

**PREPARED STATEMENT OF
THE FEDERAL TRADE COMMISSION**

on

ADVERTISING TRENDS AND CONSUMER PROTECTION

Before the

**SUBCOMMITTEE ON CONSUMER PROTECTION,
PRODUCT SAFETY, AND INSURANCE
of the
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION**

UNITED STATES SENATE

Washington, D.C.

July 22, 2009

looked at ads printed in newspapers and magazines, pasted on billboards, and broadcast by radio and television stations. Today, we also have cable television, the Internet, cell phones, and other hand-held electronic devices, with growing opportunities for techniques like viral and word-of-mouth marketing. It seems that we are continually learning about new and creative methods to get promotional messages out to consumers. Consequently, the work of monitoring advertising for compliance with the law has greatly expanded.

Today, this testimony will focus on a few areas that are of particular importance to the Commission's current advertising enforcement agenda: health and safety claims, issues raised by the use of endorsements and testimonials, environmental marketing or "green" claims, and advertising that preys on victims of the economic downturn, including offers of "free" products. Of course, these are not the only areas of focus in the Commission's advertising program. Other important FTC priorities, such as advertising to children and behavioral targeting, are not addressed in this testimony.

II. Health and Safety Claims

Americans have become far more health conscious over the past two decades. Not surprisingly, the marketplace has seen a steady stream of new or reformulated products purporting to help consumers get and stay healthy. Just within the past year, the FTC has challenged advertising claims for weight loss, cold prevention, improved concentration, and even the cure of very serious diseases, such as diabetes and cancer.

In a major law enforcement initiative targeting bogus cancer cures, the FTC announced 11 actions charging that a number of companies and individuals made false or unsubstantiated claims that their products – including laetrile, black salve, essiac tea and other herbal mixtures, coral calcium, and shark cartilage – cure or treat cancer, and, in some cases, that clinical or

scientific evidence proves the products work.³ One seller also was charged with deceptive use of a consumer testimonial about the product's efficacy because the ad failed to disclose the connection between the endorser and the company: the "consumer" endorser was, in fact, the owner of the company.⁴ Most of these actions have been resolved through settlements that bar future false or unsubstantiated claims and require notification to purchasers that little or no scientific evidence exists to demonstrate product effectiveness and urging them to consult with their doctors. Four of the settlements also re

³ See Press release, FTC Sweep Stops Peddlers of Bogus Cancer Cures (Sept. 18, 2008), available at <http://www.ftc.gov/opa/2008/09/boguscures.shtm>.

⁴ Holly A. Bacon d/b/a Cleansing Time Products, Docket No. C-4238 (Oct. 22, 2008).

⁵ A default judgment was entered in another matter, and one case was dismissed without prejudice because the individual lives in Mexico and cannot be served.

benefit claims they are making to sell their goods. Many are going far S7.000000(20)Tj15.3600 0.0(e)Tj5.280

⁶ Dietary Supplement Health and Education Act of 1994, Pub. L. No. 103-417, 108 Stat. 4325. “Structure/function” claims are representations about a dietary supplement’s effect on the structure or function of the body for maintenance of good health and nutrition. These claims are not subject to pre-authorization by the Food and Drug Administration.

⁷ **See** Press release, Marketers of Dietary Supplements Ordered to Halt False Claims About Diabetes Prevention and Treatment (Nov. 6, 2008), available at <http://www.ftc.gov/opa/2008/11/glucorell.shtm>.

⁸ **S ee** Press release, Marketers of Dietary Supplements and Devices Agree to Pay \$3 Million to Settle FTC Charges of Deceptive Advertising (Mar. 6, 2009), available at <http://www.ftc.gov/opa/2009/03/roex.shtm>.

⁹ **See** Press release, Marketers of “Supreme Greens” and “Coral Calcium Daily” Come Under Fire from the FTC (June 3, 2004), available at <http://www.ftc.gov/opa/2004/06/dma.shtm>.

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¹⁷ Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. Part 255. Guides are not rules; rather they are advisory in nature – informing businesses and others how the Commission would seek to apply Section 5 of the FTC Act, 15 U.S.C. § 45, to specific representations and conduct. As such, they provide the basis for voluntary compliance with the law by advertisers.

As part of its ongoing process of reviewing all of its rules and guides, the FTC initiated review of the Endorsement Guides in 2007.¹⁸ Based on comments received in response to that first Federal Register notice, as well as its own independent research, the Commission proposed revisions to the Guides in late 2008.¹⁹ The staff is analyzing comments received in response to those proposed changes and formulating final recommendations to the Commission. The process has elicited some strongly held views from those who submitted comments.

The 1980 Guides were adopted in a world that was quite different from the one in which advertisers and marketers promote their goods and services today. The Guides were created to cover endorsements and testimonials in print media and 30- or 60-second radio or television

¹⁸ 72 Fed. Reg. 2214 (Jan. 18, 2007).

¹⁹ 73 Fed. Reg. 72,374 (Nov. 28, 2008).

²⁰ The Report is available at <http://www.ftc.gov/bcp/reports/weightloss.pdf>.

²¹ The current Endorsement Guides provide that if an advertiser does not have substantiation that the experience described by an endorser is representative of what consumers generally will achieve, the advertiser can either clearly and conspicuously

results similar to those stated in the ads. By contrast, disclosure of actual expected results with the product significantly altered consumer expectations that the endorser's experience was representative of what others could achieve.

When it promulgated the Endorsement Guides, the Commission clearly intended that advertisers usually would accompany atypical result testimonials with disclosure of the generally expected results.²² However, as documented by the 2002 report, this has not been the practice. The testimonial of a slim individual in a bathing suit that "I lost 50 pounds in 6 months with X's weight loss pills" likely conveys to the consumer that other users of the product will achieve similar results. If the advertiser cannot substantiate that claim, a fine print or flee t claim, a fine

²² 45 Fed. Reg. 3870, 3871 (Jan. 18, 1980). Generally, a disclaimer of typicality alone probably will not be considered sufficient to dispel the representation that the experience is typical.

consumers have a right to know when they are being subjected to a sales pitch. A material connection between a consumer promoting a product and the company that makes the product might affect the weight or credibility of the consumer endorsement, and therefore should be disclosed. Admittedly, the issues are difficult and complex, and the Commission will give careful consideration to all of the comments received before it issues revised Endorsement Guides sometime later this year.

IV. Environmental Marketing Claims

In the past few years, there has been a proliferation of environmental marketing. Businesses in various industry sectors are proclaiming the “green” attributes of their products and services, and several major retailers have launched their own green product lines. Consumers have become increasingly concerned about the environmental impact of the products they use. Green claims can help them make better choices – but only when those claims are true and adequately substantiated. Therefore, the FTC has launched its own green initiative, including review of its Green Guides²³ and law enforcement actions targeting false or deceptive green claims.

The Commission’s Green Guides are the centerpiece of the agency’s environmental marketing program.²⁴ The Guides help marketers avoid making green claims that are “unfair or deceptive” in violation of the FTC Act.²⁵ The Guides also describe how to substantiate certain

²³ Guides for the Use of Environmental Marketing Claims, 16 C.F.R. Part 260.

²⁴ The Commission issued the Guides in 1992 to address confusion surrounding the meaning and proper use of proliferating green claims. 57 Fed. Reg. 36363 (Aug. 13, 1992). The Commission revised the Guides in 1996 and in 1998. 61 Fed. Reg. 53311 (Oct. 11, 1996); 63 Fed. Reg. 24240 (May 1, 1998).

²⁵ 15 U.S.C. § 45(a).

green claims and explain how consumers understand commonly used environmental claims, such as “recyclable” and “biodegradable.” In response to the explosion of green marketing in recent years, the agency initiated a review of its Green Guides to ensure that they are responsive to today’s marketplace.²⁶

To develop a robust record upon which to base its guidance, the Commission also held a series of public workshops on emerging green marketing issues, bringing together representatives from industry, government, consumer g, the Commission also held a ~~the Commission~~ ~~0.166 (groups4~~

²⁶ 72 Fed. Reg. 66091 (Nov. 27, 2007).

²⁷ Information about the review, including the workshop transcripts and written comments, is available online at www.ftc.gov/green.

²⁸ 72 Fed. Reg. 66094 (Nov. 27, 2007); 73 Fed. Reg. 11371 (Mar. 3, 2008); 73 Fed. Reg. 32662 (June 10, 2008). The comments are available at <http://www.ftc.gov/os/comments/greenguidesreview/index.shtm>.

²⁹ See 74 Fed. Reg. 22396 (May 12, 2009) (requesting comment on the FTC’s consumer perception study, as required by the Paperwork Reduction Act).

³⁰ Because many currently used green claims, such as “sustainable” and “carbon neutral,” were not common when the Commission last revised the Guides, FTC staff also is reviewing the state of green marketing claims by conducting an Internet surf to analyze the nature and incidence of particular claims. FTC staff plans to issue its findings in the near future.

The Commission is actively prosecuting companies making deceptive green claims. The latest enforcement actions charged three companies with disseminating fa

³¹ See Press release, FTC Announces Actions Against Kmart, Tender and Dyna-E Alleging Deceptive ‘Biodegradable’ Claims (June 9, 2009), available at <http://www.ftc.gov/opa/2009/06/kmart.shtm>.

³² See 16 C.F.R. § 260.7(b).

³³ FTC v. Dutchman Enterprises, LLC, et al., No. 2:09-cv-00141-FSH (D.N.J. Jan. 14, 2009) (granting stipulated injunction order).

³⁴ FTC v. Five Star Auto Club, Inc. et al., No. 99-CV-1693 (S.D.N.Y. Feb. 23, 2009) (order granting temporary restraining order to be converted to a preliminary injunction).

Commission charged that the claims for the devices violate basic scientific principles. Through litigation, the Commission is seeking to halt unsubstantiated gas savings claims and reimburse consumers who have purchased the devices.

V. Economic Assistance Claims

Offers that are too good to be true, such as help obtaining government grants, get-rich-quick plans, promises of new jobs or business opportunities, and free gifts attract a great deal of consumer interest, but may also serve as traps for the most vulnerable and unwary consumers – especially during challenging economic times. As part of a collaborative law enforcement sweep with other agencies, dubbed Operation Short Change, the Commission recently filed multiple lawsuits targeting businesses that preyed on financially vulnerable consumers.³⁵

In one action, the defendants were charged with bilking hundreds of thousands of consumers into paying \$300 million for get-rich-quick systems, marketed through nationwide infomercials and websites with promises that substantial amounts of money could be earned through real estate transactions and Internet businesses.³⁶ According to the complaint, a system, called “John Beck’s Free & Clear Real Estate System,” consisting of CDs, DVDs and written materials that sold for nearly \$40, was advertised as enabling consumers to earn thousands of dollars by purchasing homes at local government tax sales “free and clear” for just “pennies on the dollar” and re-selling them at large profits. One featured consumer endorser claimed she

³⁵ The Operation Short Change law enforcement sweep included 15 FTC cases, 44 law enforcement actions by the Department of Justice, and actions by approximately 13 states and the District of Columbia.

³⁶ See Press release, FTC Cracks Down on Scammers Trying to Take Advantage of the Economic Downturn (July 1, 2009), available at <http://www.ftc.gov/opa/2009/07/shortchange.shtm>.

³⁷ Id.

³⁸ Id.

Finally, “free gift” offers are always enticing, but often are not what they appear to be. In late 2007 and early 2008, the FTC settled actions against three companies charged with promising consumers free gifts, including iPods, flat screen televisions, and store gift cards, but failing to live up to these promises.³⁹ Online advertising and spam email misled consumers into believing they had won a contest, earned a gift for correctly answering a trivia question, or were otherwise eligible for a valuable “free” prize. Consumers who took the bait by visiting the websites to which they were directed quickly learned that their “free” gift was available only if they participated in a series of sponsor offers. These offers were tiered so that inexpensive ones appeared first, giving consumers the impression that the desired gift could be obtained for a minimal expenditure. By the time consumers arrived at the last tier of offers, they discovered that only by purchasing hundreds of dollars worth of goods, or by committing to a car or home loan, could they actually obtain their so-called “gift.” The FTC settlements required the companies to post clear and conspicuous disclosures of the true costs of the “gifts,” and also required the payment of \$3.75 million in combined civil penalties for violations of the CAN-SPAM Act.⁴⁰

³⁹ See Press releases, ValueClick to Pay \$2.9 Million to Settle FTC Charges (Mar. 17, 2008), available at <http://www.ftc.gov/opa/2008/03/vc.shtm>; Online Advertiser Settles FTC Charges. “Free” Products Weren’t Free; Settlement Calls for \$200,000 Civil Penalty (Jan. 30, 2008), available at <http://www.ftc.gov/opa/2008/01/media.shtm>; Major Online Advertiser Settles FTC Charges. “Free” Gifts Weren’t Free; Settlement Calls for \$650,000 Civil Penalty (Nov. 28, 2007), available at <http://www.ftc.gov/opa/2007/11/free.shtm>.

⁴⁰ The CAN-SPAM Act of 2003, 15 U.S.C. §§ 7701-7713, prohibits deceptive sender and subject lines in commercial email and provides consumers the right to opt out of future commercial email campaigns.

VI. The FTC Advertising Enforcement Program

Thirty years ago, the Commission's ad monitoring program primarily involved perusing major publications and viewing story boards for advertisements on the television networks. Today, of course, the Commission staff has additional marketing venues to track, as well as far more sophisticated means at its disposal to identify false and deceptive advertising. The Internet has caused a vast increase in the amount of advertising, but it has also facilitated the task of monitoring ads to detect issues and problems. Internet surfs – where staff members search for particular kinds of product claims – are conducted on a regular basis. In addition, the FTC's Consumer Response Center was established in 1997 to handle and respond to complaints and inquiries. The CRC staff receive, respond to, and collect information from the thousands of consumer and business complaints or inquiries received each w

increasingly on its authority pursuant to Section 13(b) of the FTC Act⁴¹ to initiate its own actions in federal district court seeking preliminary and permanent injunctions, as well as consumer redress or disgorgement of ill-gotten gains. The federal court option is not limited to cases of blatant fraud, but is being used increasingly for advertising substantiation actions.

VII. Conclusion

The areas of focus described above – health and safety claims, endorsements and testimonials, environmental benefit claims, and economic assistance claims – are current and future priorities for the Commission’s advertising program. As noted at the outset, the task of monitoring and pursuing false and deceptive advertising claims has grown larger and more complex over the past few decades. Significantly, however, the Commission’s resources to tackle deceptive advertising, as well as the other important consumer issues addressed by the agency’s Bureau of Consume

⁴¹ 15 U.S.C. § 53(b).

⁴² FTC, Deception in Weight-Loss Advertising Workshop: Sizing Opportunities and Building Partnerships to Stop Weight-Loss Fraud (2003), available at <http://www.ftc.gov/os/2003/12/031209weightlossrpt.pdf>.

FTC Staff Report,