



# Federal Trade Commission

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## *Consumer Protection for the Sports and Fitness Industry*

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Good morning. I think this is the first time anyone from the FTC has spoken at this event, so I'm delighted and honored to be here. Today, I'm going to talk about the FTC's recent work to protect consumers, and in particular, three topics of particular relevance to your industry: avoiding deceptive advertising, protecting consumers in the digital marketplace, and consumer privacy.

### I. The FTC's Jurisdiction and Authority

I'll start with a little background. Many of you may be familiar with the FTC, but here's a quick FTC 101 for those of you that aren't.

The FTC has broad jurisdiction to protect consumers in the commercial marketplace. We are primarily a law enforcement – not regulatory – agency, and we enforce a number of laws covering a wide array of entities.

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<sup>1</sup> The views expressed here are my own and do not necessarily represent the views of the Federal Trade Commission or any Commissioner.



make, whether the claims are express or implied.<sup>2</sup> So if you say or imply that a product promotes health, takes the pounds off, or prevents injuries, you need to have reliable evidence to back that up.

These rules apply not only to claims in a conventional ad, but also to any testimonials you include from customers or other individuals. Consumers understand testimonials to be the typical experience of a person using a product. If a testimonial doesn't represent the typical experience, it's misleading.

There are two ways to avoid this type of deception. First, you can feature a testimonial that **does** represent the typical experience of consumers using the product. Or second, you can clearly and conspicuously disclose what the evidence has shown the typical experience actually is.

Weight loss is a great example. Harry goes on TV and says he lost 20 pounds in 2 weeks drinking Weight-a-Way shakes. First of all, Harry needs to be telling the truth about his own weight loss. But second, Weight-a-Way must have a reasonable basis for the claim that 20 pounds is what consumers typically lose, or alternatively disclose clearly and conspicuously what would be typical.

These same rules apply even if you only advertise to trade customers. Because promotional materials and claims to trade customers may be passed downstream, you could be liable if you place false or unsubstantiated product claims in commerce.<sup>3</sup> For

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<sup>2</sup> Advertising Substantiation Policy Statement, appended to notice of rulemaking, 4.2(n)(6.9)(an)Tj0s ap)-9.2(pp60 1 Tf dBT 12 -0 0 117 .003 a

example, the FTC has brought cases against companies that marketed supplement ingredients to product manufacturers, and provided the manufacturers with deceptive claims and

clothing would relieve severe and chronic pain and inflammation caused by arthritis and other diseases.<sup>6</sup>

We've also brought a number of actions against marketers of ephedra and yohimbine bodybuilding and weight loss supplements.<sup>7</sup> In addition to challenging the products' performance claims, the FTC alleged that the advertisers' claims that the products were safe or had no side effects were false or unsubstantiated. The orders in these cases required the advertisers to include strong disclosures warning about the safety risks in future advertising.

Some of you also may remember our cases against Skechers and Reebok for their toning shoes. We alleged Skechers made unfounded claims that its Shape-up shoes would help people lose weight, strengthen and tone their buttocks, legs and abdominal muscles, and even improve women's cardiovascular health.<sup>8</sup> Similarly, we alleged Reebok made unsupported claims that the sole technology of its EasyTone and RunTone shoes created "micro instability" that toned and strengthened muscles as the wearer walked or ran, leading to increased toning ranging from 11- 28%.<sup>9</sup> Skechers paid \$40 million and Reebok paid \$25 million to settle the charges.

One of our cases from the 1990s illustrates how poorly tested products can be quite dangerous. A company called Fitness Quest marketed a device called the "Gut

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<sup>6</sup> [Tommie Copper Inc. No. 7:15-cv-09304-VB \(S.D.N.Y. Dec. 2, 2015\), available at https://www.ftc.gov/enforcement/cases-proceedings/142-3194-x160007/tommie-copper.](https://www.ftc.gov/enforcement/cases-proceedings/142-3194-x160007/tommie-copper)

<sup>7</sup> See, e.g. [FTC v. National Urological Group, Inc., et al. No. 104-CV-3294 \(N.D. Ga. judgment entered Jan. 15, 2009\), available at https://www.ftc.gov/enforcement/cases-proceedings/022-3165/national-urological-group-inc-et-al.](https://www.ftc.gov/enforcement/cases-proceedings/022-3165/national-urological-group-inc-et-al)

<sup>8</sup> [FTC v. Skechers U.S.A., Inc. No. 1:12-cv-01214 \(N.D. Oh. May 16, 2012\), available at https://www.ftc.gov/enforcement/cases-proceedings/102-3069/skechers-usa-inc-dba-skechers.](https://www.ftc.gov/enforcement/cases-proceedings/102-3069/skechers-usa-inc-dba-skechers)

<sup>9</sup> [FTC v. Reebok International Ltd. No. 1:11-cv-02046 \(N.D. Oh. Sept. 28, 2011\), available at https://www.ftc.gov/enforcement/cases-proceedings/102-3070/reebok-international-ltd.](https://www.ftc.gov/enforcement/cases-proceedings/102-3070/reebok-international-ltd)

Buster” as a way to flatten and strengthen abdominal muscles with just five minutes of exercise a day. We charged that the claims were false and unsubstantiated.<sup>10</sup> Of even greater concern, we charged that the company failed to warn purchasers that overstretching the device’s spring could lead it to break and cause serious bodily injury.

And that leads me to the topic of concussions. In recent years, we’ve seen strong anti-concussion claims for a variety of products, including football helmets and mouthguards. Unsubstantiated safety claims for these products raise particularly serious concerns because these products are often marketed for children.

In 2012, the agency settled allegations that mouthguard manufacturer Brain-Pad and its president made false and unproven claims that Brain-Pad mouthguards reduced the risk of concussions.<sup>11</sup> Following that case, the FTC sent warning letters to almost thirty sports equipment manufacturers and five retailers, advising them of the case and warning them that they also might be making deceptive concussion protection claims.<sup>12</sup>

The agency also investigated three major football helmet manufacturers – Riddell Sports, Schutt Sports, and Xenith – which resulted in them discontinuing potentially deceptive claims that their helmets reduced the risk of concussions.<sup>13</sup>

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<sup>10</sup> Consumer Direct, Inc., et al 13 F.T.C. 923 (1990), available at [https://www.ftc.gov/sites/default/files/documents/commission\\_decision\\_volumes/volume-113/volume113\\_923-1015.pdf](https://www.ftc.gov/sites/default/files/documents/commission_decision_volumes/volume-113/volume113_923-1015.pdf).

<sup>11</sup> Brain-Pad, Inc, No. C-4375 (Nov. 29, 2012), available at <https://www.ftc.gov/enforcement/cases-proceedings/122-3073/brain-pad-inc>.

<sup>12</sup> See, e.g. FTC Press Release, FTC Alerts Major Retailers to Concerns About Concussion Protection Claims for Athletic Mouthguards Made on Websites, Aug. 21, 2014, available at <https://www.ftc.gov/news-events/press-releases/2014/08/ftc-alerts-major-retailers-concerns-about-concussion-protection>.

<sup>13</sup> Copies of the staff’s closing letters to the three companies are posted on the Commission’s website. See Letter from Mary K. Engle to John E. Villafranco, Esq. (Apr. 24, 2013), available at [https://www.ftc.gov/sites/default/files/documents/closing\\_letters/riddell-sports-group-inc./130430riddellvillafranco.pdf](https://www.ftc.gov/sites/default/files/documents/closing_letters/riddell-sports-group-inc./130430riddellvillafranco.pdf); Letter from Mary K. Engle to Michael E. Antalics, Esq. (Apr. 24, 2013), available at

We continue to monitor the marketplace for unsupported health and safety claims and will take law enforcement action as needed to stop them. Fortunately, there are many materials available on our website discussing ad substantiation, and many good attorneys who specialize in these issues. Making sure you can support any health or safety claims you make in your ads is very much worth your time and money.

### III. The Digital Marketplace

The second topic I want to discuss is the explosive growth of the digital marketplace. We all know technology has been a game-changer for commerce. Whether you're talking about Facebook, YouTube, Twitter, mobile ads, text messages, or personalization, the digital revolution has fundamentally altered how companies engage with consumers.

These changes create many new opportunities for both consumers and businesses, but they also raise new consumer protection challenges. Today, commerce comes at consumers from every direction, at every minute – through the smartphones they carry with them everywhere, the cars they drive, the fitness devices they use, and the many other connected devices that are all around them. Data-driven predictions determine the information they receive and the offers they get. And, increasingly, consumers themselves become the marketers, as they're enlisted in campaigns on social media to tout products and services to friends and the public.

The FTC has made significant shifts in its consumer protection agenda to address these challenges. Our goal is to make clear that the fundamental principles of consumer protection still apply to today's marketplace. Tell the truth. Disclose any facts necessary to make sure your advertising claims aren't misleading. In your businesses decisions, weigh any harms you might impose on consumers very carefully. Don't help others deceive or harm consumers.

Let me discuss a few areas where the FTC has particular concerns – deceptive marketing on new platforms, unauthorized mobile payments, and native advertising.

### New Platforms

I suspect that most consumer-facing companies here today now market their products and services through a mobile site or app. We've brought a number of cases making clear that you can't deceive consumers on new platforms, just as you can't deceive them in stores or online.

I have a few illustrations, not from the sports industry, that I hope won't resemble anything you are doing – they just show how some companies are using new platforms in some not-so-good ways. Last year the FTC charged two app developers with deceptively claiming that their apps, Mole Detective and MelApp, could detect symptoms of melanoma, even in the early stages.<sup>14</sup> In fact, we alleged, the companies lacked evidence to show their apps could detect melanoma in the early stages or at all.

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<sup>14</sup> Health Discovery Corp No. C-4516 (Mar. 13, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/132-3211/health-discovery-corporation-melapp-matter>; FTC v. New Consumer Solutions LLC et al. No. 15-C-1614 (N.D. Ill. filed Feb. 23, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/132->



Similarly, we recently took action against an app called Ultimeyes, which claimed to have scientific proof that it could “turn back the clock” on consumers’ vision through a series of visual exercises available on the app.<sup>15</sup> In fact, we alleged it had no such proof.

We also brought a case against an individual doing business as Forking Path, who used the crowdfunding platform to deceive consumers.<sup>16</sup> We alleged that he used Kickstarter to raise money to produce a board game, telling backers they would get copies of the game and other rewards. He raised over three times his stated goal, but never produced anything. Instead, we alleged, he spent the money on personal items such as rent, home equipment, and moving to Oregon.

Finally, you need to be careful about how you and the companies you hire use text messages. We’re seeing many examples of companies using texts to do things that clearly would be forbidden offline or online. Just because texts have limited space doesn’t mean you can leave out important information that would prevent a claim from being misleading. We have terrific guidance online, called **Dot Com Disclosures**, about how to avoid deceptive claims and make effective disclosures in digital advertising.<sup>17</sup>

### Mobile Payments

The next tech development I want to mention is mobile payments. With the rapid growth of mobile payments, it’s become easier for consumers to pay for goods and services instantly. But these conveniences also make it easier for consumers to incur

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<sup>15</sup> Carrot Neurotechnology, Inc. No. 142 3132 (Sept. 17, 2015) (proposed consent order), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3132/carrot->



your friends on Facebook, and the author of that recent article on the “latest medical breakthrough.” We also increasingly rely on review sites – but can we trust they are real reviews and not just paid for by the company being reviewed?

We’re living in an era where the line between advertising and objective content is increasingly blurry and confusing. But sometimes, it’s not just confusing – it’s deceptive and illegal. The governing principle is pretty simple: Consumers have a right to know if they’re seeing an opinion or a marketing pitch.

The Commission recently issued an Enforcement Policy Statement and accompanying guidance on native advertising – by which I mean the use of formats that

celebrity may be well-known for being paid to tweet about products) or you need to explicitly disclose it. The source of information, and whether it's commercial content, must be clear so consumers can make informed decisions about what weight to give the information conveyed.

Let me illustrate with some real-life examples. Last year, we took action against Sony for allegedly making deceptive claims about its gaming consoles.<sup>23</sup> As part of that action, we alleged that a manager at its ad agency, Deutsch, had directed employees to post positive tweets about the console as part of the Sony ad campaign, as if they were ordinary consumers reviewing the game.<sup>24</sup> That's deceptive.

Another case in this area involved NourishLife, the marketer of a supplement for kids. We alleged that the company posted a fake research site, and trumpeted paid endorsements from parents, making unfounded claims that the supplement was scientifically proven to treat childhood speech and behavioral disorders.<sup>25</sup>

And we alleged last year that Roca Labs not only promoted unproven weight loss supplements, but also threatened to sue – and did sue – consumers who posted negative

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<sup>23</sup> Sony Computer Entertainment America LLC, No. C-4514 (Mar. 24, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/122-3252/sony-computer-entertainment-america-llc-matter>.

<sup>24</sup> Deutsch LA, Inc., No. C-4515 (Mar. 24, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/122-3252/deutsch-la-inc-matter>. See also AmeriFreight, Inc., No. C-4518 (Apr. 13, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3249/amerifreight-inc-matter> (shipment broker failed to

disclose that it provided its services to consumers who posted negative reviews on its website).

reviews online, thus preventing the truth about the product from getting out.<sup>26</sup> The company had hidden a gag clause in the fine print of its terms and conditions but we

consumers. Do consumers know how their data is used? Would they be happy if they found out? Is the data being sold to companies that may misuse it? Is the data secure?

This is an important issue for businesses. Surveys increasingly show that consumers care about privacy, that it affects who they do business with, and that they are using their browsers and other tools to block ads they don't like.<sup>28</sup>

The FTC's central message, again, is that even in the face of rapidly changing

Data security is a particular concern, and many of the companies we've sued are household names. In no particular order, they include – Eli Lilly, Guess Jeans, Petco, CVS, RiteAid, Dave and Busters, TJX, Life is Good, Fandango, Microsoft, LifeLock, Oracle, ChoicePoint, LexisNexis, HTC, Wyndham Worldwide, BJ's Warehouse.<sup>29</sup>

Most of these cases have involved the failure to address common, well-known vulnerabilities. For example, in Wyndham, we alleged that the hotel chain didn't require complex user IDs and passwords to access its systems, stored consumer data in clear text, and failed

now almost 60 cases the FTC has brought in this area.<sup>32</sup> This past year, we've also taken our message on the road with our **Start with Security** campaign, which includes events around the country on security topics and best practices.<sup>33</sup>

In addition to data security, I want to highlight four other areas of concern that



stores using Nomi's services would post signs and allow consumers to opt out of tracking at the store. In fact, we alleged, there were no signs or opt outs in stores, and consumers had no way of knowing which stores were using Nomi's services.<sup>36</sup>

Third, health data is a particular concern because it's sensitive and because consumers often regard it as private and off-limits to marketers.<sup>37</sup> As companies increasingly collect this data through health apps, wearables, and other devices, it's important to ensure that consumers know about and agree to your data practices, and that the data is collected and stored in a secure manner.

contact a child.<sup>38</sup> Compliance with this law is very important because there are substantial penalties for noncompliance and obvious reputational consequences.<sup>39</sup>

## V. Conclusion

In closing, I'd like to emphasize that everything I have been discussing here today can be viewed through a lens of legal compliance or, alternatively, gaining and keeping consumer trust. The great thing about consumer protection is that it's often the same thing. Thanks for having me here today. I'm happy to take questions.

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<sup>38</sup> See, e.g. Children's Online Privacy Protection Rule: A Six-Step Compliance Plan for Your Business (2013), available at <https://www.ftc.gov/tips-advice/business-center/guidance/childrens-online-privacy-protection-rule-six-step-compliance>