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2009

Advertising Trends and Consumer Protection:
Hearing Before the S. Comm. on Commerce,
Science and Transportation, 111th Cong., July 22,
2009 (Statement of David Vladeck, Geo. U. L.
Center)

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Testimony of David Vladeck

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Protection at the Federal Trade Commission

Hearing: Advertising and Consumer Protection

July 22, 2009

U.S. Senate Committee on Commerce, Science and Transportation

Subcommittee: Consumer Protection, Product Safety and Insurance

I. Introduction

Chairman Pryor, Ranking Member Wicker, and Members of the Subcommittee, I am David Vladeck, Director of the Bureau of Consumer Protection at the Federal Trade Commission ("FTC" or "Commission"). I appreciate the opportunity to appear before you today to discuss the Commission's efforts to combat fraudulent and deceptive advertising.

Deceptive advertising cases have always been at the core of the Commission's consumer protection law enforcement agenda. In 1972, however, the FTC revolutionized advertising law when it held that an advertiser violates the FTC Act by making an affirmative product claim without having a reasonable basis of support for that claim. In the 37 years since that groundbreaking decision, advertising substantiation has been a key focus of the Commission's consumer protection mission - and never more so than at the present time. Developments in science and technology, as well as in marketing strategies, have led to a proliferation of products and services and a parallel burgeoning of advertising claims about how these products will make us thinner, better looking, and healthier; improve the quality of our lives; make us richer; and even improve our environment. The substantiation of advertising claims has itself become a business opportunity, with a variety of labs and testing facilities - some legitimate and others less so - offering this service. For the FTC, assessing the adequacy of support for a claim also has grown more complex, sometimes requiring analysis by multiple experts.

Likewise, the venues for advertising messages have multiplied. In the 1970s, FTC staff 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. 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. 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 required a monetary payment. Two cases remain in litigation before an administrative law judge. The cancer cure cases were the result of an Internet surf coordinated among the FTC, the U.S. Food and Drug Administration (FDA), and the Competition Bureau Canada.

As an important adjunct to the law enforcement initiative, the Commission launched Cure-ious?

Ask, a consumer education campaign to raise awareness about bogus cancer treatment claims. The Commission's partners in this effort are the American Society of Clinical Oncology, the Cleveland Clinic, and the National Association of Free Clinics, all of whom are disseminating campaign information to both patients and medical care practitioners. In addition, the campaign is mentioned in numerous blogs related to health or cancer.

As demonstrated by the Internet research that resulted in the cancer cure sweep, marketers of dietary supplements and other products have become very bold in the medical- benefit claims they are making to sell their goods. Many are going far beyond the basic structure/function claims that are permitted under the Dietary Supplement Health and Education Act. Last year, for example, the Commission settled actions against two companies marketing supplements purported to prevent and treat diabetes. Earlier this year it accepted a settlement that included \$3 million in consumer redress to resolve charges of false and deceptive claims that an infrared sauna could treat cancer and that various nutritional supplements could treat, reduce the risk of, or prevent diseases including cancer, HIV/AIDS, diabetes, Alzheimer's disease, Parkinson's disease, heart attacks, and strokes. The products were sold on the Internet and through print media, but the primary marketing vehicle was a live, hour-long radio call-in program called "The Truth About Nutrition." In another case, filed in 2004, the Commission charged marketers of two supplements with falsely claiming that their products can prevent or cure cancer, heart disease, diabetes, and arthritis. In addition, the defendants were charged with failing to disclose that the infomercial promoting one of these products was a paid commercial advertisement, not an independent television program.

Supplements to prevent or treat the common cold have been another recent target of FTC enforcement activity. 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.

The settlement required the defendants to add funds to a consumer redress program already established to resolve a private class action lawsuit, bringing the total amount available for consumers to \$30 million. The Commission then turned its attention to Airborne copycat products. The agency is in litigation against the supplier of a copycat formula widely marketed under various retailer private label brand names, and last week announced a settlement with Rite Aid resolving charges that it made unsubstantiated claims for its Germ Defense products. A consumer redress program will coincide with the onset of the cold and flu season this fall. In another area important to the health of Americans, the Commission has expended substantial resources to get the weight-loss industry to shed its excess pounds of false or grossly exaggerated weight loss claims. In fact, over the past 10 years, the Commission has brought 77 cases dealing with weight- loss claims alleged to be untrue and/or not substantiated.

The heavily promoted weight-loss ingredient du jour changes with regularity. Each time the Commission brings a series of cases targeting claims for one kind of purported remedy, a new one emerges. Hoodia is one of the current weight-loss remedy favorites, and recently the Commission charged a supplement seller with falsely claiming its product was FDA-approved and would suppress appetite sufficiently to cause a user to cut calorie intake in half, from 2,000 to 1,000 calories per day. In addition, the complaint alleges that the product itself, supposedly derived from a rare South African plant, is not what it is purported to be.

Earlier this year, a federal district court judge, who had previously granted an FTC motion for summary judgment, ordered a payment of more than \$15.8 million and issued a permanent injunction against sellers of three supplements. Two of the substances were promoted as the equivalent of prescription weight-loss products and touted as causing a 19 percent loss in total body weight, while a third product was extolled as a remedy for erectile dysfunction. In addition, the court ordered the defendants' medical expert to pay \$15,454 for his deceptive endorsement of one of the weight-loss products.

In an order enforcement action brought by the Department of Justice on behalf of the FTC, home shopping channel QVC agreed to pay \$6 million for consumer redress, with an additional \$1.5 million in civil penalties, to settle allegations that it violated a prior FTC order. QVC was charged with making false and unsubstantiated claims, on 200 of its programs, for weight-loss pills, food bars, and shakes, as well as energy claims for its Bee-Alive supplement concocted from a substance secreted by bees.

The Commission considers its work in the dietary supplement and weight-loss area to be a high priority. Obesity is epidemic in the United States, causing a dramatic increase in related diseases, such as diabetes. False claims engender false hopes of an easy solution and may deter consumers from making necessary serious efforts to get their weight under control. Marketers using such claims simply prey on the hardships people face when they need to lose weight.

Health claims are becoming more prevalent in food marketing, and therefore, the FTC is giving increased scrutiny to food advertising. In April, Kellogg Company agreed to settle charges that its advertising - appearing in print and on TV, the Internet, and packages - falsely claimed that a breakfast of Frosted Mini-Wheats was shown clinically to improve children's attentiveness by nearly 20% when compared to children who ate no breakfast. The case provides a lesson to advertisers on the importance of careful and accurate portrayal of research findings when they are transformed into advertising claims.

Finally, a notable case in the health and safety area was announced in June. A major U.S. alcohol supplier agreed to settle FTC charges that it deceptively claimed a caffeinated alcohol drink would enable users to remain alert when consuming alcohol. The unsubstantiated claims - which

appeared in print ads, Web videos, and other Internet advertising - fueled the common but erroneous perception that mixing alcohol and caffeine helps people stay alert when drinking. Obviously, this kind of deceptive claim is of concern given the many ways people can and do injure themselves and others if they misjudge their alcohol intake.

III. Endorsements and Testimonials in Advertising

Based on the prevalent - and sometimes deceptive - use of third- party endorsements in advertising, and after receiving extensive public comment on the issues, the Commission, in 1980, adopted Guides to assist advertisers in using endorsements in a lawful and non-misleading way. Broadly defined, endorsements and testimonials encompass any advertising messages that consumers are likely to believe reflects the honest opinion, beliefs, findings, or experience of a party other than the sponsoring advertiser. Endorsements should not contain express or implied representations that would be deceptive, or could not be substantiated, if made directly by the advertiser. In addition, the 1980 Guides advised that a consumer testimonial on a key product attribute would be interpreted as representing that the endorser's experience is typical of what consumers generally will achieve. If the advertiser did not have substantiation to support this claim of typicality, the advertisement should disclose either what the generally expected performance of the product would be in the depicted circumstances or the limited applicability of the endorser's experience to what consumers can expect to achieve. With respect to endorsements by experts, the Guides advised that the expert must in fact have the qualifications he or she is represented to possess, and the endorsement must be supported by the appropriate exercise of that expertise. In addition, connections between endorsers and product sellers should be disclosed if they would not reasonably be expected by the audience and might affect the credibility of the endorsement.

As part of its ongoing process of reviewing all of its rules and guides, the FTC initiated review of the Endorsement Guides in 2007. 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. 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 commercials. Although the basic principles of the Guides remain valid, the specific applications and examples were not developed, obviously, 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, have made it increasingly clear that in one key aspect - disclaimers of typicality - the Guides are not working as intended to prevent consumer deception. 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*. 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. Of the ads featuring testimonials, 30% reported weight losses exceeding 70 pounds, while 20% reported losses of more than 100 pounds. In many instances, the testimonials reported results that, in all likelihood, are not achievable - e.g., weight loss of nearly one pound daily for two or more weeks. With few exceptions, advertisers did not disclose the actual weight loss consumers could expect to achieve with the product. Furthermore, the usual disclaimers - e.g., "results may not be typical" or "your results may vary" - did not adequately inform consumers that the reported weight losses were, at best, outliers or extreme cases.

The Commission has also conducted consumer research regarding the messages conveyed to consumers through consumer endorsements and the effect of disclaimers of typicality. These reports were placed on the public record in connection with the request for comments on the Endorsement Guides. In general, the research showed that even with prominent disclaimers of typicality - in fact more prominent than is usually the case in actual ads - significant numbers of consumers believed that at least half of product users would achieve 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. 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 fleeting superscript disclosure of atypicality is unlikely to cure the deception - as demonstrated by the Commission's research. For this reason, the Commission has proposed removing the "safe harbor" for disclaimers of typicality. However, the proposal does not bar the use of these disclaimers - as some comments have 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 would be subject to the same standards, under Section 5 of the FTC Act, as advertisers making similar claims without use of testimonials. As might be expected, this was one of the most controversial of the proposed revisions.

Another controversial proposed revision involves the application of the Guides to consumer-generated media. The proposed revisions include 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. 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 Guides 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. The Guides help marketers avoid making green claims that are "unfair or deceptive" in violation of the FTC Act. The Guides also describe how to substantiate certain 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.

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 groups, environmental organizations, and the academic community to explore the marketing of carbon offsets and renewable energy, green packaging claims, and claims for green building and textiles. The Commission sought additional public comment in connection with each workshop and solicited consumer perception data on consumer understanding of green claims. Because little consumer perception data was submitted, the

Commission plans to conduct its own research. This study will focus on consumers' understanding of particular green marketing claims, such as "eco-friendly," "sustainable," and "carbon neutral."

The Commission is actively prosecuting companies making deceptive green claims. The latest enforcement actions charged three companies with disseminating false and unsubstantiated claims that their products, such as disposable plates, wipes, and towels, were "biodegradable." According to the complaints, the companies could not substantiate that their "biodegradable" products would decompose into elements found in nature within a reasonably short period of time after customary disposal, because the substantial majority of solid waste is disposed in landfills, incinerators, and recycling facilities - disposal methods that do not afford the conditions to allow decomposition. Two of the cases have settled, with orders that bar deceptive "degradable" product claims, as well as other environmental claims not supported by competent and reliable scientific evidence. A third case is in administrative litigation.

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, the FTC filed a case alleging that the defendant 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." Last year, the FTC won a contempt action against another defendant for falsely advertising that its NanoDetonator would allow ordinary passenger cars to harness the power of nuclear fusion, thereby eliminating the need for gasoline. 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.

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.

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. 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 made a profit of more than \$50,000 in three months. Purchasers were automatically enrolled in a 30-day free-trial membership program, supposedly affording them access to seminars and advisors. Unknown to many consumers, however, the "free trial" was actually a continuity program, and they were subject to recurring automatic and unauthorized charges every month. Consumers also found the financial promises of the program to be empty ones.

The FTC also filed a lawsuit against related business entities that allegedly pretended to be affiliated with Google, using trade names such as Google Money Tree and Google Pro, and peddled low-cost home business opportunity kits. The defendants' websites advertised that the kits would enable consumers to earn over \$100,000 in six months by simply filling out forms and running Internet searches on Google and Yahoo. The complaint alleged that the defendants tricked consumers into divulging debit or credit card information, for supposedly nominal shipping and handling charges, but then used the account information to charge them a recurring monthly fee for a membership program. The court granted the FTC's request for a temporary restraining order to halt the defendants' practices.

In addition, the FTC has cracked down on companies making bogus claims that they can assist consumers in obtaining grants from the government and other sources. For example, the Commission obtained a temporary restraining order against a company that launched robocalls telling consumers they were qualified to receive grants to help them overcome their financial problems. Consumers were directed to visit particular websites, which referred them to yet another website that charged a fee.

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. 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 CANSPAM Act.

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 week. The complaints are made available to FTC staff and other law enforcement agencies in the U.S. and abroad through the Consumer Sentinel Network, a secure online database that includes complaints received not only by the FTC, but also by other selected government agencies and non-governmental entities. The Network is accessible only to law enforcement agencies, and about 1,700 such organizations in the U.S., Canada, and Australia are members. The Network has enabled the Commission to join forces with its law enforcement partners to bring multiple actions at one time to address a particular problem.

At one time, most advertising cases were brought as administrative proceedings. Violators of administrative orders could be subject to civil penalties through federal district court enforcement actions brought by the Department of Justice on the FTC's behalf. With the development of the Commission's fraud program during the 1980s, however, the agency relied increasingly on its authority pursuant to Section 13(b) of the FTC Act 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 Consumer Protection, have not increased enough. The FTC has a highly competent and dedicated staff that

is used to being asked to do more with less. However, increased resources would provide more effective consumer protection.

Self-regulatory programs, such as those initiated and ably administered by the National Advertising Division/National Advertising Review Council of the Council of Better Business Bureaus are a welcome adjunct to the FTC's advertising enforcement program, and clearly their work has served to lighten the load for the Commission. With respect to deceptive weight-loss claims, the FTC has enlisted the help of the media to screen advertising. It published a guide describing seven weight-loss product claims that should raise "red flags" because they are always false (e.g. a claim that one can lose weight without diet or exercise). Former Chairman Muris and former Commissioner Leary met with media members and asked them to refuse to run ads making the "red flag" claims. While there was initial resistance to the suggestion, some media members have responded to the challenge, and there was a significant decline in those particular claims. The "red flags" initiative was a step in the right direction, although obviously it has not solved the problem of deceptive weight loss advertising. Much more needs to be done by both the industry and the media.

Thank you for providing the Commission the opportunity to appear before the Subcommittee to describe the agency's advertising enforcement program.