Federal Trade Commission

LOOKING BACKWARD AND FORWARD: SOME THOUGHTS ON CONSUMER PROTECTION[1]

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for

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Good morning. I am pleased to be here today. There is so much going on in today's environment that relates to the general concept of "consumer protection." I'd like to talk about where we've been, where we are now, and then share some thoughts about the current "consumer protection" framework and ponder whether it might need to be tweaked in order to respond to some of the gaps in our regulatory regime.

My experience with consumer protection began back in 1973, when I served in the Bureau of Consumer Protection at the Federal Trade Commission for two years. During that

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[1] These remarks were prepared for the conference, but were not delivered, due to the cancellation of Commissioner's Rosch's flight to the conference.

[2] These comments are my own, and do not necessarily reflect the views of the Commission or of any individual Commissioner. I would like to express my gratitude to Beth Delaney, my attorney advisor, for her contributions to this speech.

time period, perhaps our top priority was challenging national advertising that we considered either deceptive or unsubstantiated. The respondents were both major advertisers and their advertising agencies. The remedies we sought were "all product" cease-and-desist orders that would serve as a basis for civil penalties if the respondent in the future ever engaged in false or unsubstantiated advertising for **any** product.[3] And, of course, these cases were all brought administratively.

Our thinking in bringing these cases was twofold. First, these were high profile cases that communicated the message that the cops were on the beat. Second, it gave us a hook if the respondents failed to heed our message to "sin no more." You have to remember, that back then, the Commission was unable to get any money from the respondents in the first instance. The only consequence of the initial violation was a Commission order. It was not until that order was violated that civil penalties were levied. Thus, the respondent generally got so-called "two bites of the apple."

Section 13(b), which allows the Commission to seek in federal district court equitable relief like restitution and disgorgement, was enacted in the Fall of 1973, but it was in its infancy and was not applied in consumer protection cases until the end of 1975 and then only sporadically, until the 1980s. Thus, there was a premium on putting law breakers under an "all

[3] The case the Commission brought against General Electric based on its claims respecting the "reliability" of its color television sets – a challenge that resulted in an "all products" consent decree – was illustrative of these cases. *In the Matter of General Electric Company*, 89 F.T.C. 209 (Apr. 7, 1977). *See also ITT Continental Baking Co. v. F.T.C.*, 532 F.2d 207 (2d Cir. 1976).

products" order so that any future misstep would result in civil penalties. The best way to do that was to focus on national advertisers who had multiple products. Indeed, according to the FTC's Annual Report for 1973, the Compliance Division was responsible for oversight of more than 7,500 cease and desist orders issued under the FTC Act and other statutes that prohibited false, misleading and deceptive trade practices.[4] During that same time period, 13 suits seeking civil penalties were in litigation in federal district courts,[5] and 102 cases were in adjudication before the Commission's 11 administrative law judges.[6] The Annual Reports also provide an interesting snapshot of the volume of consumer protection administrative litigation. In fiscal year 1974, 29 new consumer protection cases were referred to the Administrative Law Judges,[7] and in fiscal year 1975, 47 new consumer protection cases were referred.[8]

At roughly the same time, the Commission also was getting its feet wet in including corrective advertising as part of the relief ordered. In the early '70s, a raft of Commission orders required corrective advertising to remedy false claims ranging from a television set's superiority with respect to fire or explosion hazard – to sugar and cranberry juice as sources of "superior

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[4] Annual Report of the Federal Trade Commission, For the Fiscal Year Ended June 30, 1973, at 10, *available at* http://www.ftc.gov/os/annualreports/ar1973.pdf.

[5] *Id.*

[6] *Id.* at 29.

[7] Annual Report of the Federal Trade Commission, For the Fiscal Year Ended June 30, 1974, at 37, *available at* http://www.ftc.gov/os/annualreports/ar1974.pdf.

[8] Annual Report of the Federal Trade Commission, For the Fiscal Year Ended June 30, 1975, at 31, *available at* http://www.ftc.gov/os/annualreports/ar1975.pdf.

food energy"– to a vitamin's ability to make one work better.[9] However, these were all consent decrees. The Commission did not win a corrective advertising case in a litigated case until the D.C. Circuit Court of Appeals upheld such an order in *Warner-Lambert Co. v. F.T.C.*, decided in 1977.[10]

I believe that corrective advertising continues to be a remedy that the Commission should consider in national advertising cases. Recently, for example, I dissented from the Commission's settlement with Airborne Health, Inc., the maker of a popular effervescent tablet marketed as a cold prevention and treatment remedy. In that case, in a Section 13(b) challenge in the federal court, Airborne agreed to pay up to $6.5 million in consumer redress to settle FTC charges that it did not have adequate evidence to support its advertising claims.[11] I dissented because I was concerned about the remedy – the Stipulated Final Order allowed the defendants

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[9] *See e.g.*, *Matsushita Electric of Hawaii, Inc.*, 78 F.T.C. 353 (1971)(requiring corrective advertising to remedy false claim that company's television sets were superior with respect to fire or explosion hazard); *ITT Continental Baking Co.*, 79 F.T.C. 248 (1971)(imposing corrective advertising to alert consumers that Profile bread is not effective for weight control); *Ocean Spray Cranberries, Inc.*, 80 F.T.C. 975 (1972)(ordering Ocean Spray to correct misbeliefs about meaning of superior food energy, *i.e.*, that its juice contains more calories); *Sugar Information, Inc.*, 81 F.T.C. 711 (1972)(requiring corrective notice that research has not shown that consuming sugar before meals will contribute to weight reduction or control); *Boise Tire Co.*, 83 F.T.C. 21 (1973)(ordering corrective advertising that neither company's tires nor those of its competitors has been rated by any government or industry-wide system and that in fact no such system exists for grading tires); *Amstar Corp.*, 83 F.T.C. 659 (1973)(imposing corrective advertising on Domino's sugar for false claims that it is a special or unique source of strength, energy, or stamina); *Wasem's, Inc.*, 84 F.T.C. 209 (1975)(requiring variety of corrective messages that respondent's vitamins will not make one feel better or work better).

[10] 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

[11] FTC Press Release, *Makers of Airborne Settle FTC Charges of Deceptive Advertising; Agreement Brings Total Settlement Funds to $30 Million*, (Aug. 14, 2008), *available at* http://www.ftc.gov/opa/2008/08/airborne.shtm.

to deplete their existing inventory of paper cartons and display trays – packaging that contained the problematic representations. I believe that "run-out provisions" like this should not be included in the Order – once defendants sign the Order, they should not be allowed to continue to perpetuate misperceptions about their product by exhausting their inventory of deceptive packaging. In addition to striking the run-out provisions, I also believed that the only way to effectively remove lingering misperceptions from the product's extensive advertising campaign would have been to require the defendants to engage in corrective advertising.[12]

The nature and the scope of the relief sought was not the only noteworthy feature of the national advertising cases that the Commission brought in the early 1970s. In 1972, the Commission initiated its advertising substantiation program – announcing the legal doctrine that advertisers were expected to have a "reasonable basis" for the objective claims they made in advertising.[13] Shortly thereafter, in the *Firestone* case, the Sixth Circuit Court of Appeals upheld a challenge to advertising that the Commission argued was unsubstantiated.[14] Subsequently, in 1984, the Commission issued a Policy Statement Regarding Advertising Substantiation, which reiterated the Commission's position that a firm's failure to possess and rely upon a reasonable basis for objective claims constitutes an unfair and deceptive act or practice in violation of

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[12] *See, e.g.*, *Novartis Corp. v. F.T.C.*, 223 F.3d 783 (D.C. Cir. 2000); *Warner-Lambert v. F.T.C.*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978); *Eggland's Best, Inc.*, 118 F.T.C. 340 (1994).

[13] 48 Fed. Reg. 10,471 (Mar. 11, 1983).

[14] *Firestone Tire & Rubber Co. v. F.T.C.*, 481 F.2d 246 (6th Cir. 1973), *cert. denied*, 414 U.S. 1112 (1973).

Section 5.[15] The Policy Statement also went on to explain that when advertising contains express or implied statements regarding the amount of support the advertiser has – for example, "tests prove" or "studies show" – the firm must have at least the advertised level of substantiation.[16] For implied claims, the advertiser must possess the amount and type of substantiation the ad actually communicated to consumers.

When I came back to the Commission in 2006, I was surprised to see how dramatically things had changed on the national advertising front. Basically, over the course of my first year back, I don't think I saw one matter that I would have considered a "national advertising" case back in the '70s. As I have come to realize, there are several reasons for the different landscape for national advertising enforcement at the FTC.

One big difference in the enforcement landscape is **how** we are bringing cases. For example, the "all products" cease-and-desist order has been largely supplanted by Section 13(b) proceedings, which allow the Commission to obtain equitable relief with respect to conduct that violates Section 5. During the 1980s, the Commission started using the Section 13(b) to obtain the full range of equitable relief (including rescission, restitution and asset freezes) from the courts and to do so on an *ex parte* basis whenever notice would tip off the defendant and lead to the dissipation of assets otherwise available for consumer redress. Since then, the Commission's track record in Section 13(b) cases has been nearly perfect. Increasingly, the Commission's

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[15] 49 Fed. Reg. 30,999 (Aug. 2, 1984). Appended to *Thompson Medical Co.*, 104 F.T.C. 648, 839 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987).

[16] 49 Fed. Reg. 30,999 (Aug. 2, 1984).

national advertising challenges have been brought in federal court in the last several years. A recent example is the *Airborne* settlement I just mentioned.

That's not to say that proceeding administratively is a non-starter. Last September, as part of its "Operation False Cures" initiative, the Commission issued five administrative complaints and accepted 3 other administrative settlements against respondents making cancer-related claims for laetrile, essiac tea and related products, and "natural" products, such as mushroom extracts and various blends of herbs and other ingredients.[17] In my opinion, when one of the major issues to be litigated in a case is the level and type of substantiation required for health-related claims, proceeding administratively and using the special legal expertise of administrative law judges may make the most sense. These companies, however, despite their online advertising of products, would most likely not be considered "national advertisers" as that term was used back in the 70s.

Which brings me to another consideration. There is also a difference in the **type** of national advertising cases we are bringing. Nowadays, there is a twist on what falls within the description of a "national advertising" case. We don't merely look at products that show up during prime-time advertising on broadcast television. The advent of advertising on the Internet has changed the terrain. Cases that are "national" in scope now can arguably include sellers using websites that anyone in the country can access. For example, in 2006 the Commission

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[17] Three additional settlements were filed in federal district court. *See* FTC Press Release, *FTC Sweep Stops Peddlers of Bogus Cancer Cures – Public Education Campaign Counsels Consumers, "Talk to Your Doctor*," (Sep. 18, 2008), *available at* http://www2.ftc.gov/opa/2008/09/boguscures.shtm.

settled a case with Sunny Health Nutrition Technology and Products – a marketer of dietary supplement products that purported to enhance height and treat osteoporosis.[18] The defendants promoted their products in both English and Spanish on their website and through other Internet advertising, as well as through radio and magazine advertising. In addition to paying consumer redress for the particular products at issue, the defendants also are prohibited from making false, deceptive or unsubstantiated claims about "any covered product." And again, notably, this was brought in federal court under our Section 13(b) authority.

But, regardless of how you define a "national advertising" case, the Commission is plainly bringing **fewer** of these cases. I think that there are a couple of reasons for this.

First, I would like to think that the plethora of policy statements and guidance that the Commission has issued over the last 35 years has made a difference. The range and depth of these materials is actually quite astonishing. In 1980, the Commission issued its Policy Statement on Unfairness, followed in 1983 by the Policy Statement on Deception, and the Policy Statement Regarding Advertising Substantiation. In issuing these Policy Statements, the Commission intended to indicate to advertisers how it construed its mandate, thereby providing a greater sense of certainty as to how these mandates would be enforced, and how businesses and other industry members could stay on the right side of the law.

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[18] *Federal Trade Commission v. Sunny Health Nutrition Technology & Products, Inc.*, CIV No. 8:06-CV-2193-T-24EAJ (issued Nov. 28, 2006), *available at* www.ftc.gov/os/caselist/0623007/finalorderpermanentinjunction.pdf.

Many of the guides issued by the Commission serve this same purpose. In 1971, the Commission issued a Guide Concerning Use of the Word "Free" and Similar Representations.[19] In 1975, the Commission started issuing the first of its Guides Concerning Use of Endorsements and Testimonials in Advertising.[20] The Guides for the Use of Environmental Marketing Claims – more commonly referred to as the "Green Guides," recognized the usefulness of promoting truthful and substantiated advertising while providing certainty in the marketplace for both advertisers and consumers.[21] Industry guides for jewelry, leather products and fuel economy advertising for new automobiles followed.[22] These guides provide ongoing assistance to advertisers, and the Commission is committed to updating and revising the guides as necessary to fulfill our consumer protection mandate.

The Commission has continued to offer businesses and other industry members advertising assistance on emerging issues. The FTC publication, Dot Com Disclosures: Information About Online Advertising, for example, offers specific advice on how to make clear

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[19] 16 C.F.R. § 251.

[20] In December 1972, the Commission published for public comment proposed Guides Concerning the Use of Endorsements and Testimonials in Advertising, 37 Fed. Reg. 25548 (1972). Extensive comment was received from interested parties. On May 21, 1975, the Commission promulgated three sections of the 1972 proposal as final guidelines (16 C.F.R. §§ 255.0, 255.3, and 255.4) and republished three others, in modified form, for additional public comment. 40 Fed. Reg. 22127 (1975); 40 Fed. Reg. 22146 (1975). Public comment was received on the three re-proposed guidelines, as well as on one of the final guidelines. On January 18, 1980, the Commission promulgated three new sections as final guidelines (16 C.F.R. §§ 255.1, 255.2, and 255.5) and modified one example to one of the final guidelines adopted in May 1975 (16 C.F.R. § 255.0 Example 4). 45 Fed. Reg. 3870 (1980).

[21] 16 C.F.R. § 260.

[22] 16 C.F.R. §§ 23, 24, and 259.

and conspicuous disclosures when advertising on the Internet,[23] while Dietary Supplements: An Advertising Guide for Industry, provides detailed information on the legal obligations associated with advertising products such as dietary supplements.[24]

Second, the federal enforcement landscape has been changed by the ubiquity of Lanham Act litigation. Back in the 70s, private actions were not as common as they are now. Today, deceptive comparative ads at least are susceptible to such suits and are frequently challenged under the Lanham Act.

Arguably, however, the most influential factor respecting national advertising over the last 30 or so years is self-regulation. Meaningful self- regulation provides a critical complement to the FTC's law enforcement efforts. It relieves the FTC from supervising some issues, and frees up resources that can be used in other areas. It allows the FTC to focus more efficiently on the activities of those who don't comply with the self-regulatory regime.[25]

A recent case brought by the FTC exemplifies the importance of participating in the self-regulatory process. The National Advertising Division of the Council of Better Business

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[23] *See* Dot Com Disclosures: Information About Online Advertising, *available at* http://www.ftc.gov/bcp/edu/pubs/business/ecommerce/bus41.pdf.

[24] *See* Dietary Supplements: An Advertising Guide for Industry, *available at* http://www.ftc.gov/bcp/edu/pubs/business/adv/bus09.shtm#IIb.

[25] For example, the FTC receives referrals from the National Advertising Division, the Children's Advertising Review Unit, and the Electronic Retailing Self-Regulatory Program when marketers fail to respond or refuse to comply with findings.

Bureaus requested substantiation from a seller of the dietary supplement Oreganol for print advertising claims relating to the product's ability to kill germs and protect users from viruses. The company refused to cooperate, and the matter was referred to the FTC. In August, following a staff investigation, the supplement marketers paid $2.5 million to settle false advertising claims that its products were scientifically proven to prevent or treat colds and flu.[26] In my opinion, a case like this should remind everyone of the possible ramifications of not participating in the self-regulatory process.[27]

I must add that while we may be bringing fewer "national advertising" cases, I think that these cases are still making a big impact. For example, I just mentioned the *Airborne* settlement. A little over two years ago, Bayer agreed to pay $3.2 million in civil penalties to settle charges that it violated a 1991 Commission order against its predecessor, Miles Inc., that required all claims about the benefits of One-A-Day brand products to be substantiated by competent and reliable scientific evidence.[28] The FTC alleged that in violation of that order, Bayer marketed

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[26] *FTC v. North American Herb and Spice Co., LLC*, No. 08 CV 3169 (N.D. Ill. filed Jul. 31, 2008), *available at* http://www.ftc.gov/os/caselist/0623214/index.shtm. *See also* FTC Press Release, *Oregano Supplement Marketers Agree to Pay $2.5 Million to Settle FTC Charges for False Advertising Claims* (Aug. 12, 2008), *available at* http://www.ftc.gov/opa/2008/08/naherb.shtm.

[27] The *Airborne* settlement is another case in point. In 2002, the NAD challenged Airborne's print advertisements that created the impression that consumers could protect themselves from catching colds by taking Airborne. Airborne discontinued the ad on other grounds, but the National Advertising Division – in a comprehensive case report – outlined the substantiation requirements for making such claims: competent and reliable scientific evidence. In addition, the NAD also reminded Airborne that anecdotal evidence from consumers about the product's efficacy was not sufficient to substantiate claims.

[28] *See* FTC Press Release, *Federal Trade Commission Reaches "New Year's" Resolutions with Four Major Weight-Control Pill Marketers,* (Jan. 4, 2007), *available at*

One-A-Day WeightSmart with unsubstantiated claims that it increased metabolism, helped prevent some of the weight gain associated with a decline in metabolism in users over age 30, and helped users control their weight by enhancing their metabolism. These cases, and their corresponding settlements, send the message that the FTC is still on the beat.

So what are some of the issues advertisers should currently be most concerned about? Online behavioral advertising is one of the areas that is now front and center. Interest in behavioral advertising – known previously as online profiling – was spurred after the FTC-sponsored Tech-Ade hearings in November 2006[29] and the announcement of a proposed merger between Google and DoubleClick in April 2007. The FTC then convened a November 2007 "Town Hall" to discuss online behavioral advertising in a public forum.[30] Following this Town Hall, and on the same day that the Commission approved the Google-DoubleClick merger, the Commission issued a draft set of self-regulatory principles for online behavioral advertising and requested public comment in an effort to continue to inform and shape the debate.[31]

At the beginning of February, the Commission issued a staff report describing our

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http://www.ftc.gov/opa/2007/01/weightloss.shtm.

[29] The complete transcripts of the hearings, entitled *Protecting Consumers in the Next Tech-Ade*, are available at http://www.ftc.gov/bcp/workshops/techade/transcripts.htm.

[30] FTC Town Hall, *Ehavioral Advertising: Tracking, Targeting, & Technology*, (Nov. 1-2, 2007), *available at* http://www.ftc.gov/bcp/workshops/ehavioral/index.shtm.

[31] FTC Staff, *Online Behavioral Advertising: Moving the Discussion Forward to Possible Self-Regulatory Principles*, (Dec. 20, 2007), *available at* http://www.ftc.gov/os/2007/12/P859900stmt.pdf.

ongoing examination of online behavioral advertising and revising the proposed principles to govern self-regulatory efforts in this area. These "guidelines" for self-regulation are comprised of four basic underpinnings – and I basically view them as the "floor" rather than the "ceiling." First, clearly inform consumers about what you are doing and give them an easy-to-use method to opt out if they so decide. Second, provide reasonable security for the data that you collect and only retain it as long as it is necessary to fulfill a legitimate need. Third, get affirmative express consent from consumers if you decide that you want to use already-collected data differently than how you previously told consumers you were going to use it. Fourth, you should only collect "sensitive" data for use in behavioral advertising after obtaining affirmative express consent.

The Self-Regulatory Principles define "online behavioral advertising" as the tracking of a consumer's online activities over time – including the searches the consumer has conducted, the web pages visited, and the content viewed – in order to deliver advertising tailored to the consumer's interests. As pointed out in the Principles, this definition is not intended to include "first party" advertising, so long as data is not shared with third parties, or "contextual advertising," where an ad is based on a single visit to a web page or a single search query. However, the definition of "online behavioral advertising" would include circumstances where a website allows third parties to collect data and serve advertising to the visitors of its website, but does not collect consumer data itself. In such instances, the Principles provide that such a website should provide transparency and consumer control. In other words, even if a website is not collecting consumer data for online behavioral advertising, if it hosts third party advertisers that do, the website must disclose this to consumers and provide consumers with an opportunity

to opt out or at least a link or the information necessary to opt out. Of course, the third party advertisers in this instance would also need to comply with all the applicable principles as well.

Why is it so important that industry get involved in serious self-regulatory activities with respect to online behavioral advertising? Because if it doesn't, legislators and other regulators, including the Commission, most certainly will. That view – as set forth in their concurring statements to the staff report – is shared by my colleagues Chairman Leibowitz and Commissioner Harbour. And, as many of you may know, House and Senate members held hearings on this very issue last summer.

Second, by taking the initiative and by being proactive on this issue, industry has the unique opportunity to form policy and practices that are workable and make sense. One of the benefits of self-regulation is the fact that industry insiders – immersed in the day-to-day practicalities of a particular issue – can use their expertise and experience to craft "best practices." As an industry, you realize the value to your business models of data collection and online behavioral advertising. You need to work hard to get this "right" in order to protect that asset as well as the goodwill of your consumers.

Data collection about consumers and their preferences is an issue that is of great concern and, at the same time, confusion to consumers. A poll released in September by the Consumer Reports National Research Center indicated that 72% of Americans are worried that their online

behavior is being tracked and profiled.[32] At the same time, 43% of Americans "incorrectly believe that a court order is required to monitor activities online," while another 48% "incorrectly believe their consent is required for companies to use the personal information they collect from online activities."[33] But confused or not, consumers are concerned. You will recall the furor last month over Facebook's attempt to change its terms of services: consumers and consumer advocacy groups protested what they believed to be a change in terms that gave Facebook perpetual ownership of member contributions.[34] Facebook was on the receiving end of a similar uproar when it unveiled its Beacon service a year earlier, without providing enough disclosure to users about how the service worked.[35] Other companies – including Yahoo!, Amazon and Microsoft, to name a few – have suffered similar consequences from inartful disclosures about their terms of service or business practices.

To that end, I am heartened to see that four industry associations – the ANA, the American Association of Advertising Agencies, the Direct Marketing Association, and the Interactive Advertising Bureau, along with the Council of Better Business Bureaus, have

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[32] Consumer Reports Poll: Americans Extremely Concerned About Internet Privacy Most Consumers Want More Control Over How Their Online Information Is Collected & Used, (Sep. 25, 2008), *available at* http://www.consumersunion.org/pub/core_telecom_and_utilities/006189.html.

[33] *Id*.

[34] Brad Stone and Brian Stelter, *Facebook Withdraws Changes in Data Use*, The New York Times (Feb. 19, 2009), *available at* http://www.nytimes.com/2009/02/19/technology/internet/19facebook.html?sq=facebook%20withdraws%20changes&st=cse&scp=1&pagewanted=print.

[35] Caroline McCarthy, *Rough Seas Nearly Sink Facebook's Beacon* (Nov. 30, 2007) *available at* http://news.cnet.com/8301-13577_3-9826664-36.html.

announced that they are working together to develop enhanced self-regulatory principles for online behavioral advertising.[36] The initiative's stated goal – "to address concerns about the use of online consumer data for behavioral advertising purposes while preserving the innovative and robust advertising that supports the vast array of free online content"[37] – seems to seek the right balance to me. I encourage all involved in this endeavor to use best efforts to get this done right.

Another important issue on the near horizon consists of the proposed revisions to the Endorsement and Testimonial Guides. First issued in 1975 and 1980, these Guides generally require that endorsements reflect the honest opinion of the endorser and not contain representations that would be deceptive if made by the advertiser.[38] The Commission issued revised Guides for comment in January 2007 and again in November 2008, and the most recent comment period just closed on March 2nd.

As many of you are aware, perhaps the most significant of the proposed revisions would be the elimination of the safe harbor for the use of "results not typical" disclaimers accompanying consumer endorsements that describe experiences exceeding what consumers can generally achieve with the advertised product. In November, the Commission sought comment

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[36] IAB Press Release, *Key Advertising Groups to Develop Privacy Guidelines for Online Behavioral Advertising Data Use and Collection*, (Jan. 13, 2009), *available at* http://www.iab.net/insights_research/530468/iab_news/iab_news_article/634777, *see also* ANA Press Release, *Key Advertising Groups to Develop Privacy Guidelines for Online Behavioral Advertising Data Use and Collection*, (Jan. 13, 2009), *available at* http://www.ana.net/advocacy/content/1577.

[37] *Id.*

[38] 16 C.F.R. § 255.

on its proposal to revise the Guides to provide that testimonials reflecting consumer experience on a key attribute of a product ***will likely*** be interpreted as representing that the endorser's experience is representative of what consumers will generally achieve with the advertised product in actual conditions of use. When testimonials do convey that message, and the advertiser does not possess adequate substantiation, the proposed revisions provide that the advertiser should clearly and conspicuously disclose the generally expected performance in the depicted circumstances. A short hand version of the thinking behind this proposal is, if an advertiser can't substantiate the claim, "use our product for 60 days and lose 30 pounds," it should not be able to convey the same message by means of a testimonial accompanied by a "your results may vary" disclaimer.

In addition, the proposed revisions also cover the "disclosure of material connections." As discussed in the Federal Register notice, the Commission believes that when celebrities are paid spokespersons, their endorsements are commercial messages, regardless of whether they are disseminated in a traditional advertising context – such as a television or magazine ad – or elsewhere. In the context of a something like a talk show interview, the Commission believes that there is no reason for consumers to suspect that the "endorsement" is anything more than a spontaneous mention by a celebrity who has no apparent connection with the product's marketer. To address this issue, the Commission proposed a new example to this section making it clear that consumers would not expect a celebrity endorsing a product during a routine interview to be paid for doing so, and that knowledge of such a financial interest would likely affect the weight or credibility consumers give to the celebrity's "endorsement." In order to avoid the possibility of deception, the revised guides provide that the celebrity's financial connection to the advertiser

should be disclosed. Other new examples under this section of the Guides apply the general principle that material connections between the endorser and the advertiser should be disclosed in several new forms of marketing – namely, blogs, discussion boards, and "street teams." The Commission sought public comment on these revisions and has received 15 comments in response. Staff is currently reviewing these comments and working on the revised Guides. Ongoing scrutiny of the Commission's Guides helps ensure that consumers will be protected in a changing marketplace, while at the same time offers industry an opportunity to help shape this guidance, and once made final, provides industry with certainty for its advertising endeavors.

What I would like to finish with today is some of my thoughts on consumer protection generally. Over the last few months, it has come to all of our attention that consumers are suffering some very real threats and, unfortunately, injuries. The widespread availability of risky financial products and mortgage instruments; questions about the safety of imported food and pet products from overseas; toys from China that contained unsafe amounts of lead; an onslaught of data security breaches that have exposed consumers' personal information; and even the widespread distribution of peanut products that were known to have tested positive for salmonella contamination – these are just a few of the events with which consumers have been faced. These recent occurrences have made me wonder whether the current consumer protection framework is adequate.

There are several components to a successful consumer protection regime. Trying to reduce and eliminate deceptive and misleading advertising is one. Fostering an environment where consumers get more and better information in order to make fully-informed choices is

another. Providing consumer redress where possible, disgorging ill-gotten gains from the malfeasor, or removing the product from the stream of commerce and penalizing the seller, are other elements. And perhaps, in some cases where the stakes are so high, we also need to focus more on protecting the consumer in the first instance – before the contaminated food is consumed, or the toy is purchased or the sensitive personal data is breached.

In order to truly protect consumers, all these aspects of the consumer protection regime arguably need to be strengthened. One way to approach this is to examine the idea of streamlining consumer protection leadership across a broad spectrum. For example, I think that it would be worthwhile to take some of the expertise developed by the FTC – such as, ad interpretation and copy testing; ad substantiation; clear and conspicuous disclosures; empirical research on disclosures relating to consumer mortgages and financial notices; research respecting the impact of credit scores; and our extensive consumer education efforts – and utilize that experience in areas where there are regulatory gaps. The financial services and consumer credit sectors are potential areas that could benefit from such streamlining. Much improvement is needed in the financial services and consumer credit industries' efforts to inform consumers about the elements and risks of the products they purchase. Protecting sensitive consumer information from improper disclosure – through rulemaking and enforcement efforts including civil penalties – is another area.

Consumers might also benefit from more coordination between agencies such as the FTC, the Food & Drug Administration and the Consumer Products Safety Commission. The first step would be to identify the gaps between these regulatory regimes. For example, there is

some concern, especially in the area of direct-to-consumer pharmaceutical and medical device advertising – that consumers do not fully appreciate the risks of some products and may overestimate the benefits of other products.[39] The US Government Accountability Office recently issued a report making several recommendations on improving oversight of the dietary supplement industry and consumer understanding. In particular, the GAO recommended that the Secretary of the Department of Health and Human Services direct the Commissioner of the FDA to coordinate with stakeholder groups involved in consumer outreach to identify, implement and assess additional mechanisms for educating consumers about the safety, efficacy and labeling of dietary supplements.[40] FTC expertise in areas such as ad interpretation, copy testing, effective consumer disclosures, and consumer outreach could be a useful resource. Consumer product safety is another area that might benefit from more coordination between federal agencies, namely the FTC and the CPSC. FTC experience, for example, in communicating with consumers could be useful in formulating product recalls as well as the dissemination of other useful information to affected consumers.

The point I would like to leave you with today is that as the consumer environment changes, government agencies, such as the FTC, should continually assess and evaluate our efforts to protect consumers. When those efforts fall short, we must adapt and change. This

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[39] *See, e.g.*, Susan Heavey, *Medical Device Companies Set Ad Rules Amid Criticism*, Reuters (Mar. 6, 2009), *available at* http://in.reuters.com/article/rbssHealthcareNews/idINN0533041720090305.

[40] United States Government Accountability Office, *Dietary Supplements – FDA Should Take Further Actions to Improve Oversight and Consumer Understanding*, GAO-09-250 (Jan. 2009) at 35, *available at* http://www.gao.gov/new.items/d09250.pdf.

process, and the protection of consumers, can only be improved with the additional participation of companies and trade associations such as yourselves.

Thank you for your time and attention.