

National Advertising Division Annual Conference
New York, NY

Remarks of Thomas Pahl
Acting Director, FTC Bureau of Consumer Protection

(October 3, 2017)

I. Introduction.¹

Good morning. I would like to start by thanking the National Advertising Division and Lee Peeler for inviting me. It is truly a pleasure to have the opportunity to meet with this group as the Bureau of Consumer Protection's Acting Bureau Director. The Commission has a long history of dedication to national advertising cases and is a longtime supporter of regulation in advertising. Deceptive and unfair advertising practices not only undermine the ability of consumers to make well-informed decisions about goods and services, but they also make it more difficult for businesses to compete effectively through truthful and non-misleading representations about the goods and services they advertise. The FTC, the Council of Better Business Bureaus programs under the Advertising Self-Regulatory Council including the NAD, CARU, ERSP, and NARB models in national advertising enforcement. We value all your hard work and partnership in helping protect a free market economy by challenging false and misleading national advertising that harms both consumers and competition.

Next, I would like to congratulate Ms. Laura Brett as NAD's new Director. Having worked diligently for over 5 years as an NAD attorney handling complex advertising and previously maintaining her own private practice, Ms. Brett is an outstanding choice to oversee

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NAD's efforts to address the numerous competitor and consumer complaints about deceptive and unsubstantiated national advertising, and not to forget NAD's self-initiated proceedings, that your program handles each year.

I also would like to congratulate and welcome the new CARU Director, Ms. Dona Fraser. I believe Ms. Fraser's expertise in children's privacy issues and years of experience with self regulation from serving with the Entertainment Software Rating Board will make her a valuable asset to the CBBB self-regulatory community.

Acting Chairman Ohlhausen and I are looking forward to working with both of you and continuing to provide support to your self-regulatory programs in any way that we can. We hope to have continued discussions on how the Commission and your programs can increase our collaborative efforts to tackle deceptive advertising in the nation's marketplace.

II. Bureau of Consumer Protection Advertising Enforcement Agenda

I understand that you will hear from Associate Director Advertising Practices, Mary Engle, later today. I am sure she will welcome any questions you may have that involve her Division's review of NAD or other self-regulatory referrals and factors in determining whether to recommend FTC enforcement action.

What I plan to focus on this morning first is how the FTC is applying Acting Chairman Ohlhausen's positive consumer protection agenda in the context of national advertising. The three elements I will highlight are: (1) promoting and supporting self-regulation; (2) increasing guidance for advertisers especially small businesses by, for example, establishing ground rules for new advertising techniques and (3) focusing on protecting consumers who may be particularly vulnerable or may have been ignored by fighting unfair and deceptive advertising

targeting critical consumer audiences. These elements provide critical guidance and direction in the Bureau of Consumer Protection's national advertising enforcement agenda. I want to finish my remarks with some observations about how I think that the Commission should approach national advertising enforcement at a time when the agency is focused primarily on fighting fraud.

A. Promoting/Supporting Industry Self-Regulation

First, let's talk about something dear to all of our hearts—the importance of promoting industry self-regulation—the hard work that all of you do every day. The FTC continues to emphasize that together, industry self-regulation and appropriate government oversight provide valuable efficiencies and benefits.

Self-regulation benefits industry because it allows industry to develop solutions that conform to actual industry practices. It also permits industry to move more quickly in response to changes in dynamic markets and technologies than ordinarily would be possible through government legislation, rule-making, or enforcement.

Government agencies such as the FTC benefit greatly from industry self-regulation. Self-regulation can be a very effective tool for addressing problematic conduct, thereby freeing up the FTC to focus its attention and scarce resources on more egregious conduct that causes substantial consumer harm.

Most importantly, industry self-regulation benefits consumers. When industry can halt false or misleading claims early through a self-regulatory process, it reduces the risk that these claims will cause harm to consumers or competition. Moreover, rigorous and clear self-regulatory standards and guidance provided to industry prevents harm to consumers.

When the FTC Bureau of Consumer Protection supports industry self-regulation, it gives bite to self-regulation's bark. The FTC is in connection with industry self-regulation is to carefully review every self-regulatory referral we receive and recommend enforcement actions in appropriate cases.

When reviewing self-regulatory referrals, BC Staff's first goal is to encourage advertisers to avail themselves to the industry's self-regulatory processes. In the past few years, FTC staff has resolved nearly a dozen NAD referrals simply by contacting the companies and encouraging them to work with the NAD to bring their advertising into line with AD's recommendations and industry standards without the need to recommend further FTC action.²

Although sometimes it may require FTC staff to engage in more substantive discussions to help guide companies into making sure that their advertising does not violate the FTC Act, FTC staff often encourages the companies to make changes similar to those that the NAD or other self-regulatory programs recommended.

For example, earlier this year, in response to an NAD referral about NexGrill Industries, Inc.'s performance claims for its Evolution Infrared Plus Grill and representation that the grill used "patented" heat plates, FTC staff met with company representatives to discuss the claims challenged by NAD. Following multiple discussions with FTC staff, NexGrill discontinued the claim that its heat plates were patented, instead referring to "patent pending" technology. In

² Resolution of Referrals From the National Advertising Division (NAD) of the Council of Better Business Bureaus (Oct. 8, 2015 resolution letter), <https://www.ftc.gov/enforcement/cases/proceedings/closing>

addition

Increasing Guidance for Advertisers Establishing Ground Rules for New Advertising Techniques

A second element in Acting Chairman Ohlhausen's comprehensive consumer protection agenda is increasing guidance for advertisers including through making sure that we establish clear ground rules for businesses with the development of new advertising techniques such as today's influencer marketing.

Guidance ensures that companies who legitimately want to comply with the law can do so. Not only does this save businesses time and money, but it conserves FTC resources as well. Issuing guidance to bring companies into compliance is far less expensive than the litigation costs of bringing enforcement actions against multiple companies for similar violations.

1. Recently Clarified Guidance to Help Businesses Understand How Already Existing Guidance Applies to New Advertising Techniques Marketing through "Influencers"

Last month, the FTC announced its first of a series of actions against individuals and companies for similar violations.

“send a message that such connections must be disclosed so consumers can make informed purchasing decisions.”⁶

The FTC is committed to helping businesses better understand how to avoid misleading consumers and clarify how already existing FTC guidance on endorsements applies to new advertising techniques such as “influencer” marketing. Simultaneous with its CSGO Lotto announcement, the Commission issued updated endorsement guides FAQs that provide specific advice for social media influencers and marketers.⁷ The principles are not new or different – the updated FAQs simply further explain how the FTC’s Endorsement Guides⁸ apply to newer advertising techniques. The updated FAQs include more than 20 additional questions and answers about whether and how social media influencers should disclose material connections in their posts to avoid misleading consumers.

In areas involving new advertising techniques, like influencer marketing, the Division of Advertising Practices has been providing guidance through educational or mailing letters to marketers and businesses to make sure they understand their legal obligations under the FTC Act.

You might recall that this past April, the Division of Advertising Practices sent educational letters to more than 90 social media influencers and brands regarding their

⁶ “CSGO Lotto Owners Settle FTC’s First Complaint Against Social Media Influencers,” FTC Press Release, Sept. 7, 2017,

Instagram posts. The letters reminded recipients that influencers should clearly and conspicuously disclose their relationships to brands when promoting or endorsing products through social media. Some of the educational letters provided useful examples on how to (and how not to) appropriately disclose such information. For example, some letters addressed the problem with particular disclosures that are not sufficiently clear, explaining that many consumers do not understand disclosures like “hash tag #sp” or “Thanks – and then the brand name – as meaning a social media post is sponsored.

Staff now has sent warning letters to 21 of the social media influencers it contacted earlier this year. In addition to citing specific social media posts of concern in the warning letters, the letters ask recipients to advise FTC staff as to whether they have material connections to the brands identified in the posts; if so, the letters ask what actions they plan to take to ensure all their posts endorsing or promoting products of brands with which they have material connections clearly and conspicuously disclose their relationships. In addition to previously received educational letters, these warning letters serve as further notice to marketers and influencers. They also send a strong message to the advertising industry that already existing legal obligations – like an advertiser’s duty to clearly disclose material connections to the endorsers it uses – continue despite new and dynamic advertising techniques.

2. FTC Business Center Webpage and Business Blog

The FTC maintains a Business Center webpage⁹ that, among other things, has an advertising and marketing page with links to FTC guidance on topics such as advertising basics,

⁹ <https://business.ftc.gov>

online advertising tips

our well-known “[Dot] .com Disclosures: How to Make Effective Disclosures in Digital Advertising”¹⁵ guide, and truth-in-advertising and privacy advice for businesses developing apps.¹⁶

Spearheaded by the incomparable Lesley Fair, in our Division of Consumer and Business Education, you will hear from tomorrow the FTC also hosts a business blog that discusses recent FTC decisions and frequently posts information to guide businesses in complying with the law.¹⁷ Companies can subscribe to blog posts through FTC business center webpage on business.ftc.gov. The FTC currently has 65 thousand daily subscribers – plus thousands more who read it directly on business.ftc.gov

3. Other Business Outreach and Guidance

about endorsements and can expect a timely, meaningful response. This is especially useful for influencers and other small businesses who can't afford to hire pricey lawyers like many of you here today!

4. Future Business Guidance Activities

We anticipate updating and expanding the business guidance we provide to national advertisers and others. For example, the FTC has had industry concerns that our Dietary Supplement Guides, now nearly 20 years old, need to be updated. We also have heard industry concerns that our Green Guides also need to be updated. We have received requests for business guidance on many other topics. Under Acting Chairman Ohlhausen, we are committed to working with industry and other stakeholders to provide guidance that will promote compliance with the law. Business guidance, especially updating and expanding comprehensive guidance documents, often is a major undertaking for the agency. We are in process of determining what documents and issues we need to make a priority so we can allocate our work to the guidance topics that will have the most impact. So, more guidance from the FTC will be coming, but it will take some time before it arrives on the many, many topics on which industry believes it would be helpful.

B. Fighting Unfair and Deceptive Advertising Targeting Critical Consumer Audiences

The final element in Acting Chairman Ohlhausen's positive consumer protection plan that I want to discuss, which is critical to the Bureau of Consumer Protection's national advertising enforcement agenda, is fighting unfair and deceptive advertising that targets critical consumer audiences—consumers who may be particularly vulnerable or may have been ignored.

1. Older Americans

Given the size of the baby boom generation, it's no surprise that we are finding more and more marketers catering to that demographic. While informing these consumers about products that may help their health may be beneficial, the Commission is concerned when advertisers do so through false, misleading, or unsubstantiated claims. The market is replete with products advertised to improve memory and ward off cognitive decline, and to relieve joint pain and arthritis symptoms.

Last month, the FTC settled with the final 3 of 9 defendants that it sued in February, with the Maine Office of the Attorney General, regarding false and unsubstantiated claims that CogniPrin and FlexiPrin dietary supplements improve memory and reduce back and joint pain, respectively. The FTC's complaint also alleged that purported medical experts featured in ads endorsed the products without exercising their supposed expertise, and one such supposed expert failed to disclose that he was paid a percentage of the products' sales. The FTC charged the advertising agency and its owner for using deceptively formatted radio infomercials, print ads with fictitious endorsers, and other unlawful marketing tactics to advertise the supplements.¹⁸ In addition to strong injunctive relief, one of the orders impose a \$6.5 million monetary judgment, with all but \$556,000 suspended due to the defendants' financial condition.¹⁹

¹⁸ *FTC v. XXL Impressions LLC*, No. 1:17cv-00067NT (D. Me. complaint filed Feb. 22, 2017).

¹⁹ *Id.* (3 stipulated orders filed Mar. 10, 2017 and 2 stipulated orders filed Aug. 23, 2017).

At the beginning of this year the FTC filed a lawsuit against the makers of PrevaGen, a dietary supplement widely advertised as clinically shown to improve memory in just 90²⁰ days. This follows last year's FTC settlement with the marketers of Lumosity, a computer game advertised for a variety of cognitive benefits, including staving off dementia and Alzheimer's. In addition to requiring adequate science to back up future claims, the settlement ordered Lumosity to pay \$2 million in consumer refunds.²¹

One year ago this week the FTC settled a complaint against the sellers of Supple, a liquid supplement product misrepresented as providing complete relief from chronic and severe joint pain caused by arthritis and fibromyalgia.²² The company agreed to a court order requiring scientific evidence to support any future claims and imposing a \$150 million judgment, most of which was suspended based on the defendants' inability to pay.

2. Rural Areas

Unfortunately, the nation's opiate addiction crisis has led fraudsters trying to take advantage of public health scares and sometimes ignored or forgotten consumers in rural areas. Although drug use typically is thought of as an urban issue, in reality, death and injury from nonmedical prescription opioid abuse is more commonly found in rural areas than

²⁰ *FTC v. Quincy Bioscience Holding Co.*, No. 1:17-cv-00124 (S.D.N.Y. complaint filed Jan. 9, 2017).

²¹ *FTC v. Lumos Labs*, No. 3:16-cv-0001-WHO (N.D. Cal. Jan. 8, 2016).

²² *FTC v. Supple LLC*, No. 1:16-cv-1325 (E.D. Wis. Oct. 4, 2016).

cities.²³ Rural areas have a larger percentage of people abusing prescription pain relievers, but may have fewer resources available to deal with addiction.

In *Sunrise Nutraceuticals, LLC*, The FTC charged the marketer *Endrol*—a powder containing vitamins, minerals, and herbs—for making false and misleading claims that their product alleviated opiate withdrawal symptoms and increased users' likelihood of overcoming opiate addiction.²⁴ Our settlement order requires the company to have competent and reliable scientific evidence to backup claims for opiate-treatment products, bars deceptive claims for any health-related products, and imposed a monetary judgment of \$235,000.

3. "Made in USA" Consumers

In addition to helping ensure that consumers can rely on claims involving their health or safety, the Commission is working to protect patriotic consumers who rely on claims that a product is made in the USA. As evidenced by the numerous closing letters on our website, the Commission reviews a large number of made in America claims and most of the time when we find relatively small or inadvertent violations that are quickly corrected, we will close the matter without taking formal action.

In egregious cases, however, the agency will not hesitate to insist on an order. For

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distributor of pulley block systems who for years used imported steel plates that were

Administrative litigation before the Commission has long performed ~~critical~~ function. The FTC articulated its standards for deception in *Cliffdale*, ~~deceptive~~ and unfair omissions in *International Harvesters*, ~~substantiation~~ in *Pfizer* and *Thompson Medical*, and corrective advertising in *Warner Lambert*.

