Federal Trade Commission

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The views expressed are those of the Chairman and do not necessarily reflect those of the Federal Trade Commission or the other Commissioners.

Good afternoon. I am very pleased to be here today. This is a particularly significant conference for the FTC because it brings together academics, marketing practitioners, consumer advocates, trade association representatives and government officials to collectively share ideas and research results on public policy issues that relate to marketing, the primary focus of our consumer protection mission.

Today I will talk about the Federal Trade Commission's consumer protection mission over the past year. All in all, this has been a very exciting year for our Bureau of Consumer Protection where we have had significant accomplishments. Moreover, despite limitations on resources, we have been able to establish an enforcement presence in new areas where our presence is needed. All these activities add up to continued progress in ensuring that the Commission meets its obligations to businesses and to consumers. In addition to providing an overview, I want to take advantage of this opportunity to share some views with you on the subject of copy testing. Before I start, however, let me add the standard disclaimer: the views expressed below are my own and do not necessarily reflect the views of the Commission of any other individual commissioner.

Let me open my remarks with what I think is some justifiable boasting about some of the Commission's accomplishments in the consumer protection area when measured purely by numbers: Over the past year, the Commission has taken action on more than two-hundred individual consumer protection matters. Many of these

accomplishments have come in our core law enforcement programs: combatting fraudulent conduct, challenging deceptive advertising, and securing compliance with our orders, rules, and special statutes. These actions include orders cumulatively requiring defendants to pay more than $46 million in consumer redress as well as decrees imposing an additional $3.6 million in civil penalties.

Many of our accomplishments over the past year also have been achieved in the FTC's national advertising program. I am happy to announce today that the Commission has issued its Enforcement Policy Statement on Food Advertising. The policy statement attempts to harmonize FTC food advertising enforcement with the regulations FDA has issued to implement the provisions of the Nutritional Labeling and Education Act. This effort has raised a wide variety of issues for the Commission to resolve -- including the role of advertising versus labeling, the roles and effectiveness of disclosures in advertising, and the limits of the Commission's deception authority under Section 5. Our goal is to help ensure that the messages consumers get from food advertising are consistent with those they see in food labeling today and in the future, given the new FDA nutritional-labeling regulations. The Statement cautions advertisers that claims not specifically allowed by the FDA regulations will be carefully scrutinized for deception.

Our Policy Statement strongly advises advertisers to follow the NLEA and FDA's implementing regulations and sends a clear

deterrent message to advertisers: If your claims are outside of FDA's regulations, the FTC will carefully scrutinize them for deception. For example, the Policy Statement says that we expect that FDA-defined terms must be the same in ads, such as "low," "high," to mean the same thing in ads as on labels. We also make clear that we expect the claims to be based on FDA-defined serving sizes and that the Commission regards the "significant scientific agreement standard" to be the principal guide to what constitutes a reasonable basis for unqualified health claims.

There are, of course, limits to our statutory authority and the statement faces up to them. The Commission challenges ads when it has reason to believe they are deceptive and we must prove that they are deceptive. The FTC does not have authority to pre-approve claims and by the same token, without having found a claim deceptive cannot prohibit it.

It is my belief that the approach we have outlined in the Policy Statement will produce consistent results with the FDA regulations in the vast majority of cases - and that is what I am stressing. Even in the small number of cases where our differing statutory authority produces different results, we intend to ensure consumers are protected from deceptive or unsubstantiated claims.

In addition to issuing the Food Policy Statement, we have brought many advertising cases in the past year that have addressed a broad range of subjects including:

- The sodium, fat, and cholesterol content of foods
- The health benefits of food supplements
- Power and performance of high octane gasolines
- The environmental impact of pesticides
- The energy savings of light bulbs
- The efficacy of surgical procedures
- The efficacy of commercial weight loss programs.

The goal in our advertising enforcement program is to ensure that ads are not misleading and that all objective claims made in ads are substantiated.

We have also used the full range of remedies available to us. These include where appropriate, corrective advertising, payment of consumer redress or disgorgement of ill-gotten profits, and holding advertising agencies liable for their contribution to deceptive advertising. This year for example, we ordered corrective notices to be placed on cartons of Eggland's Best eggs to counter previous advertising that was allegedly deceptive;[1] and ordered $3.5 million in consumer redress in a settlement with one of the nation's largest infomercial producers.[2]

In addition to our work in the advertising area, the Commission has been very active in its efforts to combat

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[1] Eggland's Best, Inc., (Consent Agreement provisionally accepted for public comment Feb. 1, 1994).

[2] Synchronal Corp., FTC Dkt. No. 9251 (June 3, 1993) (consent order).

telemarketing fraud. By any measure, telemarketing fraud continues to be a "growth" industry, with annual consumer injury estimated by some consumer groups to reach as high as $40 billion. Many consumers who have already been victimized are often placed on special lists and then victimized again. These lists are bought and sold by some unscrupulous telemarkters and are invaluable because consumers who have been tricked once are vulnerable to additional scams.

We use a three-part approach to combat fraud. First, we seek strong remedies, including total bans from telemarketing (for the most culpable defendants), bond requirements, and even criminal contempt remedies for recidivists -- including jail time. Second, we target companies who provide illicit support to the boilerrooms and without whom the boilerroom could not function. Third -- and most important -- we coordinate our efforts with other agencies. The NAAG-FTC Telemarketing Fraud Database, which provides over 60 law enforcement organizations with instant access to thousands of consumer complaints, is used on a daily basis by both civil and criminal law enforcement agencies throughout the country. In addition, our regional offices have joined with state officials to create telemarketing fraud strike forces in every region of the country. These efforts are a good example of the Commission having an enforcement impact well beyond its size and resources.

We already are seeing results from the task forces. For example, the FTC recently filed a case against 30 corporations

and 16 individuals in an allegedly deceptive vending machine business opportunity/telemarketing scheme. Our staff received assistance in its investigation from members of the Southeast Regional Telemarketing Strike Force; members of the New York Regional Strike Force assisted Commission staff in searching the premises of the defendants' offices in Manhattan; and the FBI provided law enforcement backup to Commission lawyers when they searched the defendants' premises in Miami.[3] These task forces have ushered in a whole new era of tough coordinated enforcement against fraud.

Our efforts to enforce our orders is another way the FTC can achieve an impact beyond its size and resources. There have been a number of noteworthy accomplishments in this program over the past year. For example, in late April the Commission announced that General Nutrition, Inc., the largest retailer of nutritional supplements in the United States, has agreed to pay a civil penalty of $2.4 million to settle charges that it violated the terms of two previous FTC orders.[4] This is the largest civil penalty ever obtained in a consumer protection matter by the Commission. The settlement resolves allegations that General Nutrition failed to substantiate disease-reduction, weight loss, muscle-building and endurance claims for numerous products, made

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[3] FTC v. Marvin Wolf et al., Case No. 94-8119-Civ-Ferguson (S.D.Fla.)(Complaint filed March 3, 1994).

[4] FTC v. General Nutrition, Inc., Civ. Action No. 94-686 (W.D.Pa.)(consent decree filed April 28, 1994, and pending before court).

prohibited claims about certain amino acid products and failed to make certain disclaimers when advertising the efficacy of "energy boosting" vitamin products. I think you will see more cases involving order violations in the future.

Given the importance of the issue of copy testing to this group, I also want to take a few minutes to discuss that issue. I know that I don't have to tell this audience about the importance of copy testing and other forms of extrinsic evidence in the regulation of advertising. In fact, I see familiar faces in this audience who have on a number of occasions helped explain this issue to the Commission.

Well done, copy testing can be a tremendous help to the Commission in resolving questions of advertising interpretation and questions about the effectiveness -- or ineffectiveness-- of proposed remedies. As many of you are aware, the Commission has been one of the pioneers in admitting this kind of evidence in trials and in scrutinizing its use to ensure that it is reliable.

Despite this, I think there are often conflicting perceptions concerning our attitude about when we will or will not require extrinsic evidence to interpret implied claims. Here I can only assure you that the Commission understands the importance of reliable and probative extrinsic evidence and its usefulness to our decision-making. I would like to address two current issues relating to the use of copytesting. The first is whether the Commission could, and should provide guidance to advertisers by promulgating a uniform copy testing methodology

for use in all advertising cases involving implied claims. The second is whether the results of such a uniform testing methodology will produce objective truth as to the existence of these implied claim without the need for interpretation or evaluation.

First, let me start by saying that there is already a good body of guidance as to how the Commission is likely to use extrinsic evidence: The Bristol Meyers,[5] Thompson Medical[6] and Kraft[7] cases all discuss the Commission's approach to the use of copy test evidence within the context of these cases. Lanham Act cases and scholarly articles supplement this body of information. In a nutshell, Commission relies on consumer surveys as evidence of an advertisement's communication when "the surveys are methodologically sound; they draw valid samples from the appropriate population, ask appropriate questions in ways that minimize bias, and analyze results correctly."

Despite the facial appeal of the Commission providing more guidance on this issue, I think that there are a number of significant limitations on our ability to provide a greater degree of certitude to advertisers. More specifically, while there are a number of generally accepted fundamental principles

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[5] Bristol-Meyers Co., 102 F.T.C. 21 (1983), aff'd, 768 F.2d 554 (2d Cir. 1984), cert. denied, 469 U.S. 1189 (1985).

[6] Thompson Medical Co., 104 F.T.C. 648 (1984), aff'd, 791 F.2d 189 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987).

[7] Kraft, Inc., D. 9208 (Jan. 30, 1991), aff'd, 970 F.2d 311 (7th Cir. 1992), cert. denied, 113 S.Ct. 1254 (1993).

relevant to the development and analysis of copy tests intended to evaluate whether or not a specific claim is conveyed, a specific ad, different products, advertising claims, and formats can all pose different and unique challenges with respect to copy testing. Thus, I believe that it would be unlikely that anyone could devise a generic copy test; while there many be some very general commonalities, our experience is that each copy test must be custom designed to fit the specific circumstances presented by specific ad cases.

The corollary, of course, is that there is no single "correct" methodology for any specific case. Rather, in any given instance, there are generally a number of approaches that could be considered appropriate. Because the choice between such possible approaches is inherently dependent upon a number of factors, there will always be disputes as to whether the selection is a valid and reliable one. No guidance that the Commission could offer could be sufficiently prescriptive as to eliminate such controversies. This is true both as to basic design elements (such as the type of controls utilized) and the specific wording of the copy test questions themselves. The results of a copy test can differ depending upon on how questions are phrased, and questions obviously must be crafted individually on a case-by-case basis to address the issue(s) of interest in each instance.

Finally, the manner in which the results are evaluated can affect the conclusions drawn from a study. For instance,

questions as to whether verbatim responses have been properly categorized will sometimes be contentious litigation issues.

While adherence to the general principles set out here will help advertisers avoid some of the more common problems encountered when conducting copy tests in anticipation of litigation, it will not provide a safe harbor. Just as advertisers and advertising agencies have no single universally-accepted testing methodology, no guidance we could provide could be all-inclusive.

By the same token, failing to adhere to one or more of the generally accepted research practices would not automatically render copy test results entirely devoid of probative value. Depending upon the nature of the study's shortcomings and the magnitude and direction of any possible bias they might introduce, the research may still be deemed to provide probative and reliable evidence. The Commission's job in these cases is to carefully examine the record in each case to determine what weight should be give to any particular study.

None of this will, I think, come as a new revelation to the members of this audience who work daily with this type of evidence. But you need to realize that others, less familiar with your work may not understand these limitations. The challenge for your group is I think to maintain your strong advocacy of consumer research but also to be candid about its limitations.

One final note. Especially in our advertising enforcement program, we often rely upon marketing experts -- including many of you in the audience and your colleagues. Marketing experts have and continue to influence our programs by helping us select cases (for example, by helping us design and evaluate copy tests or other forms of marketing research) and advise us on settlement issues, such has the likely effectiveness of various remedies and disclosures. In addition, marketing experts have assisted in our litigation by serving as expert witnesses and as evaluators of research done by advertising agencies and marketing research firms.

Over the years, we have also been lucky enough to bring on board various marketing experts to help us. Most recently, Craig Andrews and Dick Beltramini have provided invaluable assistance on a day-to-day basis. And many others in the audience also have provided assistance, either directly or informally. We are indebted for that assistance. In addition, I should add that Tom Maronick, a marketing professor at Towson State University is a part time in house marketing expert in the Bureau of Consumer Protection.

If you simply look around the room at the number of FTC staff that are attending this conference or participating on panels you can judge the importance we attach to your ongoing research. Even if our smaller budget and increasing responsibilities means we are not the source of funding for such

research that we once were, we are avid "free riders" on your research.

I hope we can continue to improve on and build upon the ongoing dialogue between the FTC and the marketing community that has been established over the last few years. I believe that these discussions help us better serve the public interest.