



importance of careful and accurate portrayal of research findings when they are transformed into advertising claims.

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.³ The nation-wide Airborne advertising campaign – and you may recall those ads where the company’s original owner claimed she developed the product because she was sick of catching colds from the second-graders she taught – was so successful that national retail chains replicated the supplement, used similar package claims, and placed their products next to Airborne on the shelf. This year, the Commission brought cases against Rite Aid⁴ and CVS⁵ –

³ 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.

⁴ 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>.

⁵ 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>.

⁶ Federal Trade Commission, *Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation*

regulatory programs aimed at changing the profile of foods and beverages promoted to kids. Two weeks ago, the Commission published a Federal Register notice initiating the process to obtain OMB approval to conduct a follow-up food marketing study.⁷ We anticipate issuing compulsory process orders in the spring of 2010, seeking marketing data for 2009. This will enable direct comparison of the marketing expenditures and activities, as well as the nutritional profile of foods advertised to kids, between the two years. In addition to the marketing data, we will also seek company research exploring the psychological and other factors that may contribute to food advertising appeal among children and teens.

In the 2008 report, the Commission made a series of recommendations for food and beverage companies, media and entertainment companies, and the CBBB and other self-regulatory initiatives. Some of the most important of these were that:

- (1) All food and beverage companies should adopt and adhere to meaningful nutrition-based standards for marketing their products to kids under 12;
- (2) The nutrition-based standards should apply not just to TV, radio, print, and Internet

⁷ 74 Fed. Reg. 48072 (Sept. 21, 2009).

implementation of the Commission's recommendations.

B. Interagency Task Force on Nutritional Standards

As directed by Congress, representatives of the FTC, the Food and Drug Administration, the Centers for Disease Control and Prevention, and the Department of Agriculture have been hard at work on developing recommended nutritional standards for foods marketed to kids age 17 and younger. The task force is operating under a tight timetable, as the deadline to report back to Congress is July 2010. We aim to complete our work in time. Later this year, we expect to publish a Federal Register notice that seeks public comment on a proposed set of standards.

C. FTC Forum Set for December 15

Finally, in case you missed the announcement from our press office last week,

⁸ See Press release, FTC to Host Forum on Food Marketing to Children (Sept. 29, 2009), available at <http://www.ftc.gov/opa/2009/09/foodmarket.shtm>.

of sectors – industry, consumer groups, nutritionists, academic researchers, and medical and legal experts – and we want to hear the views of all of these with respect to the ambitious task before this small group of agencies.

III. Food Marketing to Adults

Our focus on food marketing is not limited to kids. I already mentioned the Kellogg case, where the Commission’s complaint charged the company with making unsubstantiated claims that a breakfast of frosted mini-wheats would improve children’s attentiveness in school by 20%. Though the product may appeal to kids, the challenged claims clearly were directed to their parents. We are also concerned about health benefit claims for various kinds of so-called “functional foods” – claims that such foods will boost the immune system, assist with memory and brain function, boost metabolism, protect the heart, or afford other physical or mental health benefits. Advertisers need to be very careful when they venture into this realm that they have good scientific research, that they are not overstating what the research shows, and that they are not making disease prevention or treatment claims not approved by the FDA. Health benefit claims will continue to be a high priority at the Commission – wherever they are found.

IV. Children’s Advertising Literacy

To return to the subject of kids – next year, the FTC is set to launch a multi-media advertising literacy campaign directed to children ages 8-12, the group known as “tweens” in the marketing world. We consider this an important educational initiative. While children may have the ability to distinguish TV advertising from program content at a fairly young age, that does not necessarily translate to a true understanding of advertising’s underlying intent to sell products. Moreover, as we found in our food marketing study, child-directed advertising has spread rapidly to the Internet and other so-called “new media.” The distinction between

advertised product or some other “bundled” product – without authorization. Moreover, the sellers make it difficult or impossible for consumers to cancel.

The Commission has brought several cases in this area. For example, consumers lured by deceptive claims for free government grants – on a website using images of the President and Vice President to suggest U.S. government affiliation – were then charged for other purported services, such as long distance calling, health benefit, or identity theft protection plans, in addition to the largely worthless information about how to write grant proposals.⁹ In another matter, the Commission charged that Internet search ads diverted homeowners seeking free counseling available through the government-endorsed website, www.makinghomeaffordable.gov, to other sites selling so-called loan modification services while trying to appear that they were government affiliated.¹⁰

We are also seeing the misuse of pre-checked boxes on web sites so that consumers inadvertently and unintentionally sign up for goods or services they do not want. For example, consumers applying for a payday loan online were charged for a pre-paid debit card based on a pre-checked “yes” box, accompanied only by fine-print disclosures buried in text. When individuals seeking a loan submitted the loan application, they also, unwittingly, “agreed” to

⁹ See Press release, At FTC’s Request, Court Halts Deceptive Claims for Free Government Grants: Web Sites Pitched “Easy to Use Program” and “\$15 Billion of Free Money” (Aug. 20, 2009), available at <http://www.ftc.gov/opa/2009/08/grantconnect.shtm>.

¹⁰ See Press releases, Court Bars False Claims of Affiliation with United States Homeowner Relief Programs (July 10, 2009), available at <http://www.ftc.gov/opa/2009/07/homeafford.shtm>, and Federal and State Agencies Target Mortgage Foreclosure Rescue and Loan Modification Scams: FTC Leads “Operation Loan Lies” to Stop Fraud and Help Distressed Homeowners (July 15, 2009), available at <http://www.ftc.gov/opa/2009/07/loanlies.shtm>.

receive and be charged for the debit card.¹¹

Most of these schemes prey on people pushed to the edge by the economic recession – those who can least afford to be the target of a scam. The practice of using pre-checked boxes in an online sales transaction is insidious – simply a way to entrap unwary consumers who don't read the tiny print of dense disclosures or click through every available link on the site – and perhaps it should be considered inherently deceptive and unfair. We will be looking closely at the tactics of these online marketers, trying to develop new strategies to ferret out and disable the abuses.

VI. The Endorsement and Testimonial Guides – time to revise

The Commission adopted the Endorsement Guides in 1972, in an effort to assist advertisers in using this advertising technique in a lawful and non-misleading way.¹² The basic underlying principle of the guides is that endorsements should not contain express or implied representations that would be deceptive, or could not be substantiated, if made directly by the advertiser. In other words, endorsements cannot be used as an end run around substantiation requirements. In addition, experts must have the qualifications they are purported to have, and

¹¹ See Press release, FTC Settlement Bars Deceptive Online Marketing Tactics; Payday Loan Applicants Were Charged for Unwanted Debit Cards (Aug. 20, 2009), available at <http://www.ftc.gov/opa/2009/08/everprivate.shtm>.

¹² Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. Part 255.

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

of section 3.3 of the Commission's disclosure rule, 16 CFR 232.3(e),

does not require a writer to disclose the relationship. The Commission's

staff reports,

¹³ The Report is available at <http://www.ftc.gov/bcp/reports/weightloss.pdf>.

cannot be substantiated.

Clearly, it was time for a change, and change is coming. On Friday, the Commission voted out revisions to the Guides that, among other things, removed the so-called “safe harbor” for disclaimers of typicality.¹⁴ As might be expected, this was one of the most controversial of the proposed revisions. The revised Guides do not bar the use of these disclaimers – as some comments on the proposal suggested – but merely makes the advertiser responsible for ensuring that consumers are not misled by the ad in its entirety. In other words, advertisers who use such disclaimers are subject to the same standards, under Section 5 of the FTC Act, as advertisers making similar claims without use of testimonials. That is, in fact, the law, and it was never intended that ads using testimonials would be subject to a lesser standard.

Another revision that generated much comment involves the application of the Guides to consumer-generated media, and it includes several new examples using such media. These examples are based on the general principle, applicable to other advertising, that 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. The Commission has not changed the Guides’ principles on this point – we’ve just added new examples illustrating the principles. Admittedly, the application of the principles can be complex, particularly within the context of new media, such as consumer blogs. The Commission gave careful consideration to all of the comments received during the review of the Guides, and the peerless Mary Engle, who runs our advertising shop, will be providing more information about

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

the changes during this morning's panel discussion. Stay tuned.

VII. Environmental Marketing Claims – still too easy being green

For Kermit the Frog, it's not easy being green – as those of you with children know. For some marketers, however, it seems to be too easy to claim being green. In recent years, environmental marketing has proliferated. Businesses in various sectors are proclaiming the “green” attributes of their products and services, and several major retailers have launched their own green product lines. They are responding to heightened consumer concerns about the environmental impact of the products they use. Green claims can help consumers make better choices – but only when those claims are true and not misleading. Therefore, the FTC has launched its own green initiative, including review of its Green Guides¹⁵ and law enforcement actions targeting false or deceptive green claims.

Recently the green initiative crossed paths with our textile labeling program as the Commission charged four sellers of clothing with deceptively labeling and advertising their garments as made of natural bamboo fiber.¹⁶ Actually, the items in question are made of rayon, a man-made fiber. The companies also made unsubstantiated claims that their clothing and other textile products are manufactured using an “environmentally friendly” process, that they retain the natural antimicrobial properties of the bamboo plant, and that they are biodegradable. Rayon is a fiber created from the cellulose found in plants and trees and processed with a toxic chemical that releases hazardous air pollutants. The cellulose could come from any plant or tree –

¹⁵ Guides for the Use of Environmental Marketing Claims, 16 C.F.R. Part 260.

¹⁶ See Press release, FTC Charges Companies with ‘Bamboo-zling’ Consumers with False Product Claims: Bamboo-based Textiles, Actually Made of Rayon, Are Not Antimicrobial, Made in an Environmentally Friendly Manner, or Biodegradable (August 11, 2009), available at <http://www.ftc.gov/opa/2009/08/bamboo.shtm>.

including bamboo – but the processed fiber is rayon, and the manufacturing process is definitely not “green.” Nor does rayon retain any natural antimicrobial properties of the bamboo plant – the chemicals used in the manufacturing process eliminates those. And finally, these textiles are not easily biodegradable after customary disposal. Three of the four companies have entered settlement agreements, and the fourth matter remains in administrative litigation.

A number of products are being promoted with claims of “biodegradability.” Most of these claims do not pass muster for the same reason. Theoretically, it may be possible for the products to decompose into elements found in nature. However, the substantial majority of solid waste is disposed of in landfills, incinerators, and recycling facilities – disposal methods that do not afford the conditions to allow decomposition. Last June, the Commission brought enforcement actions charging three companies with disseminating false and unsubstantiated claims that disposable plates, wipes, and towels were biodegradable.¹⁷ All three have settled the charges by agreeing to administrative orders that bar deceptive “degradable” product claims, as well as other environmental claims not supported by competent and reliable scientific evidence.

In addition, the Commission has brought two federal court actions against marketers of “miracle” devices advertised to dramatically increase gas mileage in ordinary cars. Earlier this year, we filed a case alleging that Dutchman Enterprises falsely advertised in major magazines that its Hydro-Assist Fuel Cell could boost automobile gas mileage by at least 50% and “turn any vehicle into a hybrid.”¹⁸ In the second matter, a contempt action, the defendant was charged

¹⁷ 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>.

¹⁸ See Press release, FTC Sues Promoters of Bogus Fuel Efficiency Device (Feb. 2, 2009), available at <http://www.ftc.gov/opa/2009/02/dutchman.shtm>. A Stipulated Preliminary

with falsely advertising that its NanoDetonator would allow ordinary passenger cars to harness the power of nuclear fusion, thereby eliminating the need for gasoline.¹⁹ In both cases, the 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.

VIII. Coordination with Other Agencies

We have renewed efforts to work closely with the Food and Drug Administration by establishing three working groups to share information regarding conventional foods, dietary supplements, and over-the-counter drugs. Staff from the FTC, FDA, and the Office of Consumer Litigation of the Justice Department will conduct regular telephone conferences to increase coordination with respect to strategic planning and case selection. These areas of overlapping jurisdiction include some of the most important FTC advertising program areas. I believe the increased cooperation will enhance the enforcement efforts of both agencies.

IX. Privacy

I gave a speech on the FTC's privacy program last Friday at NYU. I won't repeat that here, but want to note one highlight. The Commission will be hosting a series of day-long public roundtable discussions to explore the privacy challenges posed by 21st century technology and business practices – including social networking, cloud computing, online behavioral advertising, mobile marketing, and the collection and use of information by retailers, data

Injunction was entered June 8, 2009.

¹⁹ *FTC v. Five Star Auto Club, Inc. et al.*, No. 99-CV-1693 (S.D.N.Y. Feb. 23, 2009) (order converting temporary restraining order to preliminary injunction).

²⁰ *See* Press release, FTC to Host Public Roundtables to Address Evolving Consumer