DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING

FEDERAL TRADE COMMISSION ADVERTISING ENFORCEMENT

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Revised May 17, 2000 – Lesley Anne Fair

I. **INTRODUCTION**

A. Commission's Statutory Authority in Advertising Cases

1. Section 5 of the FTC Act, 15 U.S.C. § 45. Section 5 gives the Commission broad authority to prohibit "unfair or deceptive acts or practices."
2. Sections 12-15 of the FTC Act, 15 U.S.C. §§ 52-55. These sections prohibit the dissemination of misleading claims for food, drugs, devices, services or cosmetics.

A. Deception: Deception Policy Statement, appended to Cliffdale Associates, Inc., 103 F.T.C. 110, 174 (1984). An advertisement is deceptive if it contains a misrepresentation or omission that is likely to mislead consumers acting reasonably under the circumstances to their detriment. Although deceptive claims are actionable only if they are material to consumers' decisions to buy or use the product, the Commission need not prove actual injury to consumers.
B. Unfairness: Unfairness Policy Statement, appended to International Harvester Co., 104 F.T.C. 949, 1070 (1984). See 15 U.S.C. § 45(n). An advertisement or trade practice is unfair if it:

1. causes or is likely to cause substantial consumer injury;
2. which is not reasonably avoidable by consumers themselves;
3. and is not outweighed by countervailing benefits to consumers or competition.

> "In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination." According to the Conference Report, the definition is derived from the Commission's 1980 Unfairness Policy Statement, the Commission's 1982 letter on the subject, and interpretations and applications in specific proceedings before the Commission. H. Rep. No. 617, 103d Cong., 2d Sess. (1994), 140 Cong. Rec. H6006 (daily ed. July 21, 1994).

I. **REMEDIES FOR VIOLATIONS OF THE LAW**

A, Cease and Desist Orders: In advertising cases, the basic administrative remedy is a cease and desist order. The purpose of the order is two-fold: 1) to enjoin the illegal conduct alleged in the complaint; and 2) to prevent future violations of the law. FTC

v. Colgate-Palmolive Co., 380 U.S. 374 (1965). The Commission has wide discretion to fashion broad "fencing-in" provisions to deter future violations. FTC v. Universal-Rundle Corp., 387 U.S. 244 (1967). Therefore, the voluntary cessation of an advertising campaign is not a defense to a Section 5 action. See American Home Products Corp., 98 F.T.C. 136, 406 (1981).

A. Corrective Advertising: If merely prohibiting future misrepresentations will not dispel misperceptions conveyed through prior misrepresentations, the Commission may order corrective advertising. See Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977), cert. denied, 435 U.S. 950 (1978) (upholding order enjoining company from representing that Listerine helps prevent colds and sore throats and requiring it for a specific period to state in future advertising "Listerine will not help prevent colds or sore throats or lessen their severity"). Representative corrective advertising cases:

- Novartis Corp., D-9279 (May 27, 1999) (Commission Decision) (requiring marketer of Doan's pills to run corrective advertising to remedy deceptive claim that product is superior to other analgesics for back pain), appeal docketed, No. 99-1315 (D.C. Cir. Aug. 2, 1999)
- Unocal Corp., 117 F.T.C. 500 (1994) (consent order) (requiring gasoline company to mail corrective notices to credit card holders who had received ads making unsubstantiated performance claims for higher octane fuels)
- Eggland's Best, Inc., 118 F.T.C. 340 (1994) (consent order) (requiring marketer of eggs to label packaging for one year with corrective notice regarding product's effect on serum cholesterol)

A. Other Informational Remedies: The Commission may require advertisers to make accurate information available through disclosures, direct notification, or consumer education.

1. Representative disclosure cases:

   - Met-Rx USA, Inc., File No. 992-3180 (D. Colo. Nov. 15, 1999), and AST Nutritional Concepts & Research, Inc., File No. 992-3179 (C.D. Cal. Nov. 15, 1999) (stipulated final orders) (requiring labeling and advertising for purported body-building supplements containing androgen and other steroid hormones to disclose, "**WARNING:** This product contains steroid hormones that may cause breast enlargement, testicle shrinkage, and infertility in males, and increased facial and body hair, voice deepening, and clitoral enlargement in females. Higher doses may increase these risks. If you are at risk for prostate or breast cancer, you should not use this product.")
   - R.J. Reynolds Tobacco Co., C-3892 (Aug. 6,1999) (consent order) (requiring marketer of Winston "no additives" cigarettes to disclose in ads that "No additives in our tobacco does NOT mean a safer cigarette")
   - Global World Media Corp., 124 F.T.C. 426 (1997) (consent order) (requiring marketer of "Herbal Ecstasy" to disclose "**WARNING:** This product contains ephedrine which can have dangerous effects on the central nervous system and heart and could result in serious injury. Risk of injury increases with dose.")

- Safe Brands Corp., 121 F.T.C. 379 (1996) (consent order) (requiring marketer of Sierra antifreeze to include a statement on containers warning consumers that product may be harmful if swallowed)
- Third Option Laboratories, Inc., 120 F.T.C. 973 (1995) (consent order) (requiring marketers of "Jogging in a Jug" cider beverage to disclose that there is no scientific evidence that product provides any health benefits)

1. Representative direct notification cases:

- Brake Guard Products, Inc., D-9277 (Jan. 23, 1998) (requiring marketer of purported after-market braking system to notify distributors and purchasers that FTC has determined ad claims to be deceptive)
- Phaseout of America, Inc., 123 F.T.C. 395 (1997) (consent order) (requiring marketer of device advertised to reduce health risks of smoking to notify purchasers that the product has not been proven to reduce the risk of smoking-related diseases)
- Consumer Direct, Inc., 113 F.T.C. 923 (1990) (consent order) (requiring marketer of Gut Buster exercise device to mail warnings to purchasers regarding serious safety hazard of product)

1. Representative consumer education cases:

- FTC v. Bayer Corp., D-8919 (consent decree filed Jan. 11, 2000) (requiring $1 million educational campaign to inform consumers of the proper use of aspirin regimen therapy and disclosure in future ads that "Aspirin is not appropriate for everyone, so be sure to talk with your doctor before beginning an aspirin regimen" in settlement of charges that Bayer made unsubstantiated claims that regular use of aspirin is appropriate therapy for the prevention of heart attacks and strokes in the general population)
- United States v. Mazda Motor of America, Inc., (C.D. Cal. Sept. 30, 1999) (consent decree) (requiring yearly distribution of FTC consumer education materials on vehicle leasing to consumers in settlement of charges that Mazda failed to make clear and conspicuous disclosures of leasing terms)
- Exxon Corp., 124 F.T.C. 249 (1997) (consent order) (requiring consumer education campaign, including television ads and brochure, in settlement of charges that advertiser made misleading claims about gasoline's ability to clean engines and reduce maintenance costs)
- Schering-Plough Healthcare Products, Inc., 123 F.T.C. 1301 (1997) (consent order) (requiring marketer of Coppertone Kids Waterproof Sunblock to distribute educational brochures on sunscreen protection)
- California SunCare, Inc., 123 F.T.C. 332 (1997) (consent order) (requiring prominent cautionary statement in future advertising for suntanning products about hazards of sun exposure)

- Blenheim Expositions, 120 F.T.C. 1078 (1995) (consent order) (requiring producer of franchise trade shows to distribute for five years a copy of the FTC's "Consumer's Guide to Buying a Franchise" to as many as 500 people attending each trade show the company promotes)

A. Bans and bonds: To protect consumers in the future, district courts have banned individuals from certain industries or required them to post bonds before engaging in business. The Commission has imposed similar protections in consent orders. See, e.g., Synchronal Corp., 116 F.T.C. 1189 (1993) (consent order) (requiring corporate officer to establish $500,000 escrow account before marketing certain products to fund consumer redress, if necessary). Representative cases:

- FTC v. American Urological Corp., No. 98-CVC-2199-JOD (N.D. Ga. April 29, 1999) (final order for permanent injunction) (imposing $6 million bond on marketer of "Väegra," dietary supplement purporting to treat impotence)
- FTC v. iMall, Inc., (C.D. Cal. April 12, 1999) (permanently banning principals from Internet-related business ventures and imposing $500,000 performance bond before selling any business opportunity)
- FTC v. National Clearing House, Inc., No. CV-S-94-138-LDG (D. Nev. Sept. 6, 1995) (permanently banning principals in fraudulent charitable fund-raising scheme from prize-promotion telemarketing)

A. Consumer Redress, Disgorgement, and Other Financial Remedies: Pursuant to its inherent equitable powers, a district court may order redress or disgorgement of profits under Section 13(b). FTC v. H.N. Singer, Inc., 668 F.2d 1107 (9th Cir. 1982). In addition, Commission consent orders often require advertisers to pay redress or disgorge profits. The Commission also may seek redress under Section 19 of the FTC Act, 15 U.S.C. § 57b, if an advertiser has been found to have violated Section 5 and if the court finds that the challenged act or practice is one which a reasonable person would have known to be "dishonest or fraudulent."

1. Representative Section 13(b) cases:

- FTC v. Amy Travel Service, Inc., 875 F.2d 564 (7th Cir. 1988) (upholding district court's award of consumer redress under Section 13(b) to victims of fraudulent travel promotion)
- FTC v. International Diamond Corp. No. C-82-078 WAI (JSB) (N.D. Cal. Nov. 8, 1983) (upholding authority of federal court to order consumer redress under Section 13(b) when conduct is "dishonest or fraudulent")

1. Representative Section 19 case:

- FTC v. Figgie, Inc., 994 F.2d 595 (9th Cir. 1993) (upholding district court's award of consumer redress following Commission's finding of Section 5 violation for deceptive representations regarding safety of heat detectors)

1. Representative consent orders requiring financial or other remedies:

- Apple Computer, Inc., C-3890 (Aug. 6, 1999) (consent order)

(challenging company's practice of charging computer owners for technical support despite advertising that such services were free and requiring company to honor representation that customers would receive free support for as long as they own the product)

- Blue Coral, Inc., 124 F.T.C. 568 (1997) (consent order) (challenging performance claims for Quaker State's Slick 50 and preserving Commission's right to seek redress if pending class action suits result in less than $10 million for consumers)
- Apple Computer, Inc., 124 F.T.C. 184 (1997) (consent order) (requiring company to provide computer upgrade kits at reduced cost and to offer rebates to purchasers)
- Azrak-Hamway International, Inc., 121 F.T.C. 507 (1996) (consent order) (requiring toymaker to offer refunds to consumers and to notify television stations that ran the ad of the policies of the Better Business Bureau's Children's Advertising Review Unit)
- L & S Research Corp., 118 F.T.C. 896 (1994) (consent order) (requiring advertiser to pay $1.45 million in disgorgement for deceptive claims for Cybergenics bodybuilding products)

A. Civil Penalties for Violations of Commission Orders and Trade Regulation Rules: Section 5(l) of the FTC Act authorizes the Commission to seek civil penalties in federal court for violations of cease and desist orders. Section 5(m)(1) authorizes the Commission to seek civil penalties for violations of trade regulation rules.

1. Representative order violation cases involving advertising:

- United States v. Mazda Motor of America, Inc., (C.D. Cal. Sept. 30, 1999) (consent decree) ($5.25 million total civil penalty for violations of FTC and state orders related to car leasing advertising)
- United States v. Home Shopping Network, Inc., No. 99-897-CIV- T-25C (M.D. Fla. April 15, 1999) (consent decree) ($1.1 million civil penalty for violating previous FTC order barring false and unsubstantiated claims)
- United States v. Nu Skin International, Inc., No. 97-CV-0626G (D. Utah Aug. 6, 1997) (stipulated permanent injunction) ($1.5 million civil penalty against seller of chromium picolinate weight loss products for violating previous FTC order barring false or unsubstantiated claims)
- United States v. STP Corp., No. 78 Civ. 559 (CBM) (S.D.N.Y. Dec. 1, 1995) (stipulated permanent injunction) ($888,000 civil penalty against motor oil additive manufacturer for violating FTC order barring deceptive claims)
- In re Dahlberg, No. 4-94-CV-165 (D. Minn. Nov. 21, 1995) (stipulated permanent injunction) ($2.75 million civil penalty against hearing aid manufacturer for violating FTC order barring false or unsubstantiated performance claims)

- United States v. General Nutrition Corp., No. 94-686 (W.D. Pa. Apr. 28, 1994) (stipulated permanent injunction) ($2.4 million civil penalty against dietary supplement marketer for violating FTC order requiring substantiation for disease, weight loss, and muscle building claims)

1. Representative trade regulation rule violation cases involving advertising:

    - United States v. Iomega Corp., No. 98-CV-00141C (D. Utah Dec. 9, 1998) (consent decree) ($900,000 civil penalty for violations of FTC Mail Order Rule)

    - United States v. Dell Computer Corp., No. 98-CA-0210 (W.D. Tex. April 2, 1998) (consent decree) ($800,000 civil penalty for violations of FTC Mail Order Rule)

A. Civil or Criminal Contempt for Violations of District Court Orders: Federal district court orders may be enforced through civil or criminal contempt actions filed in district court. Representative contempt cases:

    - United States v. Dante, CV-90-945 ABC (GX) (C.D. Cal. 1998) (imposing prison term for criminal contempt related to violations of federal court order barring misrepresentations to consumers)

    - United States v. Jordan, CR-S-96 113-LRL (D. Nev. 1998) (imposing prison term for criminal contempt related to violations of asset freeze order enjoining operation of telemarketing "recovery room")

    - FTC v. Berggren, No. 96-C-2088 (N.D. Ill. 1997) (settling civil contempt charges for purported violations of permanent injunction against deceptive credit repair claims)

I. ADVERTISING SUBSTANTIATION

A. Advertising Substantiation Policy Statement: 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), the statement sets forth the requirement, articulated in prior Section 5 cases, that advertisers must have a reasonable basis for making objective claims before the claims are disseminated. This doctrine was first announced in Pfizer, Inc., 81 F.T.C. 23 (1972).
B. An advertiser must possess at least the level of substantiation expressly or impliedly claimed in the ad. See, e.g., Honeywell, Inc., C-3823 (Aug. 21, 1998) (consent order) (requiring claims that imply a level of performance under specific conditions, such as household use, to be substantiated by evidence relating to those conditions).
C. If no specific level of substantiation is claimed, what constitutes a reasonable basis is determined on a case by case basis by analyzing six "Pfizer factors":

    1. the type of claim;
    2. the benefits if the claim is true;
    3. the consequences if the claim is false;
    4. the ease and cost of developing substantiation for the claim;
    5. the type of product; and
    6. the level of substantiation experts in the field would agree is reasonable.

A. For health or safety claims, the Commission has typically required a relatively high level of substantiation, usually "competent and reliable scientific evidence," typically defined as "tests, analyses, research, studies, or other evidence based upon the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results." See, e.g., Brake Guard Products, Inc., D-9277 (Jan. 23, 1998). Representative cases outlining the standards for "reasonable basis":

- Schering Corp., 118 F.T.C. 1030 (1994) (consent order) (requiring that tests and studies relied upon as reasonable basis must employ appropriate methodology and address the specific claims made in the ad)
- FTC v. Pantron I Corp., 33 F.2d 1088 (9th Cir. 1994), cert. denied, 514 U.S. 1083 (1995) (holding that consumer satisfaction surveys and studies demonstrating the placebo effect are insufficient to meet "competent and reliable scientific evidence" standard)
- Removatron International Corp., 111 F.T.C. 206 (1988), aff'd, 884 F.2d 1489 (1st Cir. 1989) (requiring "adequate and well-controlled clinical testing" to substantiate claims for hair removal product)
- 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) (requiring two adequate and well-controlled clinicals to substantiate certain drug claims)

I. LIABILITY FOR FALSE OR UNSUBSTANTIATED CLAIMS

A. Principals: An advertiser is responsible for all claims, express and implied, that are reasonably conveyed by the ad. See Sears, Roebuck & Co., 95 F.T.C. 406, 511 (1980), aff'd, 676 F.2d 385 (9th Cir. 1982). The advertiser is strictly liable for violations of the FTC Act. Neither proof of intent to convey a deceptive claim nor evidence that consumers have actually been misled is required for a finding of liability. See Chrysler Corp. v. FTC, 561 F.2d 357, 363 & n.5 (D.C. Cir. 1977); Regina Corp., 322 F.2d 765, 768 (3d Cir. 1963). See also Orkin Exterminating Co. v. FTC, 849 F.2d 1354 (11th Cir. 1988), cert. denied, 488 U.S. 1041 (1989) (holding that company's purported good faith reliance on the advice of counsel is not a defense under Section 5).

B. Individual Liability: Corporate officers may be held individually liable for violations of the FTC Act if the officer "owned, dominated and managed" the company and if naming the officer individually is necessary for the order to be fully effective in preventing the deceptive practices which the Commission had found to exist. FTC v. Standard Education Society, 302 U.S. 112 (1937). The Commission is not required to show that defendants intended to defraud consumers in order to hold them personally liable. FTC v. Affordable Media, 179 F.3d 1228 (9th Cir. 1999).

1. Individual liability is justified "where an executive officer of the respondent company is found to have personally participated in or controlled the challenged acts or practices" or if the officer held a "control position" over employees who committed illegal acts. See Rentacolor, Inc., 103 F.T.C. 400, 438 (1984); Thiret v. FTC, 512 F.2d 176 (10th Cir. 1975).

2. Individuals are personally liable for restitution for corporate misconduct if they "had knowledge that the corporation or one of its agents engaged in dishonest or fraudulent conduct, that the misrepresentations were the type upon which a reasonable and prudent person would rely, and that consumer injury resulted." The knowledge requirement can be satisfied by showing that the individuals had actual knowledge of material misrepresentations, were recklessly indifferent to the falsity of a misrepresentation, or were aware of the probability of fraud along with an intentional avoidance of the truth. FTC v. Affordable Media, 179 F.3d 1228 (9th Cir. 1999), quoting FTC v. Publishing Clearing House, Inc., 104 F.3d 1168, 1171 (9th Cir. 1996).
3. In the absence of specific evidence, requisite authority may be inferred from activities that exhibit signs of planning, decision making, and supervision, such as preparing or approving ads containing deceptive representations. See Southwest Sunsites, Inc. v. FTC, 785 F.2d 1431 (9th Cir. 1986).

A. Advertising Agencies: An advertising agency is liable for a deceptive advertisement if the agency was an active participant in the preparation of the advertisement and if it knew or should have known that the advertisement was deceptive. Standard Oil Co., 84 F.T.C. 1401, 1475 (1974), aff'd and modified, 577 F.2d 653 (9th Cir. 1978). An ad agency will be strictly held to know what claims are contained in its ads, be they express or implied. ITT Continental Baking Co., 83 F.T.C. 865, 968 (1973), aff'd and modified, 532 F.2d 207 (2d Cir. 1976). An ad agency does not have to substantiate independently the claims or scientifically reexamine the advertiser's substantiation. However, it cannot ignore obvious shortcomings or facial flaws in an advertiser's substantiation. Bristol- Myers Co., 102 F.T.C. 21, 364 (1983). Representative advertising agency cases:

- Bozell Worldwide, Inc. and Martin Advertising, Inc., C-3845 and C-3846 (Jan. 4, 1999) (consent orders) (challenging agencies' roles in advertisements containing deceptive representations of car leasing terms)
- Grey Advertising, Inc., Rubin Postaer and Associates, Inc., and Foote, Cone & Belding, Inc., C-3792, C-3793, and C-3794 (April 22, 1998) (consent orders) (challenging agencies' roles in advertisements containing deceptive representations of car leasing terms)
- Grey Advertising, Inc., 122 F.T.C. 343 (1996) (consent orders) (challenging agency's role in advertisements containing deceptive demonstration for Hasbro paint-sprayer toy and deceptive claims for Dannon frozen yogurt)
- Young & Rubicam, Inc., 122 F.T.C. 79 (1996) (consent order) (challenging agency's role in advertisements containing deceptive claims for Ford's auto air filtration system)
- NW Ayer & Son, Inc., 121 F.T.C. 656 (1996) (consent order) (challenging agency's role in advertisements containing deceptive claims regarding the effect of Eggland's Best eggs on blood cholesterol)
- BBDO Worldwide, Inc., 121 F.T.C. 33 (1996) (consent order) (challenging agency's role in advertisements containing deceptive claims for Häagen-Dazs frozen yogurt)

A. "Means and Instrumentalities": Companies may be liable if they provide others with the "means and instrumentalities" for engaging in deceptive conduct. See Castrol North America Inc., C-3970 (Dec. 17, 1999) (consent order), and Shell Chemical Co., C-3912 (Jan. 7, 2000) (challenging both Castrol's role in disseminating deceptive power and acceleration

representations for its Syntec brand fuel additives and Shell's role in providing trade customers, including Castrol, with promotional materials containing deceptive claims for the purported active ingredient of Syntec, which Shell developed and tested).

B. Liability of Other Parties: The Commission has held other parties, such as catalog marketers, retailers, infomercial producers, and home shopping companies liable for their role in making or disseminating deceptive claims. Representative cases:

- Sharper Image Corp., 116 F.T.C. 606 (1993) (consent order) (holding cataloger liable for unsubstantiated claims for telephone tap detector, exercise device, and dietary supplement)
- Lifestyle Fascination, Inc., 118 F.T.C. 171 (1994) (consent order) (holding cataloger liable for unsubstantiated claims for fuel additive, pain relief device, and "Brain Tuner" for addiction and depression)
- Walgreen Co., 109 F.T.C. 156 (1987) (holding retail drugstore chain liable for deceptive advertising of OTC pain reliever); General Nutrition Inc.,111 F.T.C. 387 (1989) (consent order) (holding retailer liable for deceptive claims for dietary supplements)
- Kent & Spiegel Direct, Inc., C-3769 (Sept. 16, 1997) (holding infomercial producer liable for deceptive weight loss and spot reduction claims for abdominal exerciser)
- QVC, Inc., File No. 982-3252 (proposed consent agreement issued for public comment Nov. 23, 1999) (holding home shopping company liable for its role in making and disseminating deceptive cold prevention claims for zinc supplement)
- Home Shopping Network, Inc., 122 F.T.C. 227 (1996) (consent order) (holding home shopping company liable for its role in making and disseminating deceptive claims for vitamin and stop-smoking sprays).

I. LIABILITY FOR PARTICULAR KINDS OF CLAIMS

A. Claims Made through Endorsements: False or deceptive endorsements or testimonials violate Section 5. See Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255. The Guides are premised on the belief that because consumers may rely on the opinions of endorsers in making their product decisions, product endorsements must be non-deceptive. In addition, any "material connection" between the endorser and the advertiser (i.e., a relationship not reasonably expected by a consumer that might materially affect the weight or credibility of the endorsement) must be disclosed. See Numex Corp., 116 F.T.C. 1078 (1993) (consent order) (challenging endorser's status as corporate officer to be "material connection" that must be disclosed)

1. Expert Endorsers: An "expert" is defined as anyone possessing through experience, study, or training knowledge on a particular subject that is superior to the general public's. Endorsers represented directly or by implication to be experts must have qualifications sufficient to give them the represented expertise. 16 C.F.R. § 255.0(d). An expert endorsement must be supported by an examination or testing of the product at least as extensive as experts in the field generally agree would be needed to support the conclusions presented in the endorsement. Both the advertiser and the expert endorser may

be held liable for deceptive claims made by the endorser. See Steven Victor, M.D., 116 F.T.C. 1189 (1993), and Patricia Wexler, M.D., 115 F.T.C. 849 (1992) (consent orders) (challenging dermatologists' endorsements of baldness remedy). Representative expert endorsement cases:

- Gerber Products Co., 123 F.T.C. 1365 (1997) (consent order) (challenging deceptive representation regarding pediatricians' endorsement of baby food in survey)
- The Eskimo Pie Corp., 120 F.T.C. 312 (1995) (consent order) (challenging deceptive claim that line of frozen desserts was approved or endorsed by American Diabetes Association)
- Third Option Laboratories, Inc., 120 F.T.C. 973 (1995) (consent order and $480,000 in redress) (challenging deceptive claim that "Jogging in a Jug" cider beverage was approved by the U.S. Department of Agriculture)
- Black & Decker (U.S.) Inc., 113 F.T.C. 63 (1990) (consent order) (challenging deceptive claim that iron received the endorsement of the National Fire Safety Council because the group did not have expertise to evaluate appliance safety)

1. Consumer Endorsers: An advertisement using consumer testimonials will generally be interpreted to convey that the endorser's experience is representative of what consumers will typically achieve with the product in actual use. 16 C.F.R. § 255.2(a); see Cliffdale Associates, 103 F.T.C. 110, 173 (1984). If such is not the case, the advertiser must either clearly disclose the limited applicability of the endorser's experience to what consumers may expect to achieve or must clearly disclose what the generally expected performance would be in the depicted circumstances. Endorsements may not contain claims that could not be substantiated if the advertiser made them directly. The statement "Not all consumers will get this result" is insufficient to disclaim a representation that the endorser's experience is representative of what consumer will typically achieve. 16 C.F.R. § 255.2, Example 1. Anecdotal evidence, such as consumer testimonials, is generally inadequate to substantiate efficacy claims. See, e.g., Removatron, 111 F.T.C. at 302; Original Marketing, Inc., 120 F.T.C. 278 (1995) (consent order) (challenging use of testimonials that did not represent typical experience of consumers who used weight loss ear clip).

A. Claims made through Demonstrations: Product demonstrations must accurately depict how the product will perform under normal consumer use. An ad can be deceptive if it presents a demonstration of a material product attribute that was altered such that it does not, in fact, constitute proof of the attribute. See Colgate- Palmolive Co., 59 F.T.C. 1452 (1961), remanded, 310 F.2d 89 (1st Cir. 1962), modified, 62 F.T.C. 1269 (1963), remanded, 326 F.2d 517 (1st Cir. 1963), rev'd and enforced, 380 U.S. 374 (1965). Representative demonstration cases:

- Azrak-Hamway International, Inc., 121 F.T.C. 507 (1996) (consent order) (challenging company's use of off-camera techniques deceptively to depict performance of toy cars)
- National Media Corp., 116 F.T.C. 549 (1993) (consent order) (challenging deceptive demonstration of kitchen mixer "whipping" skim milk and "pureeing" fresh

pineapple)

- Hasbro, Inc., 116 F.T.C. 657 (1993) (consent order) (challenging company's use of monofilament wire deceptively to show G.I. Joe helicopter flying)

- Volvo North America Corp., 115 F.T.C. 87 (1992) (consent order) (challenging deceptive demonstration depicting monster truck driving over row of cars because Volvo had been reinforced and roof supports of other cars had been severed)

A. Comparative Advertising: Commission policy encourages truthful references to competitors or competing products, but requires clarity and, if necessary, appropriate disclosures to avoid deception. Statement of Policy Regarding Comparative Advertising, 16 C.F.R. § 14.15. Representative cases:

- Novartis Corp., D-9279 (May 27, 1999) (Commission Decision) (finding that marketer of Doan's pills had misrepresented that product is superior to other analgesics for treating back pain), appeal docketed, No. 99-1315 (D.C. Cir. Aug. 2, 1999)

- London International Group, C-3800 (April 17, 1998) (consent order) (challenging claims that Ramses condoms are "30% stronger" than competing products)

- Kraft, Inc., 114 F.T.C. 40 (1991), aff'd, 970 F.2d 311 (7th Cir. 1992), cert. denied, 507 U.S. 909 (1993) (holding ads for Kraft Singles cheese slices deceptive because ads implied that product contained more calcium than imitation cheese slices, when that generally was not the case)

A. Safety and Risk-reduction Claims: Advertisers must have reliable substantiation to support safety-related, risk reduction, or prevention claims and must carefully qualify claims to indicate the level of safety or significant risks. Representative cases:

- FTC v. Rothbart, No. 99-1485-CIV (M.D. Fla. Dec. 1, 1999) (temporary restraining order issued) (charging Internet marketer with falsely representing that HIV home test kits could accurately detected HIV)

- Met-Rx USA, Inc., File No. 992-3180 (D. Colo. Nov. 15, 1999), and AST Nutritional Concepts & Research, Inc., File No. 992-3179 (C.D. Cal. Nov. 15, 1999) (stipulated final orders) (challenging unsubstantiated safety claims for purported body-building supplements containing androgen and other steroid hormones, substances that the body converts to testosterone, estrogen, and other potent hormones that could pose safety risks and unwanted side effects)

- Conopco, Inc. d/b/a Unilever Home and Personal Care USA., C-3914 (Jan. 7, 2000) (challenging antimicrobial and disease prevention claims for Vaseline Intensive Care Anti-Bacterial Hand Lotion)

- Brake Guard Products, Inc., D-9277 (Jan. 23, 1998) (holding that safety claims for after-market braking system were deceptive)

- Global World Media Corp., 124 F.T.C. 426 (1997) (consent order) (challenging safety claims for "Herbal Ecstasy," ephedra-based product advertising a natural "high")

- Safe Brands Corp., 121 F.T.C. 379 (1996) (consent order) (challenging comparative safety claims for Sierra antifreeze)

A. "Made in U.S.A." Claims: On December 1, 1997, the Commission issued an Enforcement Policy Statement retaining the "all or virtually all standard" for merchandise advertised and labeled as "Made in U.S.A." The Commission has since issued ***Complying with the Made in USA Standard***, a guide for businesses making country-of-origin claims. Representative cases:

- The Stanley Works, C-3876 (June 2, 1999) (consent order) (challenging "Made in U.S.A." claims for mechanics tools)
- American Honda Motor Co., Inc., C-3864 (April 6, 1999) (consent order) (challenging "Made in U.S.A." claims for lawn mowers)

A. Coupon and Rebate Offers: Representations regarding coupon offers, cash rebates, and similar promotions are subject to the same standards of truthfulness and accuracy as other product claims. Marketers may also be subject to the timely delivery requirements of the FTC's Mail or Telephone Order Merchandise Rule. Representative cases:

- Bumble Bee Seafoods, Inc., File No. 982-3560 (proposed consent agreement issued for public comment Jan. 10, 2000) (challenging "75� off next purchase" promotion that did not disclose until consumers had already bought the product that the coupon was good only for the purchase of five cans of tuna and requiring company to undertake new coupon promotion with $200,000 payout to consumers)
- Memtek Products, Inc., C-3927 (Feb. 17, 2000) (consent order) (challenging delays in issuing advertised rebates and gift checks to purchasers of Memorex diskettes and tapes)
- UMAX Technologies, Inc., C-3928 (Feb. 17,2000) (consent order) (challenging delays in issuing advertised rebates to purchasers of computer scanners)
- United States v. Iomega Corp., No. 1:98CV00141C (D. Utah Dec. 9, 1998) (imposing $900,000 civil penalty for company's failure to fulfill rebate and merchandise premium requests in violation of the Mail Order Rule)

I. **DETERMINING AD MEANING**

A. Express Claims: Because express claims unequivocally state the representation, the representation itself establishes the meaning of the claim. No further proof about the meaning of the claim is necessary. Deception Policy Statement, 103 F.T.C. at 176; Thompson Medical Co., 104 F.T.C. at 788.

B. Implied Claims: Implied claims are any claims that are not express and range on a continuum from language virtually synonymous with an express claim to language that literally says one thing but strongly suggests something else to language that relatively few consumers would interpret as making the claim. See Kraft, Inc., 114 F.T.C. 40, 120 (1991), aff'd, 970 F.2d 311 (7th Cir. 1992), cert. denied, 507 U.S. 909 (1993); Thompson Medical Co., 104 F.T.C. at 789.

1. When the language of or depictions in an ad are clear enough to permit the Commission to conclude with confidence that a particular implied claim is conveyed to consumers acting reasonably under the circumstances, no extrinsic evidence is necessary to determine that an ad makes an implied claim. Kraft, 114 F.T.C. at 121.

2. In determining if reasonable consumers are likely to take an implied claim, the Commission looks at the net impression created by the ad as a whole. Deception Policy Statement, 103 F.T.C. at 179 & n. 32; Stouffer Foods Corp., 118 F.T.C. 746, 799 (1994). In determining the claims that an ad conveys, the Commission examines "the entire mosaic, rather than each tile separately." FTC v. Sterling Drug, 317 F.2d 669, 674 (2d Cir. 1964).

A. Extrinsic Evidence: When an implied claim is not clear enough to permit the Commission to determine its existence by examining the ad alone, extrinsic evidence may be required. Stouffer Foods Corp., 118 F.T.C. at 798-99. In all cases, if extrinsic evidence is available, the Commission will consider it, taking into account its relative quality and reliability. Kraft, 114 F.T.C. at 121.

1. Copy tests -- research in which consumers view an ad and answer questions designed to elicit what claims they took from it -- are one form of extrinsic evidence used to establish that an implied claim is conveyed. To be reliable evidence, the copy test must be methodologically. Kraft, 114 F.T.C. at 121; Thompson Medical Co., 104 F.T.C. at 790; Stouffer Foods Corp., 118 F.T.C. at 807 ("Perfection is not the prevailing standard for determining whether a copy test may be given any weight. The appropriate standard is whether the evidence is reliable and probative.")
2. Other forms of extrinsic evidence include testimony by marketing experts regarding principles derived from marketing research showing how consumers generally respond to ads presented in a particular way, and evidence of the advertiser's intent. Kraft, Inc., 114 F.T.C. at 121-22; Thompson Medical Co., 104 F.T.C. at 790.

A. Disclosures in Ads: Ads often contain fine-print footnotes or video superscripts that attempt to disclaim, limit, or explain claims made in the ad. To be effective, Commission orders require such disclaimers to be clear and prominent and in close proximity to the claim they modify. E.g., Thompson Medical Co., 104 F.T.C. at 842-43 (requiring simultaneous audio disclosure for video superscripts). In addition to the requirements of Section 5, other federal statutes mandate that information about certain products and services be clearly and conspicuously disclosed to consumers. See, e.g., Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992, 16 C.F.R. § 308; Dell Computer Corp., C-3888 (Aug. 6, 1999) (consent order), and Micron Electronics, Inc., C-3887 (Aug. 6, 1999) (consent order) (challenging under Section 5 and the Consumer Leasing Act television, print and Internet ads for consumer leases that placed material cost information in inconspicuous or unreadable fine print).

1. Print disclosures: In print ads, the Commission has frequently found such fine-print footnotes to be inadequate to disclaim or modify a claim made elsewhere in the ad. See Stouffer Foods Corp., 118 F.T.C. at 802 n.10; Deception Policy Statement, 103 F.T.C. at 180 & n. 34; Häagen-Dazs Co., 119 F.T.C. 762 (1995) (consent order).
2. Television disclosures: Video superscripts that are difficult to understand, superimposed over distracting backgrounds, compete with audio elements, or are placed in portions of the ad less likely to be remembered have been found to be ineffective in disclaiming or modifying a claim made in the main ad. Kraft, Inc., 114 F.T.C. at 124; Thompson Medical Co., 104 F.T.C. at 797-98. See General Motors Corp., 123 F.T.C. 241 (1997); American Honda Motor Co., 123 F.T.C. 262 (1997); American Isuzu Motor Co., 123 F.T.C. 275 (1997); Mitsubishi Motor Sales of America, Inc., 123 F.T.C. 288 (1997); and Mazda Motor of America, Inc., 123 F.T.C. 312 (1997) (consent orders) (requiring certain clear and conspicuous disclosure of terms in ads for car leases, defined as "readable [or audible] and understandable to a reasonable consumer"). See also United States v. Mazda Motor of America, Inc., (C.D. Cal. Sept. 30, 1999) (consent decree) ($5.25 million total civil penalty for violations of FTC and state orders related to disclosures in car leasing advertising).
3. Internet disclosures: On May 3, 2000, a staff working paper was issued examining how the

Commission's consumer protection rules and guides apply to advertising and sales on the Internet. The paper, ***Dot Com Disclosures: Information about Online Advertising***, provides guidance to businesses about how FTC law applies to online activities with a particular focus on the clarity and conspicuousness of online disclosures.

I. FOOD ADVERTISING

A. FTC-FDA Liaison Agreement: Under a longstanding agreement between the Commission and the Food and Drug Administration, the FTC has primary responsibility for food advertising, while the FDA has primary responsibility for food labeling. See Working Agreement Between the FTC and FDA, 3 Trade Reg. Rep. ¶ 9851 (CCH) (1971).
B. Nutrition Labeling and Education Act (NLEA), 21 U.S.C. § 343(I), (q), and (r). The NLEA, and FDA's regulations implementing the NLEA, effected broad changes in the regulation of nutrition information on food labels. Under the NLEA, only FDA-approved nutrient content and health claims may appear on labels.
C. Enforcement Policy Statement on Food Advertising, 59 Fed. Reg. 28388 (June 1, 1994). The FTC issued this Statement to provide guidance on its enforcement policy regarding the use of nutrient content and health claims in food advertising, in light of the NLEA and FDA's regulations. The Statement clarifies how the FTC's deception and substantiation standards apply to issues raised by FDA's regulations. Issues addressed by the Enforcement Policy Statement include:

    1. Absolute nutrient content claims: The Commission will apply FDA's definitions for terms such as "low fat" and "high fiber."
    2. Serving size: The Commission will use FDA's serving sizes in analyzing nutrient content claims.
    3. Relative or comparative nutrient content claims: Unqualified comparative claims must meet FDA's minimum percentage difference requirements, although other comparative claims that are accurately qualified to identify the nature of the increase or reduction in a nutrient and to eliminate misleading implications may also comply with Section 5, even if that increase or reduction does not meet FDA's prescribed levels.
    4. Synonyms: Claims that characterize the level of a nutrient, including those using synonyms not provided for in FDA's regulations, must be consistent with FDA definitions.
    5. Health claims: The Commission will use FDA's "significant scientific agreement" standard as its principal guide in determining whether unqualified health claims are substantiated. Health claims that are not yet FDA-approved must be adequately qualified so that consumers understand both the extent of the support for the claim and any significant contrary evidence in the scientific community. In many cases, the presence and significance of risk-increasing nutrients must be disclosed to prevent a health claim from being deceptive.

A. Representative health claim cases:

    - Conopco, Inc., 123 F.T.C. 131 (1997) (consent order) (challenging heart health claims for Promise margarine)

    - United States v. Eggland's Best, Inc., No. 96 CV-1983 (E.D. Pa. Mar. 12, 1996) (stipulated permanent injunction and $100,000 civil penalty) (violation of previous order challenging claims about product's effect on serum cholesterol)

- The Isaly Klondike Co., 116 F.T.C. 74 (1993) (consent order) (challenging claims about effect of Klondike Lite frozen dessert bars on consumers' serum cholesterol levels)
- Bertolli USA, Inc., 115 F.T.C. 774 (1992) (consent order) (challenging claims that olive oil had been medically proven to reduce cholesterol, blood pressure and blood sugar)
- CPC International, Inc., 114 F.T.C. 1 (1991) (consent order) (challenging claims about the effect of Mazola Corn Oil and Mazola Margarine on cholesterol levels)

A. Representative nutrient content claim cases:

- Pizzeria Uno Corp., 123 F.T.C. 1038 (1997) (consent order) (challenging misleading low-fat representations for "Thinzettas" line of pizzas)
- Mrs. Fields Cookies, Inc., 121 F.T.C. 599 (1996) (consent order) (challenging low-fat claims for fresh-baked cookies)
- The Dannon Co., 121 F.T.C. 136 (1996) (consent order) (challenging low- fat, low-calorie, and lower in fat than ice cream claims for Pure Indulgence frozen yogurt)
- Häagen-Dazs Co., 119 F.T.C. 762 (1995) (consent order) (challenging low-fat representations for Häagen-Dazs frozen yogurt)
- The Eskimo Pie Corp., 120 F.T.C. 312 (1995) (consent order) (challenging low-calorie claims for Sugar Freedom dessert products)
- Stouffer Food Corp., 118 F.T.C. 746 (1994) (holding that sodium content claims for Lean Cuisine products were false and unsubstantiated)

I. **DRUGS, DEVICES, WEIGHT LOSS PRODUCTS, and DIETARY SUPPLEMENTS**

A. Pursuant to the FTC-FDA Liaison Agreement, the FTC has primary responsibility for over-the-counter (OTC) drug advertising, while the FDA has primary responsibility for OTC drug labeling, prescription drug labeling, and prescription drug advertising. See Working Agreement Between the FTC and FDA, 3 Trade Reg. Rep. ¶ 9851 (CCH) (1971).

B. Drugs: Section 15 of the FTC Act defines the terms "drug" to include articles intended "for use in the diagnosis, cure, mitigation, treatment, or prevention of disease" or intended "to affect the structure or any function of the body." Representative drug cases:

- FTC v. Bayer Corp., D-8919 (consent decree filed Jan. 11, 2000) (challenging unsubstantiated claims that regular use of aspirin is appropriate therapy for the prevention of heart attacks and strokes in the general population)
- Novartis Corp., D-9279 (May 27, 1999) (Commission Decision) (finding that marketer of Doan's pills had misrepresented that product is superior to other analgesics for treating back pain), appeal docketed, No. 99-1315 (D.C. Cir. Aug. 2, 1999)
- Pfizer, Inc., C-3841 (Dec. 23, 1998) ; Del Pharmaceuticals, Inc., C-3837 (Dec. 23, 1998) ; and Care Technologies, Inc., C-3840 (Dec. 23, 1998) (consent orders)

(challenging efficacy claims for anti-lice shampoos)

- Johnson & Johnson Consumer Products, 121 F.T.C. 22 (1996) (consent order) (challenging sexually-transmitted disease prevention claims for K-Y Plus Spermicidal Lubricant)
- FTC v. Redhead, No. 93-1232-JO (D. Ore. June 20, 1994) (stipulated permanent injunction and redress for misleading claims for purported AIDS treatment)
- Sterling Drug Inc., No. CA90-1352 (D.D.C. June 12, 1990) (consent decree and $375,000 civil penalty for unsubstantiated claims for Midol, in violation of previous order)

A. Devices: Section 15 of the FTC Act defines the terms "device" to include "instruments, apparatus, and contrivances" intended "for use in the diagnosis, cure, mitigation, treatment, or prevention of disease" or intended "to affect the structure or any function of the body." Representative device cases:

- London International Group, C-3800 (April 17, 1998) (consent order) (challenging comparative efficacy claims for Ramses condoms)
- Natural Innovations, Inc., 123 F.T.C. 698 (1997) (consent order) (challenging pain relief claims for "The Stimulator," a device emitting a purported acupressure-like electrical charge)
- Numex Corp., 116 F.T.C. 1078 (1993) (consent order) (challenging arthritis treatment and pain relief claims for roller device)
- Viral Response Systems, Inc., 115 F.T.C. 676 (1992) (consent order) (challenging claims that inhaler device can remedy colds)

A. Weight Loss: The Commission has challenged deceptive weight loss claims for products, services, and exercise devices through traditional law enforcement actions and industry outreach and education. Commission staff also participates in the Partnership for Healthy Weight Management, a coalition of scientists, health care professionals, government agencies, businesses, and others interested in promoting sound guidance on strategies for maintaining a healthy weight. In February 1999, the Partnership issued ***Voluntary Guidelines for Providers of Weight Loss Products or Services***. Representative weight loss cases:

- Enforma Natural Products, Inc., No. 04376JSL(CWx) (C.D. Cal. April 26, 2000) (stipulated final order) (ordering $10 million in consumer redress from marketer of the Enforma System, two dietary supplements -- chitosan-based "Fat Trapper" and pyruvate-based "Exercise in a Bottle" -- represented to block the absorption of fat, increase the body’s ability to burn fat, and cause weight loss)
- FTC v. SlimAmerica, Inc., No. 97-6072-Civ (S.D. Fla. 1999) (permanent injunction) (ordering $8.3 million in consumer redress from marketer of weight loss products)
- **Operation Waistline**: See, e.g., Bodywell, Inc., 123 F.T.C. 1577 (1997); Cambridge Direct Sales, 123 F.T.C. 1596 (1997); 2943174 Canada Inc., 123 F.T.C. 1465 (1997) (consent orders) (seven actions brought challenging weight loss claims for a variety of products, devices, and programs, including SeQuester, Lipitrol, Fat Burner, Svelt-Patch, Slimming Insoles, Food for Life Weight Management System, and the

Cambridge Diet)

- **Project Workout**: Abflex, U.S.A., Inc. 124 F.T.C. 354 (1997); Kent and Spiegel Direct, Inc. 124 F.T.C. 300 (1997); Icon Health and Fitness, Inc., 124 F.T.C. 215 (1997); and Life Fitness, 124 F.T.C. 236 (consent orders) (challenging deceptive calorie-burning claims for three exercise devices -- the Abdomenizer, the Lifecycle, and the Proform Cross Walk Treadmill -- with accompanying consumer education materials published with the American College of Sports medicine and other groups)
- Jenny Craig, Inc., D-9260 (Feb. 27, 1998) (consent order) (challenging claims for weight loss program)
- Weight Watchers International, Inc., 124 F.T.C. 610 (1997) (consent order) (challenging claims for weight loss program)
- Nutrition 21, 124 F.T.C. 1 (1997) (consent order) (challenging weight loss claims for products containing chromium picolinate)
- NordicTrack, Inc., 121 F.T.C. 907 (1996) (consent order) (challenging weight loss study claims for exercise device)
- Schering Corp., 118 F.T.C. 1030 (1994) (consent order) (challenging weight-loss and fiber claims for Fiber-Trim tablet)
- Nutri/System, Inc., 116 F.T.C. 1408 (1993) (consent order) (challenging claims for weight loss program)

A. Dietary Supplements: The Commission has challenged deceptive claims for dietary supplements through traditional law enforcement, industry outreach, and education. On November 18, 1998, the Commission issued a ***Guide for the Dietary Supplement Industry***, describing how the basic principles of advertising law apply to the marketing of dietary supplements. Representative cases:

- Quigley Corp., C-3926 (Feb. 10, 2000) (consent order), and QVC, Inc., File No. 982-3152 (proposed consent agreements issued for public comment Nov. 23, 1999) (challenging unsubstantiated claims that Cold-Eeze zinc supplement would prevent colds, relieve allergy symptoms, and reduce the severity of cold symptoms in children)
- Met-Rx USA, Inc., File No. 992-3180 (D. Colo. Nov. 15, 1999), and AST Nutritional Concepts & Research, Inc., File No. 992-3179 (C.D. Cal. Nov. 15, 1999) (stipulated final orders) (challenging unsubstantiated safety claims for purported body-building supplements containing androgen and other steroid hormones and requiring labeling and advertising to disclose risks of breast enlargement, testicle shrinkage, and infertility in males, and increased facial and body hair, voice deepening, and clitoral enlargement in females).
- FTC v. American Urological Corp., No. 98-CVC-2199-JOD (N.D. Ga. April 29, 1999) (permanent injunction) ($18.5 million judgment against marketers of "Väegra," a dietary supplement purporting to treat impotence)
- Rose Creek Health Products, Inc., No. CS-99-0063-EFS (E.D. Wash. May 1, 2000) (proposed consent decree) (ordering $375,000 in consumer redress from marketers of "Vitamin O," a supplement claiming to prevent cancer, pulmonary disease, and

other conditions by providing oxygen to the body)

- Bogdana Corp., C-3820 (Aug. 6, 1998) (consent order) (challenging claims that supplements "Cholestaway" and "Flora Source" could lower blood pressure, reduce cholesterol, and treat AIDS and chronic fatigue syndrome)
- Efamol Nutraceuticals, Inc., File No. 992-3027, and J & R Research, Inc., File No. 972-3234 (proposed consent agreements published for public comment May 11, 2000), and New Vision International, Inc., C-3856 (March 15, 1999) (consent order) (challenging efficacy claims for dietary supplements marketed to treat Attention Deficit Disorder and hyperactivity)
- Global World Media Corp., 124 F.T.C. 426 (1997) (consent order) (challenging safety claims for "Herbal Ecstasy," ephedra-based product advertising a natural "high," and requiring safety disclosures in future ads)
- Home Shopping Network, Inc., 122 F.T.C. 227 (1996) (consent order) (challenging unsubstantiated claims for vitamin and stop-smoking sprays); and United States v. Home Shopping Network, Inc., No. 99-897-CIV-T- 25C (M.D. Fla. April 15, 1999) (consent decree) ($1.1 million civil penalty for violating previous FTC order barring false and unsubstantiated claims for skin care, weight-loss, and PMS/menopause products).
- United States v. General Nutrition Corp., No. 94-686 (W.D. Pa. April 28, 1994) (stipulated permanent injunction) ($2.4 million civil penalty for unsubstantiated disease prevention, weight loss, and muscle building claims for dietary supplements)

I. ENVIRONMENTAL ADVERTISING

A. Guides for the Use of Environmental Marketing Claims, 16 C.F.R. § 260 (1996). After public hearings and comments, the Commission issued the Environmental Marketing Guides in 1992 and amended them in 1996. On April 22, 1998, the Commission revised the Guides to reflect current consumer perceptions of the terms "recyclable," "recycled," and "compostable" (published in Fed. Reg. on May, 1, 1998). Although they do not have the force of law, the Guides offer administrative interpretations of Commission laws, cases and enforcement policy.

1. Through definitions and illustrative examples, the Guides address the use of terms such as degradable, biodegradable, recyclable, recycled, refillable, ozone-safe, and ozone-friendly, as well as general environmental benefit claims such as "environmentally safe" or "environmentally friendly."
2. The Guides restate Commission law requiring that all express and implied claims about objective product attributes be supported by competent and reliable evidence. The Guides also address concerns that qualifiers and disclosures be clear and prominent; that the claims make clear whether they apply to the product, the packaging, or a component of either; and that comparative claims are accurate.

A. Representative degradability cases:

- Archer Daniels Midland Co., 117 F.T.C. 403 (1994) (consent order) (challenging

"biodegradable" and landfill benefit claims for plastic products containing corn starch additive)

- Mobil Oil Corp., 116 F.T.C. 113 (1993) (consent order) (challenging "biodegradable" and landfill benefit claims for Hefty plastic trash bags)

A. Representative recyclability cases:

- LePage's, Inc., 118 F.T.C. 31 (1994) (consent order) (challenging "recyclable" claims for adhesive tape's plastic dispenser and paperboard backcard where few facilities exist to recycle either material)
- Keyes Fibre Co., 118 F.T.C. 150 (1994) (consent order) (challenging "biodegradable" and "recyclable" claims for Chinet paper plates where few facilities exist to recycle food-contaminated waste)

A. Representative cases challenging claims regarding ozone/CFCs:

- Creative Aerosol Corp., 119 F.T.C. 13 (1995) (consent order) (challenging "No Fluorocarbons" and "Environmentally Safe Contains No Fluorocarbons" claims for aerosol soaps containing VOCs and ozone-depleting chemicals)
- Redmond Products, Inc., 117 F.T.C. 71 (1994) (consent order) (challenging environmental claims for "Aussie" hair styling products that contained VOCs that can contribute to smog formation)

A. Representative cases challenging environmental health or safety claims:

- FTC v. TradeNet Marketing, Inc., No. 99-944-CIV-T-24B (M.D. Fla. April 21, 1999) (consent order) (challenging claims for a laundry detergent substitute advertised to clean clothes without causing water pollution)
- Safe Brands Corp., 121 F.T.C. 379 (1996) (consent order) (challenging claims that Sierra antifreeze was safe if ingested, environmentally safe, and safer for the environment than conventional antifreeze)
- Orkin Exterminating Co., 117 F.T.C. 747 (1994) (consent order) (challenging claims that company's lawn pesticides are "practically non-toxic" and pose no significant risk to human health or environment)
- Mr. Coffee, Inc., 117 F.T.C. 156 (1994) (consent order) (challenging claims paper filters were manufactured by a "chlorine-free" process that was not harmful to the environment)
- The Vons Companies, 113 F.T.C. 779 (1990) (consent order) (challenging claims for "pesticide-free" produce sold in grocery stores)

I. **TOBACCO**

A. Statutory Authority

1. Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1337. The Cigarette Act gives the Commission administrative responsibility for the rotational plans for health warnings on packaging and advertising. The Act also directs the Commission to publish an annual report to Congress on cigarette advertising and promotion. In addition, the Commission regularly publishes a report listing official tar and nicotine ratings.
2. Comprehensive Smokeless Tobacco Health Education Act, 15 U.S.C. § 4401. The Smokeless Tobacco Act requires the Commission to issue regulations on the placement of rotating health warnings on packaging and advertising, gives the Commission enforcement responsibility for the warnings, and directs the Commission to publish a biennial report to Congress on smokeless tobacco advertising and promotion. The Commission issued a trade regulation rule in 1986 setting out provisions for the size, color, typeface, and rotation of the statutory health warnings, 16 C.F.R. § 307.

A. Representative tobacco cases:

- Santa Fe Natural Tobacco Company, Inc., File No. 992-3026 (proposed consent agreement accepted for public comment April 27, 2000) (challenging claim that Natural American Spirit cigarettes are safer to smoke than other cigarettes because they contain no additives)

- Alternative Cigarettes, Inc., File No. 992-3022 (proposed consent agreement accepted for public comment April 27, 2000) (challenging claim that Pure, Glory, Herbal Gold, and Magic cigarettes are safer to smoke than other cigarettes because they contain no additives)

- R.J. Reynolds Tobacco Co., C-3892 (Aug. 27, 1999) (consent order) (challenging claims for Winston "no additives" cigarettes and requiring disclosures that "No additives in our tobacco does NOT mean a safer cigarette")

- American Tobacco Co., 119 F.T.C. 3 (1995) (consent order) (challenging claim that "10 packs of Carlton have less tar than one pack" of other brands)

- Pinkerton Tobacco Co., 115 F.T.C. 60 (1992) (consent order) (challenging as violations of the television advertising ban the display of Redman Tobacco brand name and selling message on signs, vehicles, uniforms, etc., at company-sponsored televised events)

- R.J. Reynolds Tobacco Co., 113 F.T.C. 344 (1990) (consent order) (challenging deceptive claims regarding findings of scientific study on health effects of smoking)

I. **ALCOHOL**

A. Report to Congress: In September 1999, the Commission issued a Report to Congress, *Self-Regulation in the Alcohol Industry: A Review of Industry Efforts to Avoid Promoting Alcohol to Underage Consumers*, evaluating the effectiveness of voluntary industry codes and self-regulatory programs. Based on "special reports" submitted by eight major marketers pursuant to Section 6(b) of the FTC Act, the Commission recommended that the industry:

1. create independent review boards to consider complaints from consumers and competitors;

2. raise the current standard that permits advertising placement in media where just over 50% of the audience is 21 or older; and
3. adopt a series of "best practices" to curb on-campus and spring break sponsorships, block underage access to websites, disallow placement on television shows with large underage audiences, and restrict paid product placements to R-rated or NC-17 movies.

A. Representative alcohol cases:

- Allied Domecq Spirits and Wine Americas, Inc. d/b/a Hiram Walker, C-3858 (Mar. 25, 1999) (consent order) (challenging misrepresentation of Kahlua White Russian pre-mixed cocktail as "low alcohol" beverage)
- Beck's North America, Inc., C-3859 (Mar. 25, 1999) (consent order) (challenging depiction in Beck's beer ads of potentially dangerous and illegal conduct)
- Canandaigua Wine Co., 114 F.T.C. 349 (1991) (consent order) (alleging that the advertising and packaging of Cisco brand beverage misrepresented the product as a wine cooler or other low-alcohol, single-serving drink, when in fact a single bottle of Cisco had the same quantity of alcohol as five one-ounce servings of 80 proof vodka)

I. COMPUTERS

A. The Commission has brought a series of Section 5 actions challenging deceptive representations about computers, software, and other high-tech products. Enforcement in this area is particularly important because consumers are often not able to evaluate the accuracy of advertising claims for such products.

B. Representative cases:

- Tiger Direct, Inc., C-3903 (Nov. 12, 1999) (consent order) (alleging that national mail order seller of computers misrepresented terms of warranties)
- Apple Computer, Inc., C-3890 (Aug. 6, 1999) (consent order) (challenging practice of charging computer purchasers for technical support despite advertising that services were free)
- Gateway 2000, C-3844 (Jan. 7, 1999) (consent order) (challenging representations regarding company's "money back guarantee" policy and onsite warranty services and imposing $290,000 in redress)
- Apple Computer, Inc., 124 F.T.C. 184 (1997) (consent order) (challenging representations that PCs were presently upgradeable to PowerPC technology)
- Hayes Microcomputer Products, Inc., 118 F.T.C. 1159 (1994) (consent order) (challenging claims that use of competitors' computer modems creates a substantial risk of data transmission failure)

I. INFOMERCIALS

A. Program-length commercials were illegal until a 1984 change to FCC law lifted regulations limiting the number of commercial minutes per hour. FTC infomercial cases have challenged one or more of the following practices:

1. Deceptive format: Do consumers know that the program they are watching is a commercial?
2. Unsubstantiated claims: Infomercial advertisers must possess the same level of substantiation that would be required to support claims disseminated in any other media. Deceptive use of expert endorsements and consumer testimonials have been an area of particular concern.
3. Other violations: Mail Order Rule, unordered merchandise, unauthorized use of credit cards, etc.

A. Representative infomercial cases:

- FTC v. Kevin Trudeau, (N.D. Ill. Jan. 13, 1998) (stipulated order for permanent injunction and final order) ($1 million in consumer redress for deceptive claims about deceptive memory program, speed reading program, addiction-treating product, etc.)

- Kent & Spiegel Direct, Inc., 124 F.T.C. 300 (1997) (holding infomercial producer liable for deceptive weight loss and spot reduction claims for abdominal exerciser)

- Synchronal Corp., 116 F.T.C. 1189 (1993) (consent order) ($3.5 million in redress for deceptive claims for baldness remedy and cellulite treatment, and for unauthorized charges to consumers' credit cards)

- National Media Corp., 116 F.T.C. 549 (1993) (consent order) and Michael Levy, 116 F.T.C. 885 (1993) (consent order) ($275,000 in consumer redress for deceptive claims and products demonstrations)

I. TELEMARKETING, 900 NUMBERS, and TELECOMMUNICATIONS

A. Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994, 15 U.S.C. § 6101. Pursuant to this statute. the Commission promulgated the ***Telemarketing Sales Rule***, 16 C.F.R. § 310. To protect consumers from deceptive and abusive telemarketing practices, the Rule:

1. Requires telemarketers promptly to disclose to consumers the fact that it is a sales call, the identity of the seller, the nature of the goods or services being offered, and if it is a prize promotion, the fact that no purchase is necessary to win, as well as to make certain disclosures before asking consumers for any credit card or bank account information or before they make arrangements for a courier to pick up payment.
2. Contains broad prohibitions against misrepresentations regarding any of the information required to be disclosed and regarding any material aspect of the performance, efficacy, or nature of the goods or services.

3. Prohibits telemarketers from debiting checking account without the consumer's express, verifiable authorization, and from making misleading statements to induce consumers to pay for goods or services.
4. Bars anyone from giving substantial assistance to a telemarketer when the person knows or consciously avoids knowing that the telemarketer is engaged in conduct that would violate certain provisions of the rule.
5. Prohibits telemarketers from calling before 8 a.m. and after 9 p.m., and from calling consumers who have said they do not want to be called.
6. Provides that violations of the rule may result in civil penalties of up to $10,000. The rule is enforceable by the FTC, and also by the 50 state attorneys general, who, for the first time, will be able to get orders that apply nationwide against fraudulent telemarketers.

A. Telephone Disclosure and Dispute Resolution Act of 1992, 15 U.S.C. § 5701. Pursuant to this statute. the Commission promulgated the ***Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992***, 16 C.F.R. § 308. The rule addresses advertising requirements, operating standards, and billing for 900 numbers; requires specific disclosures, such as the cost of the call and that individuals under 18 must have parental permission to call; and prohibits advertising directed to children under 12.
B. ***Joint FTC-FCC Policy Statement on the Advertising of Dial-Around and Other Long-Distance Services to Consumers:*** On November 4, 1999, the FTC and the Federal Communications Commission co-sponsored a Joint Forum on the Advertising and Marketing of Dial-Around and Other Long-Distance Services to Consumers. The Commissions issues a joint policy statement on March 1, 2000, offering guidance to members of the industry on the application of well-settled truth-in-advertising principles to advertising for long distance services.

I. INTERNET ADVERTISING and GLOBAL COMMERCE

A. Internet Advertising: The Commission applies the same well-established principles of substantiation to Internet advertising as it applies to advertising in any other media. To date, the FTC has brought more than 100 law enforcement actions challenging deceptive practices on the Internet and has conducted a dozen national and international "surf days" to monitor online advertising representations on the Internet. See *Five Years: Protecting Consumers Online*, FTC Staff Report issued December 1999.
B. Representative Internet cases:

- FTC v. Periera, et al., (E.D. Va. Sept. 22, 1999) (preliminary injunction ordered) (challenging practice of "pagejacking" -- duplicating legitimate websites and involuntarily diverting Internet users to sexually explicit adult websites -- and "mouse trapping" -- disabling the browser's "back" and "exit" commands so that users' efforts to leave the adult sites opens up additional windows of explicit material)

- FTC v. iMall, Inc., (C.D. Cal. April 12, 1999) (stipulated final judgment) (ordering $4 million in consumer redress and imposing lifetime ban on participation in Internet-related business venture for promoters of deceptive Internet business opportunities)

- FTC v. Audiotex Connection, C97-0726 (E.D.N.Y. Nov. 4, 1997) (granting

consumers credit for $2.7 million in unauthorized charges stemming from modem "hijacking" scheme in which defendants switched consumers from local Internet service provider to international telephone lines in Moldova)

- FTC v. Fortuna Alliance, L.L.C., No. C96-0799 (W.D. Wash. Oct. 30, 1997) (civil contempt action for company's failure to pay $2 million in redress pursuant to settlement stemming from Internet pyramid scheme)
- FTC v. Craig Hare, No. 98-8194-CIV (S.D. Fla. Sept. 8, 1998) (stipulated permanent injunction) (challenging practices of marketer who advertised nonexistent merchandise through online auction houses and imposing lifetime ban on any form of online commerce)

A. Other Internet-related law enforcement activities:

- ***Operation Cure.all*****:** On June 24, 1999, the Commission announced law enforcement actions against four companies who had made deceptive claims on the Internet for products advertised to treat cancer, arthritis, heart disease, liver disease, and other serious health illnesses. Among the products targeted were dietary supplements derived from shark cartilage and magnetic therapy devices.
- ***Health Claims Surf Days*****:** In 1997 and again in 1998, in conjunction with law enforcement agencies and consumer protection offices from more than 25 countries, staff identified 800 websites containing questionable claims for products advertised to treat cancer, AIDS, heart disease, diabetes, arthritis, and multiple sclerosis. Staff followed up with e-mail notices regarding the Commission's policy on advertising substantiation.
- ***Applicability of FTC Rules and Guides Online***: On May 3, 2000, a staff working paper, ***Dot Com Disclosures: Information about Online Advertising***, was issued providing guidance to businesses on how the Commission's rules and guides apply to advertising and sales on the Internet. The paper focuses on the clarity and conspicuousness of online disclosures.

A. Consumer Privacy on the Internet: The Commission continues to examine consumer privacy issues raised by Internet advertising through traditional law enforcement actions, public workshops and conferences. Representative activities related to Internet privacy:

- ***Children's Online Privacy Protection Act***, Pub. L. 105-277 (Oct. 21, 1998). This statute requires that websites obtain "verifiable parental consent" before collecting, using, or disclosing personal information from children. The Commission issued final rules effective on April 21, 2000, outlining the procedures for commercial websites to use in obtaining parental consent before collecting, using, or disclosing personal information from children under 13. The rules apply to operators of commercial Web sites and online services directed to children under 13, and general audience sites that know that they are collecting personal information from a child. Pursuant to the rules, sites must provide parents notice of their information practices, obtain verifiable parental consent before collecting a child's personal information, give parents a choice as to whether their child's information will be disclosed to third parties, provide parents access to their child's personal information and allow them to review it and have it deleted, give parents the opportunity to prevent further use or collection of information, not require a child to provide more information than is

reasonably necessary to participate in an activity, and maintain the confidentiality, security, and integrity of information collected from children.

- ***Online Profiling Workshop:*** On November 8, 1999, the FTC and the Department of Commerce convened a joint public workshop on the consumer privacy implications of online profiling, the practice of tracking information about consumers' preferences and interests online and using that information to create targeted advertising on websites.

- Liberty Financial Companies, Inc., C-3891 (Aug. 12, 1999) (challenging company's practice of collecting identifiable personal information about family finances from children at its "Young Investors" website despite representation that information would be compiled anonymously)

- GeoCities, C-3849 (Feb. 12, 1999) (consent order) (alleging the company misrepresented the purposes for which it collected personal identifying information from children and adults on its website)

- ***Report to Congress on Privacy Online:*** On June 4, 1998, the Commission reported the results of privacy policies of more than 1400 websites, raised concerns about the adequacy of current self-regulatory efforts, and called for legislation to address specific concerns about children's privacy online.

- ***Public Workshop on Consumer Information Privacy:*** The June 1997 workshop updated the Commission on self-regulatory efforts and technological advances, including online collection of information from children and "look-up services," databases that collect identifying information about consumers.

A. Consumer Protection Implications of E-Commerce and Cross-Border Transactions: The Commission has taken an active role in exploring international consumer protection issues raised by the emergence of electronic commerce and cross-border trade. Representative activities:

- ***U.S. Perspectives on Consumer Protection in the Global Electronic Marketplace:*** In June 1999, the Commission held a national workshop on consumer protection ramifications of the emerging digital economy. Participants included the Secretary of Commerce, the U.S. Trade Representative, and panelists from more than 60 companies and organizations.

- ***Joint Strategies to Combat Health Fraud:*** In December 1998, the FTC, FDA, and law enforcement officials from Canada and Mexico announced a formal agreement expanding joint international efforts against the fraudulent marketing and sale of health-related products and services.

- ***Campaña Alerta I and II:*** On June 26, 1997, the Commission, the Food and Drug Administration, seven state Attorneys General, and the government of Mexico announced a campaign to fight fraudulent health claims aimed at Spanish-speaking consumers, including four law enforcement actions. On June 26, 1998, the coalition continued the crackdown by announcing additional law enforcement actions and Spanish-language public service announcements.

- ***Conference on Global Commerce and Innovation:*** The October 1995 conference examined the FTC's consumer protection role in the emerging high-tech, global

marketplace. In May 1996, Commission staff issued a report based on the conference, "Anticipating the 21st Century: Consumer Protection Policy in the New High-Tech, Global Marketplace."

- ***Consumer Protection and the Global Information Infrastructure:*** The April 1995 conference examined advertising of goods and services on the global information infrastructure, marketing of on-line services, electronic payment systems, consumer privacy issues, and self-regulation.

I. SELF-REGULATORY INITIATIVES

A. Media Clearance: The Commission staff has taken steps to encourage media to adopt effective in-house clearance procedures for screening out facially deceptive ads before they run. In 1995, the FTC co-sponsored with FDA, the National Association of Attorneys General, and the American Association of Advertising Agencies a national conference, ***Preventing Fraudulent Advertising: A Shared Responsibility***, to encourage effective self-regulation by print and broadcast media. That meeting was followed by regional conferences in 1997. In 1998, the Commission published ***Screening Advertisements: A Guide for Media***, a brochure on developing effective in-house ad clearance procedures, published with the United States Postal Inspection Service and the Direct Marketing Association.

B. The Commission has also encouraged effective in-house ad clearance by identifying by name in the Commission complaint and press release the media in which the deceptive advertising appeared or by requiring the respondent to notify the media that ran the ads of the FTC action. Representative cases:

- Zygon International, Inc., 122 F.T.C. 195 (1996) (consent order), and Johnson & Collins Research, Inc., 121 F.T.C. 675 (1996) (consent order) (identifying in the complaint and press release the publications that ran the ads challenged as deceptive)

- Azrak-Hamway International, Inc., 121 F.T.C. 507 (1996) (consent order) (requiring toy manufacturer to advise stations that ran deceptive ads of FTC's action and the availability of guidelines developed by the Council of Better Business Bureaus' Children's Advertising Review Unit)

- Operation Waistline, C-3747 through C-3754 (June 18, 1997) (consent orders) (challenging deceptive claims for a variety of weight loss products and contacting the more than 100 publications that ran the ads to suggest additional media screening efforts)

A. Marketing Practices of Segments of the Entertainment Industry: In June 1999, the FTC announced that it will conduct a joint study with the Department of Justice on marketing practices of the entertainment industry to determine whether members of the industry market violent material rated for adults to children. The study will focus on the movie, music recording and video game industries, and will examine whether self-regulatory restrictions are effective in ensuring that products rated as inappropriate for children are not sold to children

B. Marketing Practices of the Alcohol Industry: In September 1999, the Commission issued a Report to Congress, *Self-Regulation in the Alcohol Industry: A Review of Industry Efforts to Avoid Promoting Alcohol to Underage Consumers*, evaluating the effectiveness of voluntary industry codes and self-regulatory programs and recommending specific improvements in code

standards and implementation.

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