

**2006 Annual Advertising Law & Business Conference
Association of National Advertisers**

**Remarks by
Lydia B. Parnes
Director, Bureau of Consumer Protection
Federal Trade Commission**

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I. Introduction

Good afternoon. I am delighted to be here today to talk to you about the Federal Trade Commission's consumer protection mission and to highlight for you some of our recent law enforcement initiatives and priorities.¹

The FTC views itself primarily as a law enforcement agency – the “cop on the beat” in advertising and marketing. We are continually working to be more effective law enforcers and to focus our law enforcement resources on those practices posing the greatest risk of harm to consumers. I think what makes us unique as a law enforcement agency is our substantial expertise in consumer behavior and the way markets work. Because of this expertise – and because of the agency's hard-earned reputation for objectivity – we are frequently asked by Congress and others to weigh in on the impact of advertising and marketing practices on a wide range of consumer issues.

Today, I'd like to outline our current priorities and talk about how we are implementing

¹ The views expressed in this speech are my own. They do not necessarily represent the views of the Federal Trade Commission or of any individual Commissioner.

them; share some thoughts on the evolution of new advertising and marketing techniques and how the FTC views them; and finally, talk about the Commission's role in the government's efforts to address the growing problem of childhood obesity.

II. Tough Law Enforcement

Let me start by giving you an overview – sort of “the world as we see it.” Our primary mission is twofold. First, we police the marketplace to ensure that claims made in advertising are truthful and not misleading, and that products are not marketed in a way that jeopardizes the safety of consumers. Our second key mission is to protect consumers from fraud. There is seemingly no end to the variety of consumer fraud that unscrupulous marketers are willing to perpetrate. We continue to confront fraud in its old guises as cure-all remedies and weight loss magic bullets. We are also working to address new threats to consumers in the computer age, ranging from x-rated spam to spyware to data security. And, with more than 116 million telephone numbers now signed on to our National Do Not Call Registry, we are vigilantly policing against telemarketers who violate the rule.

As part of each of these initiatives, we are working to effectively reach and protect all segments of society, with particular emphasis on the more than 41 million Hispanic consumers in the U.S., whom we found in a 2004 survey to be at heightened risk of falling victim to fraud.²

2005 was a particularly successful year for FTC law enforcement. During this past fiscal year, the Commission obtained 103 orders requiring defendants to pay more than \$824 million in

² See FTC Press Release, *FTC Releases Consumer Fraud Survey: More Than One-In-10 Americans Fell Victim to Fraud* (Aug. 5, 2004), available at <http://www.ftc.gov/opa/2004/08/fraudsurvey.htm>.

consumer redress, and 15 judgments of more than \$6.6 million in civil penalties. We filed 77 complaints in federal court to stop unfair and deceptive practices, approximately 30 of which are pending final disposition and we are increasingly working with criminal law enforcers to ensure that fraud is punished appropriately. Since April 2005, the FTC has assisted in criminal prosecutions of 113 FTC defendants or their associates.

III. Health Fraud

We don't like any form of consumer fraud, but health fraud is particularly high on our list of priorities.

In close cooperation with our partners at the Food and Drug Administration, we've worked hard to stop health fraud. For example, this month, after over two and a half years of litigation, we succeeded in obtaining a broad ban against Glenn Braswell, the mastermind of a sweeping direct mail campaign selling millions of dollars worth of dietary supplements as cures for diabetes, emphysema, Alzheimer's, and many other diseases. The settlement of that litigation bans Glenn Braswell from any direct response marketing of any foods, drugs and supplements. It also requires him to pay \$4.5 million in cash and assets.³

The federal district court order in the Braswell case builds on another order against the now infamous TV pitchman – Kevin Trudeau – banning Mr. Trudeau from appearing in, producing, or distributing infomercials that advertise any type of product, service, or program, with one narrow exception for truthful infomercials for books or other informational

³ See FTC Press Release, *Direct Response Marketer Banned* (Jan. 3, 2006), available at <http://www.ftc.gov/opa/2006/01/braswell.htm>.

publications.⁴

Of course, we are not only concerned about outright fraud in the sale of products touted for their health benefits. We also closely monitor the ads of mainstream national advertisers to make sure such companies are not overselling the health benefits of their products.

For example, last year, the Commission entered into a consent agreement with *Tropicana Products* after the company ran ads for its “Healthy Heart” orange juice, claiming the juice would produce dramatic effects on blood pressure, cholesterol, and blood homocysteine levels, thereby reducing the risk of heart disease and stroke. The Commission’s complaint charged that these very specific health benefits had not been substantiated and that claims of clinical support for them were false.⁵

And in 2004, the Commission settled with *KFC Corporation*, on charges that KFC made false claims in a national television advertising campaign about the relative nutritional value and healthiness of its fried chicken. The Commission’s complaint also charged KFC with making false claims that its fried chicken was compatible with certain popular weight-loss programs.⁶

The Commission is committed to review of national advertising for truthfulness and will continue to bring cases where appropriate.

IV. Buzz Marketing and Beyond

⁴ See FTC Press Release, *Kevin Trudeau Banned from Infomercials* (Sept. 7, 2004), available at <http://www.ftc.gov/opa/2004/09/trudeaucoral.htm>.

⁵ See FTC Press Release, *FTC Puts the Squeeze on Tropicana’s Orange Juice Claims* (June 2, 2005), available at <http://www.ftc.gov/opa/2005/06/tropicana.htm>.

⁶ See FTC Press Release, *KFC’s Claims That Fried Chicken Is a Way to “Eat Better” Don’t Fly* (June 3, 2004), available at <http://www.ftc.gov/opa/2004/06/kfccorp.htm>.

In addition to our review of traditional advertising we are also monitoring the evolution of new marketing techniques – word of mouth or “buzz” marketing, product placement, and marketing via cell phone.

We consider all forms of marketing to be within our purview. As you have heard this morning, one of the concerns about these new forms of marketing is simply that they are becoming more pervasive. That is not an FTC issue. At the same time, we want to be clear that we will not tolerate deceptive or unfair uses of new marketing technologies and we intend to watch that closely.

An analogy would be the development of the infomercial industry. Initially there were concerns simply about the fact that it was a new marketing technique – using the broadcast airwaves for the first time to air program-length commercials. Later, however, this marketing technique was also seized upon by some entrepreneurs who somehow equated “new” with “unregulated” and thought – “the rules don’t apply here.” The result was that the term “infomercial” quickly evolved into a synonym for “deceptive.” Pundits and late night talk show hosts could get a laugh just by using the term.

Ultimately, an active and aggressive law enforcement program and a serious, sustained, self-regulatory effort on the part of the infomercial industry made inroads on the infomercial industry’s poor reputation.

It is important, therefore, for the implementors of other new marketing tools to learn from the infomercial industry’s experience.

As you may know, the Commission has received a complaint from Commercial Alert urging the FTC to take action against buzz marketers and to develop guidelines to address this

new form of marketing.⁷

As I understand it, the Word of Mouth Marketing Association has issued draft ethical conduct guidelines to make sure that buzz marketers are up front about who they are and what they are doing.⁸ I am encouraged by the steps the Association has taken. The Commission will closely monitor developments in this area.

V. Spyware and Data Security

While we are on the subject of issues to pay attention to, let me add two more – data security and spyware.

The concerns about data security should at this point be clear to every company that collects, maintains, or uses sensitive personal information about consumers. The bottom line is that sensitive personal information and account numbers are just as attractive to criminals as the money in your bank accounts. Yet all told, last year more than 50 million sensitive consumer files were reported as lost, stolen or just misplaced. How many stories do you read about companies misplacing or losing boxes of money? Two of our most recent enforcement actions in this area involve alleged failure to have in place rudimentary data protection measures for sensitive consumer information that, by contract, the companies weren't even supposed to be keeping.⁹

⁷ See Letter from Gary Ruskin to Donald Clark (Oct. 18, 2005), available at <http://www.commercialalert.org/buzzmarketing.pdf>.

⁸ See Draft Code of Ethics, Word of Mouth Marketing Association (Feb. 9, 2005), available at <http://womma.org/ethicscode.htm>

⁹ See FTC Press Releases, *DSW Inc. Settles FTC Charges* (Dec. 1, 2005), available at <http://www.ftc.gov/opa/2005/12/dsw.htm>; and *BJ'S Wholesale Club Settles FTC Charges* (June 16, 2005), available at <http://www.ftc.gov/opa/2005/06/bjswholesale.htm>.

This is a top enforcement priority for us. Several of our cases have challenged false security claims by companies who promised consumers they would take reasonable steps to protect sensitive information, but then failed to do so. The Commission has also made it clear that the failure to take reasonable security measures to protect sensitive consumer data may be an unfair business practices under Section 5 of the FTC Act. As an example, the FTC charged the national shoe discounter chain, DSW Inc., with unfair practices when it failed to protect data, and allowed hackers to gain access to sensitive credit, debit, and checking account information of more than 1.4 million customers. The settlement requires DSW to implement a comprehensive security program and submit to routine, independent audits. DSW has also reimbursed customers for expenses they incurred in closing checking accounts.¹⁰ According to DSW's July 2005 SEC filings, the company's exposure for losses related to the security breach ranged from between 6.5 to \$9.5 million. Inadequate security can violate the FTC Act – and it's also bad business.

Another priority for the FTC is the growing problem of spyware. According to some surveys, spyware is rapidly overtaking spam as a top consumer concern on the Internet.

Some purveyors of spyware are simply criminals, placing malicious code on consumer's computers and compromising sensitive information. These online predators are properly subject to criminal law enforcement. But the term "spyware" is an elastic one, and encompasses a wide range of practices in which commercial sites download software that simply helps itself to the consumer's computer's resources.

As an example, in the FTC's case against Odysseus Marketing, consumers were lured to

¹⁰ DSW Inc., *supra* note 9.

the defendant's Web sites with promises of anonymous peer-to-peer file sharing. What they got instead was spyware that replaced and reformatted search engines, generated pop-up ads and captured and transmitted information, including personal information.¹¹ The Commission has obtained a preliminary injunction in this, and in four other spyware cases we filed.¹²

We will continue to take aggressive enforcement actions against all forms of spyware. But any company that engages in online advertising also has a role here. Frequently, spyware scams are fueled by revenues from online advertising. Now, I can't think that any online marketer would want their ads associated with spyware. But currently there appears to be little in the way of controls to prevent this. Efforts are underway by TrusteE and a group of online advertisers to develop a self-regulatory system to give advertisers a tool to identify advertising placement services that employ appropriate controls to prevent spyware.¹³ I would encourage all online advertisers to look into this and other efforts to ensure their advertising dollars are not used to fuel the current spyware epidemic.

VI. Spam

We continue to fight against a variety of computer-related fraud. To date, the FTC has

¹¹ See FTC Press Release, *FTC Seeks Halt to Illegal Spyware Operation* (Oct. 5, 2005), available at <http://www.ftc.gov/opa/2005/10/odysseus.htm>.

¹² See FTC Press Releases, *Two Bogus Anti-spyware Operators Settle FTC Charges* (Jan. 5, 2006), available at <http://www.ftc.gov/opa/2006/01/maxtrust.htm>; *FTC Shuts Down Spyware Operation* (Nov. 10, 2005), available at <http://www.ftc.gov/opa/2005/11/enternet.htm>; and *FTC Cracks Down on Spyware Operation* (Oct. 12, 2004), available at <http://www.ftc.gov/opa/2004/10/spyware.htm>.

¹³ See TRUSTe Press Release, *TRUSTe's Trusted Download Beta Program to Offer First Independent Industry Standards, Monitoring and Enforcement Program for Downloadable Software* (Nov. 16, 2005), available at http://www.truste.org/about/press_release/11_16_05.php.

filed more than 80 cases involving spam, against 225 individuals and companies. Recently, the Commission, together with the Department of Justice, announced the filing of seven civil penalty cases against online purveyors of x-rated spam on charges of violations of the FTC's Adult Labeling Rule and the CAN-SPAM Act.¹⁴ Some of these defendants attempted to escape liability by arguing that someone else pushed the button sending the illegal spam. Unfortunately for them, CAN-SPAM establishes a strict liability standard for any one who "initiates" illegal spam – in these cases by paying affiliate marketing programs to send the offending spam. These cases, along with our announcement in December that we'd settled with DirectTV for \$5.3 million in civil penalties for violations of the Do Not Call registry,¹⁵ hit home the point that sellers are on the hook for emails and calls placed on their behalf. CAN-SPAM and the Do Not Call Rule apply to all players in the marketing chain, not just the button pushers and phone dialers.

VII. Beyond Law Enforcement: Marketing and Childhood Obesity

Now as I mentioned at the outset, in addition to law enforcement, the Commission serves another important function: that of an independent and objective fact finder on marketing and competition issues. Increasingly, the Commission has been asked by Congress and others to act as a sort of ombudsman, assessing industry conduct and its impact on consumers. This is especially true for young consumers.

These efforts span a broad range of subjects, from children's privacy to obesity to alcohol

¹⁴ See FTC Press Release, *FTC Cracks Down on Illegal "X-Rated" Spam* (July 20, 2005), available at <http://www.ftc.gov/opa/2005/07/alrsweep.htm>.

¹⁵ See FTC Press Release, *DirectTV to Pay \$5.3 Million Penalty For Do Not Call Violations* (Dec. 13, 2005), available at <http://www.ftc.gov/opa/2005/12/directv.htm>.

advertising to the marketing of violent entertainment products, such as “R” rated movies and “Mature” rated video games.

As you are all aware, a major area of current concern is the role of food advertising and marketing in the nation’s current childhood obesity crisis. I am sure you are all aware of the alarming statistics underlying these concerns.

There is no disputing that many factors have contributed to rising childhood obesity rates and that the interaction of all these factors is complex. We may never resolve the debate about exactly how the nation got to this crisis in the first place.

Regardless of how we have gotten here, all segments of society – government, schools, parents, doctors, food companies, and the media – need to take a hard look at what we can do to help our children get back their health. Rather than spending a lot of time figuring out who is to blame, we should be figuring out how the industry can harness its knowledge and creativity to encourage children to eat better and exercise more.

That was the goal of the joint workshop that the FTC and the Department of Health and Human Services hosted last July.¹⁶

We were greatly encouraged by the many positive examples of progress that industry described at our workshop. We heard from several large food marketers about product and packaging changes and positive shifts in marketing messages and techniques to foster better diets. We heard from children’s entertainment companies about their efforts to incorporate

¹⁶ See Marketing, Self-Regulation, and Childhood Obesity: A Joint Workshop of the Federal Trade Commission and the Department of Health and Human Services (July 14-15, 2005), available at <http://www.ftc.gov/bcp/workshops/foodmarketingtokids/index.htm>.

healthy eating messages into programming and public service announcements. We heard from the Ad Council and others of their commitment to develop a strong and sustained social marketing campaign to motivate children to eat better – we know that the Ad council’s PSAs on obesity reflect the creativity that makes your industry the envy of the world. Probably most encouraging of all was the Grocery Manufacturer Association’s announcement of a proposal for enhanced industry-wide efforts toward responsible marketing, with specific emphasis on expanding and strengthening self-regulation.¹⁷

I hope companies will expand on these activities and that the advertising industry will follow through on GMA’s call for enhanced self-regulation. In doing so, both individual companies and the industry need to listen carefully to their critics. Participants at our workshop raised some valid concerns about the limitations of what industry has done so far.

I am encouraged to see that the advertising community has already begun to implement some of the GMA’s proposals and has recommended specific changes to the CARU self-regulatory process. It is critical, however, that you not be content to stop with the areas where you find easy agreement. If you want your efforts toward responsible food marketing to be credible, you need to take a serious look at some of the tougher issues raised by GMA and by public health advocates. What, for instance, is the appropriate use of licensed characters in food marketing to children? And what can be done to shift the mix of foods marketed to children toward products that are lower in calories and more nutritious?

My optimism is tempered by my impression that some members of your industry may not

¹⁷ See GMA Press Release, *GMA Statement Regarding Proposals to Strengthen Self-Regulation of Children’s Advertising* (July 15, 2005), available at <http://www.gmabrands.org/news/docs/NewsRelease.cfm?DocID=1542&>.

be taking the challenges posed by the nation's obesity crisis seriously. This is the time for your industry to embrace self-regulation and to move forward to convince your critics that you can address public concerns on a self-regulatory basis.

Since it was created in 1971, CARU has established an enviable track record of effective self regulation on the issues that were of concern at the time it was created – mainly deception in children's advertising. Despite its many accomplishments, and despite this industry's enormous marketing skills, CARU has an image problem. CARU is hardly a household name. Many of those who are aware of CARU view it as under-funded with a mandate from the industry that relates more to the 1970's than to the challenges of the 21st century.

The emergence of concerns about childhood obesity and the role of advertising and marketing seem to present an ideal opportunity to correct this: this is the time for your industry to adapt the CARU model and move forward to address public concerns on a self-regulatory basis. But, for reasons that are not clear to me, that has not happened, or at least not publicly.

Chairman Majoras has made clear that she considers vigorous self-regulation as the preferred approach to the growing concerns about kids' food advertising and marketing.¹⁸ But CARU, of course, is not the only model that can be used for self-regulation. Indeed, as we heard in our July workshop, concerns about advertising and marketing of foods to kids have spread to the global community, and the role of self-regulation will be debated on the world stage as well as domestically. As the discussion of this issue moves forward, I hope the industry can look to

¹⁸ See Deborah Platt Majoras, Chairman, Federal Trade Commission, *Opening Remarks at the FTC/HHS Perspectives on Marketing, Self-Regulation, and Childhood Obesity Workshop* (July 15, 2005), available at <http://www.ftc.gov/speeches/majoras/050715obesityworkshopremarks.pdf>.

today's challenges as the opportunity that it is and move forward with an effective self-regulatory response, whether that comes in the form of improvements to the CARU process or adoption of another form of self regulation.

Thank you.