ensure that advertisers don't make promises that aren't backed by solid science.

As science advances, so does the nature of advertising substantiation. Advertising substantiation itself has become an industry, with experts, labs, and consultants for hire – some legitimate, some less so – offering substantiation services to advertisers. For the FTC, having to keep up with current research and cutting-edge science can make analysis of substantiation a more complex task, sometimes requiring the assistance of multiple experts.

treatment claims and to encourage consumers to discuss treatment options with their doctors.

[4] *See* 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.

ingredients that may be potentially dangerous to some or all users. Despite consumers' growing concerns over the source and purity of supplements and the FDA's establishment of good manufacturing practices (GMP) for dietary supplements, there are still some manufacturers who spike supplements with pharmaceutical ingredients or their chemical analogues. Such adulteration can occur in any type of product but has most commonly been reported in weight loss, athletic performance, and sexual enhancement products.

The danger to consumers is potentially grave. The failure to disclose the presence of such intentionally added ingredients is both deceptive and dangerous. We are currently in discussions with FDA on how the agencies can work together to pursue unscrupulous marketers who sell such products.

III. Cases involving retailers, manufacturers, and ingredient suppliers

We aim to stop deceptive health claims at their source, which is usually the advertiser. But this is not always the case. Sometimes, unsubstantiated claims originate with a retailer, manufacturer, or ingredient supplier. When this occurs, we want to pursue cases against the responsible parties, no matter where they fall in the manufacturing and distribution chain.

Last year, the Commission settled charges that Airborne Health, Inc. disseminated false and unsubstantiated claims that Airborne effervescent tablets prevent or treat colds, protect against exposure to germs in crowded environments, and offer a clinically proven cold remedy.[5] The nation-wide Airborne advertising campaign – and you may recall those ads where the original owner of the company claimed she developed the product because she was sick of

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

catching colds from the second-graders she taught – was so successful that national retail chains replicated the supplement, used similar package claims, and placed the product next to Airborne on the shelf. This year, the Commission brought cases against Rite Aid[6]

[6] *See* Press release, Rite Aid to Pay $500,000 in Consumer Refunds to Settle FTC Charges of False and Deceptive Advertising (July 13, 2009), available at http://www.ftc.gov/opa/2009/07/riteaide.shtm.

[7] *See* Press release, CVS to Pay Nearly $2.8 Million in Consumer Refunds to Settle FTC Charges of Unsubstantiated Advertising of AirShield 'Immune Boosting' Supplement (Sept. 8, 2009), available at http://www.ftc.gov/opa/2009/09/cvs.shtm.

[8] *See* Press release, Rite Aid to Pay $500,000 in Consumer Refunds to Settle FTC Charges of False and Deceptive Advertising, *supra* note 6.

We are actively seeking out opportunities where it would be appropriate and effective for the FTC and FDA to undertake joint enforcement efforts. Earlier, I mentioned the cancer cures sweep which involved participation from both the FTC and FDA, as well as the anticipated collaboration between the agencies to address the problem of dietary supplements contaminated with prescription drugs and other potentially dangerous pharmaceuticals. In addition, last week the FTC and FDA issued a joint warning letter to a website selling a dietary supplement purporting to protect against cold and flu. We intend to follow-up with additional joint warning letters to other web sites selling products purporting to prevent or treat H1N1 flu virus. These sites were identified earlier in an Internet surf conducted by FTC staff. Unfortunately, whenever a new health concern is in the news headlines – whether it's bird flu, SARS, or swine flu – some marketers rush in to exploit the situation and offer all sorts of cure-all products. We will continue to work with FDA to address these scams.

V. The endorsement guides

I know there has been a lot of press coverage on the revisions to the Commission's Endorsement Guides. The Commission announced several proposed revisions to the Guides in November 2008 and invited public comments on the proposals. The Commission gave careful consideration to all of the comments received during the comment period and announced earlier this month that it had approved final revisions to the Guides.

The Guides define endorsements and testimonials and provide guidelines for consumer and expert endorsements and for the disclosure of material connections.[10] The Commission adopted the Guides in 1980, in an effort to assist advertisers in using this advertising technique

[10] Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. Part 255.

in a lawful and non-misleading way. The basic principles underlying the Guides are unchanged. Endorsements should not contain express or implied representations that would be deceptive, or could not be substantiated, if made directly by the advertiser. Endorsements themselves are not competent and reliable scientific evidence. Experts must have the qualifications they are purported to have, and material connections between endorsers and sellers should be disclosed if they might affect the weight or credibility of the endorsement.

Obviously, the Guides were formulated in a world quite different from the one in which advertisers and marketers promote their goods and services today. This is the first time that the Guides have been revised since their adoption almost 30 years ago. While the basic principles that underlie the Guides remain valid, the specific applications and examples were not developed within a context of program-length infomercials, Internet advertising, word of-mouth or viral marketing, and consumer blogs. In 1980, the advertiser always disseminated the advertisement. With the advent of advertiser-promoted consumer blogging, the advertiser is not always disseminating the endorsement, although it certainly expects to profit from the message.

Moreover, the Commission's enforcement history with false or deceptive advertising using consumer endorsements, as well as its own research on consumer perception of such ads, has made it increasingly clear that in one key aspect – disclaimers of typicality – the Guides were not working as intended to prevent deception. Such disclaimers simply are not effective. Consumers interpret the results depicted in testimonials to be representative of what consumers can expect to achieve, even where testimonials are accompanied by the statement, "Results not typical." The Commission's consumer research found that even where testimonials were accompanied by the strong statement: "These testimonials are based on the experiences of a few people and you are not likely to have similar results," consumers still believed that the results in

the testimonial were representative of what would generally be achieved.

The misuse of testimonials and endorsements has been particularly prevalent in the promotion of weight-loss products, as described in the FTC staff's 2002 report, *Weight-Loss Advertising: An Analysis of Current Trends*.[11] A review of 300 weight-loss ads revealed that two-thirds used consumer testimonials, and those testimonials rarely described realistic achievements, instead proclaiming extraordinary weight loss results that, in all likelihood, are not achievable. Disclosures regarding atypicality of the advertised results – when they appeared – often were buried in a fine-print footnote or a video superscript flashed too quickly to be read. The typical disclaimers – such as, "results may not be typical" or "results may vary" – did not adequately inform consumers that the reported weight losses were, at best, outliers or extreme cases. Endorsements and testimonials too often convey results that most consumers can never achieve and, in doing so, they make claims that cannot be substantiated.

Clearly, it was time for a change. The Commission has removed the so-called "safe harbor" for disclaimers of typicality from the guidelines. It is no longer a shield from liability to simply use the "Results not typical" language with testimonials. The revised Guides do not bar the use of atypical or best-case testimonials. But where the net impression from an ad is that the experiences of the testimonialists in ad are representative of what consumers can generally expect to achieve, that is, that they are "typical" results, the advertiser should clearly and conspicuously disclose the generally expected result in the depicted circumstances. The Commission's consumer research has found that this is the most effective way to counter the otherwise common consumer perception that testimonials portray typical results. We expect that

[11] The Report is available at http://www.ftc.gov/bcp/reports/weightloss.pdf.

advertisers who have competent and reliable scientific evidence to support a health claim also have reliable information as to what results consumers can generally expect with their products.

While this change in the Guides has garnered quite a bit of attention, the most

goal will be to address those situations where a given piece of research, though it may have been conducted according to established protocols, achieved results inconsistent with the weight of scientific evidence in the relevant field. One outlier study should not be the sole basis of support for a claim that a product will confer a benefit – particularly a health benefit. We need to ensure that our orders are enforceable and do not permit deceptive claims, and I am seeking changes to make that happen.

VII. Conclusions

Before I close, I would like to acknowledge the constructive role that CRN has played in this industry. In particular, CRN's self-regulatory program, which I'm told by my staff that the FTC had a role in fostering, provides an important resource for resolving problematic advertising claims for dietary supplements without the necessity of expending scarce law enforcement resources. We were please to hear that CRN has extended its agreement with NAD to continue this program to 2014.

Consumer protection in the 21st century is a daunting task – confronting challenges that were not imagined even ten years ago. In addition to battling long-standing deceptive practices, the FTC has adapted with the times, and we continue to do so. I look forward to working with you as our regulatory and enforcement programs evolve to meet the challenges.