



Federal Trade Commission

**Remarks of Deborah Platt Majoras¹
Chairman, Federal Trade Commission
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“Food for Thought: The FTC and Market Influences on Consumer Health”

I. Introduction

I am pleased to be here today. I would like to thank the Food and Drug Law Institute for inviting me to be part of this special event marking 50 years of outstanding programs to educate food and drug professionals. In this constantly evolving field of law, your efforts to keep us all up-to-date are important. And congratulations to those who will be honored today for their roles in FDLI's success.

As the luncheon speaker at the 50th Annual Food and Drug Law Institute Conference, it will be difficult for me to avoid the temptation to use a few food metaphors today. I will, however, do my best to whet your appetite with a little food for thought and proceed with

¹ The views expressed herein are my own and do not necessarily represent the views of the Federal Trade Commission or any other Commissioner.

minimal puns from here on.

This morning you heard from Commissioner Eschenbach about the critical mission of the Food and Drug Administration to protect and promote consumer health while overseeing the safety of everything from the food we eat to innovations like nano-technology (one of the topics on tomorrow's agenda). This is an enormous charge, and we are reassured by the range of scientific, medical, and nutrition expertise housed in the various centers of FDA.

The FTC has jurisdiction to protect competition – which in turn protects consumers – and then to further protect consumers from unfair and deceptive practices in most economic sectors. The FTC is a small, independent agency of around 1100 employees, made up primarily of lawyers and economists, with an annual budget of a little over \$200 million. While our mission is different from that of the FDA, and we do not have their level of scientific and technical knowledge, we do have an important contribution to make to consumer health, and we frequently partner with the FDA on health issues. The two agencies share jurisdiction over health-related products pursuant to a longstanding agreement.² Under this agreement, the FTC has primary responsibility to oversee the advertising of over-the-counter drugs, food, cosmetics, and devices, while the FDA regulates the labeling of these products. Through this work, our staff has developed a keen understanding of marketplace forces and consumer behavior, and our expertise in the workings of the market is a valuable complement to FDA's oversight of the food and drug industry.

Marketplace forces can and do have a tremendous impact on consumer health – both

² Working Agreement Between the FTC and FDA, 3 Trade Reg. Rep. (CCH) ¶ 9,859.01 (1971).

positive and negative. Food and entertainment companies can harness the creative ingenuity of their marketing teams and advertising agencies to educate families about good nutrition. They can even persuade young children to turn off the TV and go out and play – and while you are at it, eat more vegetables. At the same time, there are too many unscrupulous purveyors of products that they claim produce weight loss without diet or exercise , “ionized” bracelets that eliminate chronic pain, or herbal teas that lower blood sugar and treat diabetes. They trick desperate consumers into wasting their money. And, worse, they often misdirect consumers from proven methods to manage their weight, reduce chronic pain, or treat serious diseases.

It is the FTC’s role to ensure that the market is competitive so as to provide consumers with ample and affordable choices for managing their health and that it gives them accurate and timely information about these choices. I would like to share with you just a few examples of the Commission’s ongoing efforts to foster positive market influences on consumer health and to rid the market of negative influences.

II. Fostering Market as Positive Influence – Tackling Childhood Obesity

The first example has been a priority of mine since I came to the Commission – using the power of the food and media industry to tackle childhood obesity. More than 10 million school-age children in America are overweight – that’s nearly 1 in 5.³ The Institute of Medicine has characterized childhood obesity as “the most common serious contemporary public health

³ Centers for Disease Control and Prevention, “Overweight and Obesity: Childhood Overweight: Overweight Prevalence,” *available at* <http://www.cdc.gov/nccdphp/dnpa/obesity/childhood/prevalence.htm>.

concern faced by young people in the United States.”⁴ And the disease implications are sobering. The CDC estimates that 60% of overweight children have at least one risk factor for cardiovascular disease.⁵

Few people would disagree with the notion that childhood obesity is an extremely complex problem, or that there are many social and economic factors that have contributed to rising obesity rates. Some in the U.S. and around the world, however, point the finger solely at marketplace influences, specifically food advertising and marketing to children, as the culprit. I have no interest in investing my agency’s resources in an unending debate over how to allocate blame. The simple fact is that all segments of society: parents, schools, government, health care professionals, food companies, and the media have an obligation to fight this public health crisis, regardless of how we got here.

The FTC’s efforts to fight childhood obesity took shape with our 2005 workshop on Marketing, Self-Regulation, and Childhood Obesity, hosted jointly with the Department of Health and Human Services. The workshop brought together academics, consumer advocates, pediatricians, government officials, and some of the largest food manufacturers and entertainment companies. At the workshop, I expressed my continued support for self-regulation and the many benefits it provides consumers, without government regulation of speech – a

⁴ Institute of Medicine, “Food Marketing to Children and Youth: Threat or Opportunity?” (2006) pp. 2-2 to 2-3.

⁵ Centers for Disease Control and Prevention, “Overweight and Obesity: Childhood Overweight: Consequences,” *available at* <http://www.cdc.gov/nccdphp/dnpa/obesity/childhood/consequence.htm>.

position that has its share of skeptics.⁶ Thus, I also warned those in the food industry that it would be unwise to maintain the status quo. What was most encouraging about the workshop was that, despite some initial mistrust and skepticism about one another, the participants engaged in a candid dialogue. Real progress occurred during the course of those two days. The food industry pledged to implement a major self-regulatory initiative, and panelists generated many other creative ideas.

The FTC/HHS report that followed our workshop included several specific recommendations directed to food companies and the media and entertainment industry. It also included a detailed assessment of the industry's self-regulatory system, with proposals for both immediate and longer term revisions to enhance that system. The FTC surely has not been the only voice calling for action, but we have been pleased to be told that our joint workshop and report provided a stimulus for many of the industry initiatives that have followed.

In November, the Council of Better Business Bureaus and the National Advertising Review Council announced the Children's Food and Beverage Advertising Initiative, a promising effort designed to shift the mix of advertising to children under 12 and encourage healthier eating choices and lifestyles.⁷ The charter participants – Cadbury Schweppes USA,

⁶ *Perspectives on Marketing, Self-Regulation, & Childhood Obesity: A Report on a Joint Workshop of the Federal Trade Commission and the Department of Health and Human Services* (April 2006) at 43 (citing remarks of Senator Tom Harkin and Comments submitted by the Campaign for a Commercial Free Childhood and the Public Health Advocacy Institute) available at <http://www.ftc.gov/os/2006/05/PerspectivesOnMarketingSelf-Regulation&ChildhoodObesityFTCandHHSReportonJointWorksho.pdf>.

⁷ "New Food, Beverage Initiative to Focus Kids' Ads on Healthy Choices; Revised Guidelines Strengthen CARU's Guidance to Food Advertisers," (Nov. 14, 2006), available at <http://www.bbb.org/alerts/article.asp?ID=728>.

Campbell Soup Company, The Coca-Cola Company, General Mills, The Hershey Company, Kellogg Company, Kraft Foods, Masterfoods, McDonald's, PepsiCo, and Unilever – have pledged to change both the content of their messages to kids about what they should be consuming, as well as how they communicate those messages. Of course, the true test of this initiative will be in the details of how pledges are implemented and whether the program will grow beyond these 11 charter companies. I hope this initiative will produce noticeable change in the children's food marketing landscape.

At the same time, in another significant development, the Children's Advertising Review Unit (CARU) revised the self-regulatory system for children's advertising. CARU's revised guidelines address topics such as unfair conduct in advertising targeted to children; the blurring of distinctions between advertising and program or editorial content; and the use of commercial messages in interactive games or "advergaming." They also require that messages in children's food advertising be nutritionally responsible. For instance, ads should depict portion sizes appropriate to children and should not portray snacks as a meal substitute. The changes to CARU's program are an important initial step in what needs to be an ongoing effort to make sure that the self-regulatory process is transparent, tough, and keeps pace with new marketing techniques.

The media and entertainment companies also are using their marketing power to reach young audiences with positive health messages. For better or worse, beloved characters like Sesame Street's Elmo capture the attention of young children in ways that parents and teachers cannot. At our workshop, we saw remarkable data about Elmo's ability to persuade children to choose broccoli, even over chocolate. We know that Cookie Monster has already changed his

tune – cookies are now a “sometimes” food. And Sesame Workshop executives have even joked that he may soon become “Pilates Monster.”⁸

Sesame Street’s characters are not the only ones selling good nutrition. Disney now limits the licensing of its characters to foods meeting new nutritional guidelines. Nickelodeon’s SpongeBob appears on packages of carrots and spinach. And when Dreamwork’s Shrek is featured in Ad Council messages urging kids to “Get up and play an hour a day,” there is a good chance that children will respond.

Other positive collaborations are underway to shift children’s marketing toward healthier choices. The Keystone Center’s new Food and Nutrition Roundtable has begun to explore the idea of a uniform, front-of-label seal that could be adopted by the entire food industry to identify healthier foods. Consumers would have one quick and easy tool for making smart food choices – a vast improvement over the confusing array of multiple icons currently in the market. The Alliance for a Healthier Generation – a joint initiative of the American Heart Association and the William J. Clinton Foundation – has focused on marketing in the school setting. It has been successful in getting commitments from several leading manufacturers to replace current offerings in schools with smaller-portion, lower-calorie snacks and beverages.

All of these developments are evidence of the potential that the marketplace has to address public health problems like childhood obesity. Still, we appreciate the need for government to remain a productive partner. This is no food fad; the Federal Trade Commission’s commitment to combat childhood obesity is sincere and sustained, and we will

⁸ See Sesame Workshop 2005 Annual Report at 15 (quoting *Saturday Night Live*’s “Weekend Update”) available at <http://www.sesameworkshop.org/aboutus/pdf/SesameWorkshop2005.pdf>.

continue to conduct research to stay informed about what is happening in the marketplace. At our 2005 workshop, our Bureau of Economics described some initial data from a staff study on children's exposure to food advertising on TV. Their formal findings will be released later this summer. At the request of Congress, the FTC also is working on a far more comprehensive study of food industry marketing expenditures and activities targeted toward children and adolescents. This effort is exploring not only traditional TV, print, and radio advertising, but will provide an analysis of all of the many other ways that the industry reaches children – through in-store promotions, events, packaging, the Internet, and product placement in video games, movies, and television programs. We hope to get a more complete picture of marketing techniques for which publicly available data have so far been lacking. To accomplish this, the agency will issue compulsory process orders to major food and beverage manufacturers, distributors, and marketers and quick service restaurant companies. We will submit the aggregated data about children's food marketing in a report to Congress, as directed in our 2006 appropriations legislation.

In addition, we are continuously assessing industry progress in implementing the recommendations in our report, as well as other new techniques. Today I am announcing that the FTC, again together with HHS, will host a Forum on Marketplace Responses to Childhood Obesity this summer. Our Forum, scheduled for July 18, will serve as a follow-up to our 2005 workshop. We will review some of the recent research on children's exposure to food marketing and look at industry-wide initiatives and specific product packaging, and marketing innovations implemented by individual companies. Our goal for this forum is to look beyond the promises, pledges, and press releases to identify which programs have actually been put into place and are

having an impact on children's health. I am optimistic about what we will find even as I recognize that effecting the necessary change will take time and require sustained and new efforts.

III. Keeping Market Free of Negative Influences

Even as we highlight some of the industry efforts to combat obesity, we know that they are being undermined by those who seek to take advantage of consumers desperate to lose weight. Some promise dramatic, effortless weight loss in a pill. Others offer potions that will speed up your metabolism. The FTC is constantly combating weight loss fraud and other health scams with aggressive legal action, initiating, over the past decade, 229 enforcement actions challenging false and misleading health and safety claims for products ranging from weight-loss pills to cancer cures.

A. Weight Loss Fraud

This January, in a "New Year's Resolution" press conference, the FTC announced settlements with the makers of four significant and high-profile weight-control and weight-loss products, Trimspa, Cortislim, Xenadrine, and One-A-Day WeightSmart.⁹ The marketers of these four products, collectively, surrendered total cash and assets worth more than \$25 million. Their conduct illustrates why the Commission must be tough against fraud. TrimSpa for example, promised to make losing "30, 50, even 70 pounds painless." Cortislim marketers attempted to disguise their ads as talk shows featuring an expert medical professional. Ads for Xenadrine EFX promised rapid and substantial weight loss despite the fact that one of their studies showed

⁹ "Federal Trade Commission Reaches New Year's Resolution with Four Major Weight-Control Pill Marketers," (Jan. 4, 2007) *available at* <http://www.ftc.gov/opa/2007/01/weightloss.htm>.

more weight loss in the placebo group than in the group taking Xenadrine. The Xenadrine ads also featured testimonials from extremely trim and muscular consumers – who failed to mention not only that they had been paid up to \$20,000 for their testimonials but also that their “After”-photo bodies were actually the product of rigorous diet and exercise programs.

Claims for Bayer’s One-A-Day WeightSmart may have been slightly more restrained, but still fell short on substantiation. The product was a multivitamin supplement advertised to enhance metabolism and help control weight. It contained, however, only a sprinkling of green tea extract, the purported weight control ingredient. The case is a reminder that the FTC’s substantiation standard for health claims not only requires that marketers possess competent and reliable scientific studies, but also that those studies must match the product being marketed and the claims being asserted. Too often, marketers overlook the second part of that equation, for instance, claiming weight loss where only metabolism effects have been studied, or marketing a product containing only a fraction of the active ingredient studied.

The Bayer case also illustrates that the FTC’s enforcement actions are not limited to outright fraud by fringe marketers. The FTC will take action against any company that steps across the line and makes exaggerated claims for otherwise legitimate products. The civil penalty in Bayer – \$3.2 million – is the largest penalty for an order violation ever obtained by the FTC in a health case.

We currently are in litigation with Centro Natural Services, which sold a supposed obesity treatment in the form of pills and “special soap” that would “reduce dress sizes,” and made claims that you can “Lose 35 pounds in 2 months,” “Everything you lose, you will never

gain back,” and “No diets, no skipping dinner, no calorie counting, no side effects.”¹⁰ And we recently settled a case with Basic Research, which sold three skin gels that they claimed melted away fat wherever applied, including on thighs, tummy, even a double chin.¹¹

B. Diabetes Initiative

Perhaps even more reprehensible than the weight loss fraud is the conduct of companies that promise cures for serious diseases, like diabetes and heart disease, some of which relate to obesity. For example, we recently settled a case against Garden of Life for claims it made about four different dietary supplements.¹² The defendants alleged that their products could treat or cure cancer, diabetes, inflammation, asthma, and cardiovascular disease.

Unfortunately, scam artists offering bogus cures and treatments for disease tend to be pervasive on the Internet. Sometimes, fraudulent Web marketing is too extensive for government to combat effectively using traditional case-by-case enforcement. In those instances, the Commission has partnered with other law enforcement to conduct sweeps of the Internet and issue warning letters to online marketers.

In our most recent coordinated sweep, last fall, we targeted fraudulent diabetes cures and treatments online. The FTC worked with FDA and partner agencies in Mexico and Canada in a

¹⁰ See FTC Press Release, *FTC: Three Pills and Special Soap “Obesity Treatment” Won’t Wash Away the Pounds* (Oct. 17, 2006) available at <http://www.ftc.gov/opa/2006/10/centronatural.shtm>.

¹¹ See FTC Press Release, *Final Consent Order Issued in Matter of Basic Research, LLC* (June 23, 2006) available at <http://www.ftc.gov/opa/2006/06/fyi0641.shtm>.

¹² See FTC Press Release, *Dietary Supplement Maker Garden of Life Settles FTC Charges* (Mar. 9, 2006) available at <http://www.ftc.gov/opa/2006/03/gardenoflife.shtm>.

drive to stop these scams.¹³ The first step was the issuance of 180 warning letters and advisories to online marketers in three countries. Follow-up action may include seizures by FDA and FTC actions for injunctions. The FTC also launched a consumer education campaign to help consumers avoid phony diabetes cures. One component of that campaign employs a “teaser” Web site for a fictitious product called “Glucobate.” When consumers go to the site and click for more information, they are linked to an FTC page warning them about health scams. Indeed, in just a few months, the Glucobate Web site received more than 20,000 hits, and information about the site appeared on more than 100 online bulletin boards and message groups.

C. Endorsement and Testimonial Guides

It is evident from our enforcement efforts that consumer testimonials and expert endorsements are among the most persuasive and, at the same time, the most widely misused techniques employed by advertisers of weight loss supplements and other health products. One of the most brazen examples comes from the FTC’s case against the marketers of the Q-Ray “ionized” bracelet as a remedy for pain.¹⁴ The infomercial featured several dramatic and moving testimonials, including one from a woman suffering from ovarian cancer who spoke of the insufferable pain she endured from multiple rounds of chemotherapy: “There’s just some mornings I just can’t even get out of bed,” she states before tearily describing how the Q-Ray bracelet has transformed her life, “I’m just amazed and in disbelief. I’m just excited that, you

¹³ See FTC Press Release *FTC and FDA Act Against Internet Vendors of Fraudulent Diabetes Cures and Treatment* (Oct. 19, 2006) available at <http://www.ftc.gov/opa/2006/10/diabetessweep.shtm>.

¹⁴ *FTC v. QT, Inc.* 448 F. Supp. 2d 908 (N.D. Ill. 2006).

know, my life is normal again.”¹⁵ Unfortunately, Q-Ray’s marketers had no valid science to back up their pain relief claims. As the Judge said, “Not only did Defendants not have a gold-standard study in their possession, they did not even have a copper-standard study.”

The Commission will not tolerate such egregious misuse of testimonials, and we litigated this case to the bitter end to get a court order requiring the marketers to pay up to \$87 million in refunds to consumers – the entire net sales generated by the infomercials.¹⁶ But there is also a need for the Commission to tackle the problem of testimonial misuse more systematically.

As you may know, the Commission’s Guides Concerning Use of Endorsements and Testimonials in Advertising have been slated for review. The comment period has now been extended to June.¹⁷ While these guides contain many useful principles, they have not been revised for more than 27 years. It may be time to make a few changes (if for no other reason than to update archaic examples that refer to secretaries giving testimonials about their favorite typewriters).

For the current review, the Commission has released reports on two studies it commissioned regarding the messages conveyed by consumer endorsements. The studies examined questions related to the “typicality” of the consumer’s experience implied by testimonials. They also examined the impact of disclosures indicating that results may not be typical. If an ad features a consumer who has lost 10 pounds in 6 weeks, but the clinical studies show more modest average weight loss, should that testimonial be used? If so, what disclaimers

¹⁵ *Id.* at 924-25.

¹⁶ *Id.* at 975.

¹⁷ See FTC Press Release, *FTC Requests Comments on Endorsement Guides* (Jan. 16, 2007) available at <http://www.ftc.gov/opa/2007/01/fyi0707.htm>.

may be necessary to prevent misleading implications? These are the types of questions we need help in exploring, and we invited comments.

V. Conclusion

Like a fine meal, there are many components that go into creating a robust healthcare marketplace – one that offers consumers affordable and effective choices. Obviously, it has to start with fine ingredients – and those ingredients are the many innovative products that the food and drug industry offer to improve consumer health. Next, the recipe calls for a perfect balance of seasonings. By that I mean a little sweetness, and a little spicy heat. The sweetness is our encouragement of industry to market responsibly and our support of self-regulatory programs. The heat is tough enforcement when necessary. And no recipe could be a success without the best chefs – the many bright and dedicated professional staff at agencies like the FTC and FDA and HHS and the creative thinkers in industry.

Thank you and I would be happy to take any questions.