from Commissioner Eschenbach about the critical mission of the Food and Drug Administration to protect and promote consumer health while overseeing the safety of everything from the food we eat to innovations like nano-technology (one of the topics on tomorrow's agenda). This is an enormous charge, and we are reassured by the range of scientific, medical, and nutrition expertise housed in the various centers of FDA.

The FTC has jurisdiction to protect competition – which in turn protects consumers – and then to further protect consumers from unfair and deceptive practices in most economic sectors. The FTC is a small, independent agency of around 1100 employees, made up primarily of lawyers and economists, with an annual budget of a little over \$200 million. While our mission is different from that of the FDA, and we do not have their level of scientific and technical knowledge, we do have an important contribution to make to consumer health, and we frequently partner with the FDA on health issues. The two agencies share jurisdiction over health-related products pursuant to a longstanding agreement.² Under this agreement, the FTC has primary responsibility to oversee the advertising of over-the-counter drugs, food, cosmetics, and devices, while the FDA regulates the labeling of these products. Through this work, our staff has developed a keen understanding of marketplace forces and consumer behavior, and our expertise in the workings of the market is a valuable complement to FDA's oversight of the food and drug industry.

Marketplace forces can and do have a tremendous impact on consumer health – both

² Working Agreement Between the FTC and FDA, 3 Trade Reg. Rep. (CCH) ¶ 9,859.01 (1971).

positive and negative. Food and entertainment companies can harness the creative ingenuity of their marketing teams and advertising agencies to educate families about good nutrition. They can even persuade young children to turn off the TV and go out and play – and while you are at it, eat more vegetables. At the same time, there are too many unscrupulous purveyors of products that they claim produce weight loss without diet or exercise , “ionized” bracelets that eliminate chronic pain, or herbal teas that lower blood sugar and treat diabetes. They trick desperate consumers into wasting their money. And, worse, they often misdirect consumers from proven methods to manage their weight, reduce chronic pain, or treat serious diseases.

It is the FTC’s role to ensure that the market is competitive so as to provide consumers with ample and affordable choices for managing their health and that it gives them accurate and timely information about these choices. I would like to share with you just a few examples of the Commission’s ongoing efforts to foster positive market influences on consumer health and to rid the market of negative influences.

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³ Centers for Disease Control and Prevention, “Overweight and Obesity: Childhood Overweight: Overweight Prevalence,” *available at* <http://www.cdc.gov/nccdphp/dnpa/obesity/childhood/prevalence.htm>.

⁴ Institute of Medicine, “Food Marketing to Children and Youth: Threat or Opportunity?” (2006) pp. 2-2 to 2-3.

⁵ Centers for Disease Control and Prevention, “Overweight and Obesity: Childhood Overweight: Consequences,” *available at* <http://www.cdc.gov/nccdphp/dnpa/obesity/childhood/consequence.htm>

Campbell Soup Company, The Coca-Cola Company, General Mills, The Hershey Company, Kellogg Company, Kraft Foods, Masterfoods, McDonald's, PepsiCo, and Unilever – have pledged to change both the content of their messages to kids about what they should be consuming, as well as how they communicate those messages. Of course, the true test of this initiative will be in the details of how pledges are implemented and whether the program will grow beyond these 11 charter companies. I hope this initiative will produce noticeable change in the children's food marketing landscape.

At the same time, in another significant development, the Children's Advertising Review Unit (CARU) revised the self-regulatory system for children's advertising. CARU's revised guidelines address topics such as unfair conduct in advertising targeted to children; the blurring of distinctions between advertising and program or editorial content; and the use of commercial messages in interactive games or "advergaming." They also require that messages in children's food advertising be nutritionally responsible. For instance, ads should depict portion sizes appropriate to children and should not portray snacks as a meal substitute. The changes to CARU's program are an important initial step in what needs to be an ongoing effort to make sure that the self-regulatory process is transparent, tough, and keeps pace with new marketing techniques.

The media and entertainment companies also are using their marketing power to reach young audiences with positive health messages. For better or worse, beloved characters like Sesame Street's Elmo capture the attention of young children in ways that parents and teachers cannot. At our workshop, we saw remarkable data about Elmo's ability to persuade children to choose broccoli, even over chocolate. We know that Cookie Monster has already changed his

having an impact on children's health. I am optimistic about what we will find even as I recognize that effecting the necessary change will take time and require sustained and new efforts.

III. Keeping Market Free of Negative Influences

Even as we highlight some of the industry efforts to combat obesity, we know that they are being undermined by those who seek to take advantage of consumers desperate to lose weight. Some promise dramatic, effortless weight loss in a pill. Others offer potions that will speed up your metabolism. The FTC is constantly combating weight loss fraud and other health scams with aggressive legal action, initiating, over the past decade, 229 enforcement actions challenging false and misleading health and safety claims for products ranging from weight-loss pills to cancer cures.

A. Weight Loss Fraud

This January, in a "New Year's Resolution" press conference, the FTC announced settlements with the makers of four significant and high-profile weight-control and weight-loss products, Trimspa, Cortislim, Xenadrine, and One-A-Day WeightSmart.⁹ The marketers of these four products, collectively, surrendered total cash and assets worth more than \$25 million. Their conduct illustrates why the Commission must be tough against fraud. TrimSpa for example, promised to make losing "30, 50, even 70 pounds painless." Cortislim marketers attempted to disguise their ads as talk shows featuring an expert medical professional. Ads for Xenadrine EFX promised rapid and substantial weight loss despite the fact that one of their studies showed

⁹ "Federal Trade Commission Reaches New Year's Resolution with Four Major Weight-Control Pill Marketers," (Jan. 4, 2007) *available at* <http://www.ftc.gov/opa/2007/01/weightloss.htm>.

more weight loss in the placebo group than in the group taking Xenadrine. The Xenadrine ads also featured testimonials from extremely trim and muscular consumers – who failed to mention not only that they had been paid up to \$20,000 for their testimonials but also that their “After”-photo bodies were actually the product of rigorous diet and exercise programs.

Claims for Bayer’s One-A-Day WeightSmart may have been slightly more restrained, but still fell short on substantiation. The product was a multivitamin supplement advertised to enhance metabolism and help control weight. It contained, however, only a sprinkling of green tea extract, the purported weight control ingredient. The case is a reminder that the FTC’s substantiation standard for health claims not only requires that marketers possess competent and reliable scientific studies, but also that those studies must match the product being marketed and the claims being asserted. Too often, marketers overlook the second part of that equation, for instance, claiming weight loss where only metabolism effects have been studied, or marketing a product containing only a fraction of the active ingredient studied.

The Bayer case also illustrates that the FTC’s enforcement actions are not limited to outright fraud by fringe marketers. The FTC will take action against any company that steps across the line and makes exaggerated claims for otherwise legitimate products. The civil penalty in Bayer – \$3.2 million – is the largest penalty for an order violation ever obtained by the FTC in a health case.

We currently are in litigation with Centro Natural Services, which sold a supposed obesity treatment in the form of pills and “special soap” that would “reduce dress sizes,” and made claims that you can “Lose 35 pounds in 2 months,” “Everything you lose, you will never

gain back,” and “No diets, no skipping dinner, no calorie counting, no side effects.”

¹⁰ See FTC Press Release, *FTC: Three Pills and Special Soap “Obesity Treatment” Won’t Wash Away the Pounds* (Oct. 17, 2006) available at <http://www.ftc.gov/opa/2006/10/centronatural.shtm>.

¹¹ See FTC Press Release, *Final Consent Order Issued in Matter of Basic Research, LLC* (June 23, 2006) available at <http://www.ftc.gov/opa/2006/06/fyi0641.shtm>.

¹² See FTC Press Release, *Dietary Supplement Maker Garden of Life Settles FTC Charges* (Mar. 9, 2006) available at <http://www.ftc.gov/opa/2006/03/gardenoflife.shtm>.

drive to stop these scams.¹³ The first step was the issuance of 180 warning letters and advisories to online marketers in three countries. Follow-up action may include seizures by FDA and FTC actions for injunctions. The FTC also launched a consumer education campaign to help consumers avoid phony diabetes cures. One component of that campaign employs a “teaser” Web site for a fictitious product called “Glucobate.” When consumers go to the site and click for more information, they are linked to an FTC page warning them about health scams. Indeed, in just a few months, the Glucobate Web site received more than 20,000 hits, and information

¹³ See FTC Press Release *FTC and FDA Act Against Internet Vendors of Fraudulent Diabetes Cures and Treatment* (Oct. 19, 2006) available at <http://www.ftc.gov/opa/2006/10/diabetessweep.shtm>.

¹⁴ *FTC v. QT, Inc.* 448 F. Supp. 2d 908 (N.D. Ill. 2006).

know, my life is normal again.”¹⁵ Unfortunately, Q-Ray’s marketers had no valid science to back up their pain relief claims. As the Judge said, “Not only did Defendants not have a gold-standard study in their possession, they did not even have a copper-standard study.”

The Commission will not tolerate such egregious misuse of testimonials, and we litigated this case to the bitter end to get a court order requiring the marketers to pay up to \$87 million in refunds to consumers – the entire net sales generated by the infomercials.¹⁶ But there is also a need for the Commission to tackle the problem of testimonial misuse more systematically.

As you may know, the Commission’s Guides Concerning Use of Endorsements and Testimonials in Advertising have been slated for review. The comment period has now been extended to June.¹⁷ While these guides contain many useful principles, they have not been revised for more than 27 years. It may be time to make a few changes (if for no other reason than to update archaic examples that refer to secretaries giving testimonials about their favorite typewriters).

For the current review, the Commission has released reports on two studies it commissioned regarding the messages conveyed by consumer endorsements. The studies examined questions related to the “typicality” of the consumer’s experience implied by testimonials. They also examined the impact of disclosures indicating that results may not be typical. If an ad features a consumer hesan 27 8s9eyed by gge9 the Judge

¹⁵ *Id.* at 924-25.

¹⁶ *Id.* at 975.

¹⁷ See FTC Press Release, *FTC Requests Comments on Endorsement Guides* (Jan. 16, 2007) available at <http://www.ftc.gov/opa/2007/01/fyi0707.htm>.

may be necessary to prevent misleading implications? These are the types of questions we need help in exploring, and we invited comments.

V. Conclusion

Like a fine meal, there are many components that go into creating a robust healthcare marketplace – one that offers consumers affordable and effective choices. Obviously, it has to start with fine ingredients – and those ingredients are the many innovative products that the food and drug industry offer to improve consumer health. Next, the recipe calls for a perfect balance of seasonings. By that I mean a little sweetness, and a little spicy heat. The sweetness is our encouragement of industry to market responsibly and our support of self-regulatory programs. The heat is tough enforcement when necessary. And no recipe could be a success without the best chefs – the many bright and dedicated professional staff at agencies like the FTC and FDA and HHS and the creative thinkers in industry.

Thank you and I would be happy to take any questions.