

**Keynote Address of Commissioner Edith Ramirez**

**Association of National Advertisers  
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Good morning, everyone, and thank you very much for your kind invitation to speak to you today. It's terrific to have an opportunity to discuss some of the FTC's recent work in the advertising arena.<sup>1</sup>

I'd like to start by telling you about a recent experience I had as a consumer. A few weeks ago, in the midst of snow, slush, and the freezing cold, I started to feel a little under the weather. Now keep in mind that I'm a Southern California native and that this is my first winter in DC and my first winter on the East Coast since I was in law school. The last thing I wanted was to get sick and reveal to everyone that I can't handle the winters here. So I did what any self-respecting consumer would do — I jumped online to look for a product that would solve my problem. I typed in the phrase "prevents cold and flu," and lo and behold, I found exactly what I was looking for right at the top of my search results.

One of the first links in my search results described a group of people on the Island of Leonia who never get sick. I was intrigued so I clicked on the link and found some very interesting information. But I also noticed that the site seemed to know a lot about me. For instance, the ads on the margins catered to the fact that I am from Los Angeles, that my office is in the Federal Triangle, and even to the type of car I drive.

Then, I turned to a fascinating story about a blogger who came across a special variety of starfruit that grows only in the rainforests of Leonia. As it turns out, the Leonians have been eating this fruit for centuries and apparently they never get colds or the flu. So, the blogger decided to give the fruit a try. She said that she used to get on average two to three colds every winter, but that after trying the starfruit, a whole winter went by and she didn't get sick once.

morning: online privacy, health-related advertising, endorsements and testimonials, and green marketing.

## **I. Privacy**

accepted practices. Staff has sought comment on what practices fall into this “commonly-accepted” category. And for practices that are not commonly-accepted, the report recommends that consumers be given notice and choice.

not new, so why the call now for Do Not Track? I think there are several reasons why the proposal is gaining traction now. First, the met

personalized ads that many consumers value and prefer. But while I am sensitive to the concern that Do Not Track will undermine the basic business model that underlies much of the Internet, I believe that concern is overstated.

As reflected in recent rer



Dan Active dairy drink helped prevent colds and flu. And in a major advertising campaign that included TV ads featuring the actress Jamie Lee Curtis, Dannon claimed that one daily serving of its Activia yogurt relieved temporary irregularity.

The *POM Wonderful* case involves claims about the health benefits of antioxidants in POM juice and POM dietary supplements. The FTC's complaint challenges claims that POM products prevent and treat heart disease and prostate cancer, among other things. The Commission also entered into a consent order against dietary supplement manufacturer Iovate Health Sciences, concerning weight loss and other health claims.<sup>14</sup>

In all of these cases, the companies pointed to scientific studies that ostensibly backed-up their health claims, but the Commission alleged that the available science simply did not support them. While the Commission resolved the *Nestlé*, *Iovate* and *Dannon* cases through consent orders, its litigation against POM is ongoing before an administrative law judge.

The consent orders in *Nestlé*, *Iovate*, and *Dannon* contain two new provisions that have generated some controversy. First, these orders prohibit claims that a product will reduce the risk of colds or flu unless they have been approved by the FDA. For other health claims, such as weight loss or the reduction of temporary irregularity, the orders require competent and reliable scientific evidence in the form of at least two independent and well-controlled human clinical studies of the covered product, or of an essentially equivalent product.

Some have argued that these two provisions represent a major shift in how the FTC approaches advertising substantiation. We have heard the charge that the Commission has abandoned the flexible substantiation requirements established in its 1972 decision in *Pfizer*.<sup>15</sup> But reports of the death of *Pfizer* are greatly exaggerated. I would like to dispel the notion that the FTC has heightened the substantiation required by the FTC Act or abandoned the *Pfizer* test.

The Commission retooled its order provisions for two very practical reasons: first, to provide brighter lines and greater clarity for companies that are under order. And, second, to make it easier for the FTC to enforce its orders in civil penalty or contempt proceedings.

The broad "competent and reliable scientific evidence" standard found in the FTC's old orders presented significant enforcement challenges. Too often, companies under order viewed this open-ended language as a license to continue making the same false claims that had brought them to the FTC's attention in the first place, often relying on an outlier study. And it took a great deal of time and resources to prove the order violation.

Using FDA approval as a proxy avoids this problem. Either a claim has been approved by the FDA or it hasn't. We will still no doubt have disputes with companies over the meaning

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<sup>14</sup> See *Iovate Health Sciences USA, Inc.*, FTC File No. 072-3187 (final judgment and order), available at <http://www.ftc.gov/os/caselist/0723187/100729iovatestip.pdf>.

<sup>15</sup> *In the Matter of Pfizer, Inc.*, 81 F.T.C. 23, 64 (1972).

of a particular advertisement, but we will not spend years litigating whether the FDA has approved a claim.

So, the new order provisions do not represent a shift toward a stricter and more rigid substantiation standard under the FTC Act. Rather, the requirement of FDA approval is simply a form of “fencing-in” relief. Where an advertiser has already been accused by the FTC of making unfounded disease claims and is now subject to an order, it’s reasonable to prohibit the advertiser from making the same type of disease treatment or prevention claims without FDA approval.

It is also worth noting that back in 1994, in its policy statement on food advertising, the Commission made clear that FDA standards would serve as the FTC’s principal guide in examining scientific substantiation.<sup>16</sup> In other words, the gap between what the FTC Act requires and what the FDA requires in the food marketing realm has never been great.

Our complaint against POM Wonderful shows that we are not seeking to ratchet up the substantiation requirements for companies that aren’t under order. The *POM* complaint alleges that the respondents lacked a reasonable basis for their health claims. In other words, the Commission’s complaint advances the same theory of liability that it has asserted for decades — that advertisers must have a reasonable basis for their objective claims. It does not assert that the respondents violated the FTC Act because they did not obtain FDA approval to make these claims.

A similar, practical rationale applies to the second part of our recent orders, which requires two independent well-conducted clinical studies. The Commission, with input from its consulting experts, determined that this was the level of substantiation mandated by *Pfizer* as applied to the weight loss claim in *Iovate* and the medical treatment claims in *Nestlé* and *Dannon*.



### **III. Revisions to the Endorsement Guides**

I'd now like to address the FTC's recently revised Endorsements Guides. Endorsements and testimonials are appearing in contexts that were unheard of just a few years ago. Today, consumers seek out information about products through a variety of means, including social networks and blogs that are far from traditional forms of advertising.

According to a recent Zogby Interactive poll, 63% of all adults say they visit blogs at least occasionally. Thirty-five percent of adults visit a blog daily. One in five blog readers say they have purchased a product or service advertised on a blog.<sup>17</sup>

Consumer reviews are also increasingly influential. In a Nielsen survey conducted in 2009, 70% percent of the consumers surveyed stated that they trust consumer opinions posted online.<sup>18</sup>

This means that payments by advertisers to bloggers and other online endorsers must be disclosed. This includes situations when an endorser has been given something of value to tout a marketer's product. As has always been the case, the Commission's aim is to ensure that the audience understands the reviewer's relationship to the company whose products are being reviewed.

Our enforcement actions also make clear that the focus remains on advertisers. For example, today the Commission is announcing a consent order against a company called Legacy Learning Systems and its owner.<sup>21</sup> Legacy recruited what it called "Review Ad" affiliates to promote the company's popular series of guitar lesson DVDs through endorsements in articles, blog posts, and other online editorial material, in exchange for substantial commissions on the sale of each product. These endorsements generated millions of dollars in sales of Legacy's courses. Although Legacy was in effect paying its affiliates to write positive reviews, it failed to take reasonable steps to ensure that its affiliates were disclosing their financial ties to Legacy. Many did not, and, instead, passed themselves off as ordinary consumers or independent reviewers. The FTC's complaint charges Legacy with two counts of deception — for causing dissemination of their affiliates' deceptive reviews and, relatedly, for failing to employ a reasonable monitoring program to ensure that their affiliates disclosed that they were getting paid by Legacy. Under the settlement, the respondents will have to monitor their affiliate marketers and make sure they are disclosing that they are not independent users or ordinary consumers. In addition, Legacy and its owner must disgorge \$250,000 in ill-gotten gains.

The *Legacy* case follows the Commission's first enforcement action under the new Endorsement Guides against a company called Reverb.<sup>22</sup> Reverb is a public relations agency that was hired by video game developers to promote their games online. The company engaged in deceptive advertising by having employees pose as ordinary consumers posting game reviews on the iTunes store and not disclosing that the reviews came from paid employees working on behalf of the developers. We alleged that this information would have been material to consumers reviewing the iTunes posts in deciding whether to buy the games.

The *Legacy* and *Reverb* settlements confirm that well-settled principles of truthful advertising apply to new forms of online marketing. Advertisers should not pass themselves off as ordinary consumers touting a product, and they should ensure that endorsers make it clear when they have financial connections to sellers.

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<sup>21</sup> See *Legacy Learning Systems, Inc.*, FTC File No. 102-3055 (Mar. 15, 2011) (consent order accepted for public comment), available at <http://www.ftc.gov/os/caselist/1023055/110315llsagree.pdf>.

<sup>22</sup> See *Reverb Communications, Inc.*, FTC File No. 092-3199 (Nov. 26, 2010) (final decision and order), available at <http://www.ftc.gov/os/caselist/0923199/101126reverbdo.pdf>.

#### IV. Revisions to Green Guides

My final topic is “green” marketing, another area of growing importance to consumers. Green claims tend to be “credence” claims — in other words, consumers often can’t determine for themselves if the claims are truthful or substantiated. As a result, the Commission’s Green Guides play an important role in ensuring that consumers can make well-informed decisions about their environmental choices, and that sellers fulfill their promises.<sup>23</sup>

Since the Guides were last revised in 1998, green claims have become a virtual fixture in marketing of all types of products and services. Unfortunately, this explosion of green claims has led to “greenwashing” — the phenomenon by which consumers grow skeptical or even become numb to these types of claims because some marketers have stretched the meaning of green too far.

Against this backdrop, the Commission decided it was time to update its Green Guides. The Commission held three public workshops, elicited comments, and conducted a consumer perception study to see how consumers interpret different types of green claims.

Last fall, we proposed updated guidance in which we suggested that advertisers should qualify general claims to focus consumers on the specific environmental benefits that can be adequately substantiated.<sup>24</sup> The proposal also includes a new section addressing the use of certifications and seals of approval, which emphasizes that they are considered endorsements and should therefore comply with the principles contained in the FTC’s Endorsement Guides. Moreover, we advise marketers to accompany seals or certifications with clear and prominent language limiting implied general environmental benefits to particular attributes that can be substantiated.

The new Guides also include new types of claims that were not addressed before. For instance, the proposed changes incorporate advice about claims regarding the use of the terms “renewable materials” and “renewable energy,” advising marketers to provide specific information about the materials and energy used. The proposed Guides also provide guidance about carbon offset claims, recommending that marketers disclose if the emission reductions that are being offset by a consumer’s purchase will not occur within a certain period of time, and that they avoid advertising an offset if the activity that produces that offset is already required by law.

There were, however, some types of claims, such as claims that a product is “sustainable,” “natural,” or “organic,” that were discussed during this process, but for which the Commission decided not to offer new guidance at this point due to a lack of sufficient information or to avoid duplication with guidance offered by other government agencies.

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<sup>23</sup> See FTC Green Guides (1998), available at <http://www.ftc.gov/bcp/grnrule/guides980427.htm>.

<sup>24</sup> See Proposed Revisions to the Green Guides (Oct. 2010), available at <http://www.ftc.gov/os/fedreg/2010/october/101006greenguidesfrn.pdf>.

Our proposal did include additional requests for comment, and we received over 300 comments. We are now in the process of reviewing them, and we hope to issue our final guides some time later this year.

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Let me close with a final point, in case it is not already obvious. The subjects that have dominated the FTC's recent advertising agenda are quite diverse. But what connects them is that these are the issues that are crucial to consumers today. It is always a challenge for any law enforcer to keep pace with a rapidly-changing marketplace, but there is no question in my mind that in the advertising realm, the FTC is doing just that.

Thank you, and I will be happy to take any questions you may have.