

Remarks of FTC Commissioner Julie Brill

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Panel on Consumer Protection: Update on State and Federal Efforts

Moderator: Janet Mills, Attorney General of Maine
Other Panelists: C. Lee Peeler, President of NARC,
Pamela Gilbert, former Executive Director of the Consumer Product Safety Commission

Good morning. I am very glad to be here. I would like to thank many people here in the audience and around the table who have been instrumental in my career and so helpful in the process of getting me to the Federal Trade Commission. The truth is, there are really too many of you to thank. I have so many friends, because I have worked with so many of you for so many years. You all do incredible work.

I would like to talk first about the relations between the Federal Trade Commission and the state Attorneys General, both on the consumer protection and the antitrust fronts. As many of you know, relations between the states and various federal agencies have ebbed and flowed over time. There have been some pretty dark days in the relationships between AGs and various federal agencies. But even in the darkest of those days, I think some of us realized that the Federal Trade Commission managed to reach out, more than most, to the states to try to work together. My sense—and I would be interested to hear whether you agree—is that things are much better now. On a micro level, I have talked to a lot of your staffs and asked them how things are going. Two to one, the consumer protection chiefs, the antitrust chiefs, the chief deputies tell me that the relationships have never been better between the Federal Trade Commission and the states.

Of course, you all know that we enforce many of the same laws, and it makes sense for the Federal Trade Commission and the States to work together on many activities and many cases. But it has not always worked out that well. Sometimes it seemed as if we were competing for headlines, as if we were competing for targets. But in this target-rich environment in which we are living in right now, as we say in D.C., there is really no reason for competition.

What I see right now is actually mutually reinforcing collegiality and a real effort to applaud the work that the others are engaged in. I think that that is incredibly healthy. I hear that we are working together in ways that we never have before; we are engaged in joint prosecutions and sweeps, more so than we ever have before. And I think that there is a real effort to focus on those who are suffering from the economic downturn and focus on scams that are really designed to take these consumers' very last dollar.

I think it is fair to say that I bring a pretty unique understanding and focus on state issues to Washington. I think that it is more critical now than ever before to have that kind of focus. I am working on sensitizing my fellow Commissioners—I am one of five, as most of you know—to issues that the state AGs face, to issues that the staffs face, and to issues that the states face generally. In each and every case that comes before me, you will be happy to know, I always ask the staff, “What is the position of the state AG?” or “What is the position of the state AGs?” if it is a regional or national issue. They are getting used to this now—it has been ten weeks—but now in the memos I get a little paragraph telling me what the position of the state AG is on a particular issue.

I think that it is really important for the Commissioners to know what is happening out in the states on the consumer protection and antitrust issues we are working on. I would really like you to view me as your bridge: your bridge between the state AGs and the Federal Trade Commission. I really do want you to contact me and let me know if things are not working well, and even if things are working well. Let me know that too.

Let me talk a little bit about some of the issues that the FTC is working on. Of course, I speak only for myself. I do not speak for any other Commissioner here today. I thought one of the issues that would be most interesting for me to talk about here today would be Food Marketing. I know some of you have done work in the food marketing area and it is such an important issue right now.

The data with respect to the relationship between food advertising and obesity is alarming. The CDC says that one in three kids is overweight or obese right now. Childhood obesity rates have tripled in the last thirty years. The long-term health consequences of these facts are also alarming. Increased early onset of diabetes, increased heart disease and many other problems are associated with obesity.

Food marketing to children is frequently cited as a factor contributing to childhood obesity. Several AGs have initiatives underway on this issue. My mentor and friend Attorney General Bill Sorrell of Vermont has decided to take Governor Gregoire’s advice and use the broad authority that AGs have to talk about food in his state and to develop an entire initiative dealing with all sorts of state agencies, focusing on food issues and obesity issues. And I am sure others of you are thinking about or have undertaken similar initiatives.

The FTC has undertaken extensive work in the area of food marketing in the past few years. The Commission has studied the way the food industry markets to kids; it has urged food and media industries to improve their practices and how they market to kids; it has developed recommendations and is working on developing recommendations for food advertising guidelines—that is, what kind of foods ought to be advertised to kids based upon their nutritional content.

In 2008, the FTC issued a landmark report based upon an analysis that the staff did of industry expenditures on food advertising to children and teens in calendar year 2006.¹ Some of the findings were as follows: 1.6 billion dollars in 2006 were spent on advertising food and beverages to kids and teens.² Television advertising was the top category. \$745 million were spent in that year alone on television advertising for food and beverages.³ Cross-promotional advertising—that is, where a product like “Shrek” is used to advertise a food or beverage product—is also a very big category. \$208 million, or 13% of the total advertising dollars spent in 2006, were spent on these kinds of cross-promotional efforts.⁴ These are the types of things that the FTC has been looking at. We have been trying to analyze the data to determine or not whether a type of advertising could be improved, both in terms of where the ads are placed and in terms of the nutritional content of the products being advertised.

The White House has also gotten involved in this issue. As many of you know, the White House Task Force on Childhood Obesity issued a report to the President back in early May.⁵ The Federal Trade Commission participated in drafting that report, as did many other federal agencies. Consumer groups, congressmen, and many other people in Washington are urging a great deal of concentration on this issue in order to solve the problem of childhood obesity in our nation.

Of course, this public scrutiny has not gone unnoticed by the industry and the industry has been trying to improve what it does. Sixteen companies have formed the Children’s Food and Beverage Advertising Initiative, which is part of the Better Business Bureau. It is a self-regulatory initiative. The companies have pledged to make their advertisements better; they have pledged to make both what they’re advertising and how they are advertising more appropriate in terms of nutritional content and more appropriate in terms of where the ads are placed.

But it is my opinion that what the industry is doing right now is not enough. Obesity rates continue to be high and they are persisting. Industry does have a critical role to play in this arena. I am not alone in wanting the industry to do more: the Commission itself, as a whole, has asked the industry to do more as well. We are asking industry to think more carefully about what products it is advertising to children, and where those products are being advertised. We are asking for meaningful and uniform standards. When products say things like “Smart Choice” or “Better for You” on the product package, it should actually have some meaning not only in terms of substance, but also that it be consistent from one manufacturer to another manufacturer.

Some of you, particularly Attorney General Blumenthal in Connecticut and in other states, got very involved in one program called “Smart Choices.” You all may remember that.

¹ “Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation, A Report to Congress.” Federal Trade Commission. July 2008. Available at <http://www.ftc.gov/os/2008/07/P064504foodmktngreport.pdf>

² “Marketing Food to Children and Adolescents,” pg. ES-1

³ “Marketing Food to Children and Adolescents,” pg. ES-2

⁴ “Marketing Food to Children and Adolescents,” pg. ES-3

⁵ “Solving the Problem of Childhood Obesity Within a Generation, White House Task Force on Childhood Obesity Report to the President.” May 2010. Available at:

http://www.letsmove.gov/pdf/TaskForce_on_Childhood_Obesity_May2010_FullReport.pdf

This was a front-of-package labeling program that launched last year. Food and beverage products could have the words “Smart Choice” on their packaging if they met the various nutritional standards established by participating companies.

It turned out, though, that a few products raised a red flag for many people. A few products that made the list and were being labeled as a “Smart Choice” included Fruit Loops, Lucky Charms, Chocolate Lucky Charms, and other cereals that have a substantial amount of sugar in them and do cause concern in some arenas within consumer groups, nutritional experts, and others with respect to whether or not those products really are a “Smart Choice.”

General Blumenthal and the Food and Drug Administration both raised concerns about this front-of-package labeling program. The program was stopped immediately—again, going back to what Governor Gregoire was talking about in terms of urging the kind of platform that you all have as Attorneys General. The program was stopped immediately and the FDA determined that it was going to revisit all front-of-package labeling programs. It really was a powerful effort that was engaged in by the state AGs and a good example of the kind of work that you all are doing in this area.

In addition to thinking about uniform and meaningful standards—that is, standards that consumers understand are applicable from product to product and from manufacturer to manufacturer, and standards that would not allow Fruit Loops to be labeled as a “Smart Choice”—the Commission is also asking the media and entertainment industry to do its part. Not just thinking about Saturday morning cartoons, but also thinking about the vast swath of advertising that takes place in this space: that is, the cross-promotional advertising, in-store promotions, product packaging, viral marketing, what is happening on Facebook, on MySpace, on the blogosphere. All of these areas should be focused on by industry and by the media in terms of what kinds of ads they are taking, which ads they will place on which programs, and then of course, what the ads actually say.

I also want to talk briefly about the enforcement work that the FTC has been involved in, as Attorney General Mills mentioned. There has long been an effort at the Federal Trade Commission to look closely at claims that food companies make about their products. Recently, we dealt with one company that was making claims about its cereal products, with two cases back to back within about six months of each other. The claims at issue are called “functional food claims;” they are the kind of claims that a manufacturer makes when it wants to say “Do not only eat this food because it provides you with the nutrition that you need to lead a normal life, but because if you eat this product it will actually do something to improve your life—give you better reasoning ability, make you more attentive,” things like that. These are the kinds of claims that we are going to look at very closely and, I would add, that you all should look at very closely.

Kellogg’s made the claim, with respect to Frosted Mini Wheats, that eating this cereal for breakfast was clinically shown to improve children’s attentiveness by nearly 20%. We had

concerns about the substantiation for this claim, and Kellogg's agreed to stop making that claim.⁶ But what happened, of particular concern to me, was that about six months later, Kellogg's launched, and therefore had planned much earlier, a claim that its Rice Krispies products boosted children's immunity.

Now, this is the kind of claim that an advertiser must substantiate. We require substantiation that shows the product actually does do something: this product itself will do something to improve immunity, or this product itself will do something to improve attentiveness. The kind of substantiation that was offered, in my opinion, was not appropriate, it was not sufficient. I have actually litigated these issues, so I know something about what courts would require or not require for substantiation.

Kellogg's is now under order to have all of its health claims for all of its foods to be supported by competent and reliable scientific evidence.⁷ But I did take the time, during my fourth week as a Commissioner, to write a statement saying that I really do expect more of a company like Kellogg's.⁸ Kellogg's is in every single one of our kitchen cabinets, we all serve its products to our kids at some time or another. It is a very well respected company, and we do expect better from such a company.

With that, I will wrap up. I would love to take your questions.

⁶ FTC Approves Final Consent Order in Matter Concerning Kellogg Company (July 31, 2009), *available at* <http://www.ftc.gov/opa/2009/07/kellogg.shtm>.

⁷ FTC Investigation of Ad Claims that Rice Krispies Benefits Children's Immunity Leads to Stronger Order Against Kellogg (June 3, 2010), *available at* <http://www.ftc.gov/opa/2010/06/kellogg.shtm>

⁸ Concurring statement of Commissioner Julie Brill and Chairman Jon Leibowitz, June 3, 2010 *available at* <http://www.ftc.gov/os/caselist/0823145/100602kelloggstatement.pdf>