United States of America

Federal Trade Commission

Back to the Future on 600 Pennsylvania Avenue

Remarks of Maureen K. Ohlhausen
Commissioner, Federal Trade Commission[1]

ANA Advertising Law and Public Policy Conference
Washington, DC

April 23, 2014

Thank you for the invitation to address the ANA Conference. The Federal Trade Commission's authority over advertising is one of the most important parts of our mission, and I have long been involved in this area, both at the Commission and in private practice. I have been particularly interested in the interaction between our competition and consumer protection missions, and the FTC's advertising work brings the intersection of these missions to the forefront. Today, I will discuss the important role that information plays in markets and why where the FTC draws the line in advertising matters for competition and ultimately for consumers.[2] As part of that discussion, I will highlight recent developments in the Commission's advertising substantiation program.

The title of this session is "Back to the Future on 600 Pennsylvania Avenue." How appropriate! But I want to go back further than you may expect, and not just to when the FTC was created in 1914. Rather, I am looking back to over two hundred years ago, when the drafters

[1] The views expressed in this speech are solely those of Commissioner Ohlhausen and are not intended to reflect the views of the Commission or any other Commissioner.
[2] This part of the discussion draws upon themes explored by former Chairman Deborah Platt Majoras in The Vital Role of Truthful Information in the Marketplace, October 11, 2007.

of our Constitution recognized that the free flow of information is critical to the functioning of a free society.

Most people recognize and respect the protection that the First Amendment gives to citizens to speak out on political issues, to express their views artistically, and to report on the events and issues of the day, all of which may guide the public's views and lead to a well-informed populace. What fewer people may appreciate is that the First Amendment protects not just political and artistic speech but also commercial speech, which includes most advertising and marketing, as long as it is true and not misleading. Just as information is crucial to a well-functioning democracy, it is likewise crucial to a well-functioning market. The Supreme Court recognized over thirty years ago that "a consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." Because it is in the public interest that consumers' decisions in the marketplace be "intelligent and well informed" the free flow of commercial speech is "indispensable."[3]

For the government to restrict commercial speech – if it is not misleading and does not concern illegal activity – it must satisfy the stringent requirement of restricting no more speech than is necessary to advance directly a substantial government interest.[4] Even in my time at the FTC, where I started at the GC's office in 1997, there has been a clear trend in providing greater protection for commercial speech.[5] Thus, the proper treatment of commercial speech is crucial to the FTC's work.

---

[3] *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 765 (1976).
[4] *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980).
[5] *See, e.g., United States v. United Foods*, 533 U.S. 405 (2001); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999); *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012).

The Commission has two core missions: promoting competition and protecting consumers. Our two missions are designed to accomplish the same goals: to promote efficiency, prevent consumer harm and enhance consumer welfare, and to do so without unduly burdening legitimate business. To achieve these goals, the FTC must encourage and defend truthful, non-misleading commercial speech. We mainly do this by protecting the marketplace and consumers from false commercial speech, but we must also help to foster an environment that provides consumers access to useful commercial information. I believe that our job is to ensure that consumers get the information they need to make informed choices and, once made, that those choices are respected. I also believe, however, that it is not our job to substitute our judgment for that of consumers.

There are several ways that we help to ensure that consumers get the information they need to make informed choices. The most familiar way is FTC enforcement against deceptive and misleading advertising, a core function of our consumer protection mission. The pursuit of our competition mission also helps protect the free flow of commercial information, however. Thus, we challenge private restrictions on the dissemination of truthful information and protect competitive markets, which, when operating properly, provide consumers with valuable information. Finally, to advance both missions, we advocate against government restrictions on truthful, non-misleading advertising.

The Importance of Information for Consumers

It is beyond dispute that fraud and deception harm consumers, and I strongly support the FTC's enforcement actions against fraudulent and deceptive claims. However, in working to eliminate false and deceptive advertising, we must also avoid restricting consumers' access to

truthful marketplace information. In our free-market system, private economic decisions determine the allocation of scarce resources. Actions, whether private or public, that limit the amount of truthful marketplace information available to consumers make those markets work less efficiently, which in turn harms consumers.

Our intuition and personal experience supports the notion that consumers who can more easily compare their marketplace options, such as by using the many online and app-based tools available today, make better decisions. And empirical research has demonstrated that when consumers can compare their market options, prices tend to be lower and less varied.[6] Likewise, it is no surprise that other studies have shown that when government restricts truthful advertising, prices rise and quality suffers.[7]

The benefits of more marketplace information are not limited to price data. An FTC staff study on the effects of the dissemination of health information in the ready-to-eat cereal market is a real world example of the consumer and competitive benefits of health claims for food

---

[6] *See*, *e.g.*, James C. Cooper, *Price Levels and Dispersion in Online and Offline Markets for Contact Lenses*, FTC Bureau of Economics Working Paper (2006), *available at* http://www.ftc.gov/reports/prices-price-dispersion-online-offline-markets-contact-lenses; Jeffrey R. Brown & Austan Goolsbee, *Does the Internet Make Markets More Competitive? Evidence from the Life Insurance Industry*, 110 J. POL. ECON. 481 (2002); Alan T. Sorensen, *Equilibrium Price Dispersion in Retail Markets for Prescription Drugs*, 108 J. POL. ECON. 833 (2000); Erik Brynjolfsson & Michael D. Smith, *Frictionless Commerce? A Comparison of Internet and Conventional Retailers*, 49 MGM'T SCI. 563 (2000).

[7] *See, e.g.*, James H Love & Jack H. Stephen, *Advertising, Price and Quality in Self-regulating Professions: A Survey*, 3 INT'L J. ECON. BUS. 227 (1996); Frank H. Stephen, *Advertising, Consumer Search Costs, and Prices in a Professional Service Market,* 26 APPLIED ECON. 1177 (1994); J. Howard Beales & Timothy J. Muris, *State and Federal Regulation of National Advertising* 8-9 (1993); James H. Love et al., *Spatial Aspects of Competition in the Market for Legal Services*, 26 REGIONAL STUD. 137 (1992); Deborah Haas-Wilson, *The Effect of Commercial Practice Restrictions: The Case of Optometry*, 29 J.L. & ECON. 165 (1986); John Kwoka, *Advertising and the Price and Quality of Optometric Services*, 74 AM. ECON. REV. 211 (1984); Timothy J. Muris & Fred S. McChesney, *Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics*, 1 AM. B. FOUND. RES. J. 179 (1979); Roger Feldman & James Begun, *The Effects of Advertising: Lessons from Optometry*, 13 J. HUMAN RESOURCES 247 (1978); J.F. Cady, *An Estimate of the Price Effects on Restrictions on Drug Price Advertising*, 14 ECON. INQUIRY 490 (1976); Lee Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15 J.L. & ECON. 337 (1972).

products.[8] In 1984, the Kellogg Company began claiming on labels and in advertising that All Bran cereal was high in fiber and that diets high in fiber could reduce the risk of cancer, claims that the FDA had previously prohibited. In response, competitors soon made similar claims for their own high-fiber cereals, as well as introducing more of these products. Even more importantly, consumers began to make significant changes in their cereal choices, substantially increasing their consumption of high-fiber products. In sum, the dissemination of these fiber/cancer claims benefitted consumers by providing important dietary guidance and by expanding the range of high fiber cereal choices available in the market.

As the FTC staff observed in a comment to the FDA on the First Amendment, "A flexible approach to commercial speech – one that encourages the dissemination of accurate speech and tailors restrictions to prevent speech that is false or misleading – will result in greater dissemination of valuable information with benefits for both consumers and competition. In contrast, the evidence indicates that broad restrictions on the dissemination of truthful commercial speech, while effectively stopping false or misleading information, can deprive consumers of useful information as well."[9]

The FTC's Traditional Substantiation Standard

This brings me to the FTC's approach to advertising substantiation. At the core of our advertising substantiation program is a fairly simple sound bite: An advertiser must possess a

[8] P. Ippolito & A. Mathios, Health Claims in Advertising and Labeling: A Study of the Cereal Market, FTC Staff Report (1989).
[9] FTC Staff Comment Before the Department of Health and Human Services Food and Drug Administration, Docket No. 02N-0209 (Sept. 2002), *available at* http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-food-and-drug-administration-concerning-first-amendment-issues/fdatextversion.pdf .

reasonable basis for making its advertising claims.[10] FTC law has traditionally provided for substantial flexibility regarding what constitutes a reasonable basis, based on how an advertiser presents and qualifies a claim. If, for instance, the ad contains an express or implied representation regarding the amount of support the advertiser has for the claim, the Commission expects the advertiser to have at least the level of support claimed in the ad. Claims that are more clearly qualified to reflect more limited support would therefore require less substantiation than an unqualified claim.

If the advertiser has not claimed that a particular level of evidence underlies the claim, the Commission will consider a number of factors drawn from the 1972 *Pfizer* case to determine the appropriate level of support for a claim. These factors include "the type of claim, the product, the consequences of a false claim, the benefits of a truthful claim, the cost of developing substantiation for the claim, and the amount of substantiation experts in the field believe is reasonable."[11]

One of the goals of the *Pfizer* analysis is to balance the value of greater certainty of information about a product's claimed attributes with the risks of both the product itself and the suppression of potentially useful information about it. Thus, under such an analysis, the burden for substantiation for health- or disease-related claims about a safe product, such as a food,[12] for example, should be lower than the burdens imposed on drugs because consumers face lower risks when consuming the safe product.

---

[10] FTC Policy Statement Regarding Advertising Substantiation (appended to *Thompson Med. Co., Inc.*, 104 F.T.C. 648, 840 (1984)).

[11] *Pfizer, Inc.*, 81 F.T.C. 23 (1972); *see also* FTC Policy Statement Regarding Advertising Substantiation.

[12] The FDA designates most food ingredients as GRAS (generally recognized as safe). 21 C.F.R. § 170.30. Vitamins and minerals are treated as foods by the FDA and are also GRAS. *See* FDA Guidance for Industry: Frequently Asked Questions about GRAS (Dec. 2004), *available at* http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/IngredientsAdditivesGRASPackaging/ucm061846.htm#Q1.

Recent Trends in FTC Orders

As many of you may know, I have expressed concern that some of the FTC's recent orders may have put its substantiation standard in tension with its precedent in *Pfizer* by requiring two randomized, controlled studies (also known as RCTs) as substantiation for any health- and disease-related claims, even for relatively safe products such as foods. Some have characterized a two RCT requirement as appropriate fencing- in relief. Fencing-in remedies, however, are designed to prevent future unlawful conduct through "provisions in a final Commission order that are broader in scope than the conduct that is declared unlawful."[13] Past decisions discussing the proper application of fencing-in remedies generally involve the extension of the scope of a final order beyond the specific product, parties, or type of conduct involved in the actual violation.[14] Requiring past violators to meet a higher burden of substantiation would not fence them in – it would only make it more difficult for them to make truthful claims that could be useful to consumers.[15]

More importantly, RCTs can be difficult to conduct and are often costly and time-consuming relative to other types of testing, particularly for diseases that develop over a long

[13] *Telebrands Corp. v. FTC*, 457 F.3d 354, 357 n.5 (4th Cir. 2006); *see also, e.g.*, *FTC v. Colgate-Palmolive, Co.*, 380 U.S. 374, 394-395 (1965); *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); *Kraft, Inc. v. FTC*, 970 F.2d 311, 326 (7th Cir. 1992).

[14] *See, e.g.*, *Colgate-Palmolive, Co.*, 380 U.S. at 395 ("We think it reasonable for the Commission to frame its order broadly enough to prevent respondents from engaging in similarly illegal practices in future advertisements."); *FTC v. Ruberoid Co.*, 343 U.S. at 474-475 (holding that the Commission's order encompassing "wholesalers, retailers, and roofing contractors or applicators" was "reasonably related to the facts," even though only retailers and applicators were affected by Ruberoid's violation); *Telebrands Corp.*, 457 F.3d at 357, 362 (holding that a reasonable relationship existed between Telebrand's violation involving advertisements for an abdominal belt and the Commission's remedy that encompassed future "manufacturing, labeling, advertising, promotion, offering for sale, or distribution of" the actual product as well as that of "any food, drug, dietary supplement, device, or any other product, service or program") (emphasis omitted); *Kraft, Inc. v. FTC*, 970 F.2d at 326 ("The FTC has discretion to issue multi-product orders, so-called 'fencing-in' orders, that extend beyond violations of the Act to prevent violators from engaging in similar deceptive practices in the future."); *Am. Home Prods. Corp. v. FTC*, 695 F.2d 681, 705 (3rd Cir. 1982) ("'Fencing in' often takes the form, as in this case, of a multi-product order.").

[15] A more specific requirement would not "fence in" proven violators; rather, it would "wall off" truthful claims that would be quite valuable to consumers. *See* J. Howard Beales III, Timothy J. Muris & Robert Pitofsky, *In Defense of the Pfizer Factors*, George Mason Law & Economics Research Paper No. 12-49, at 35, May 2012, *available at* http://www.law.gmu.edu/assets/files/publications/working_papers/1249InDefenseofPfizer.pdf.

period of time or complex health conditions. Requiring RCTs may be appropriate in some circumstances, such as where use of a product carries some significant risk, or where the costs of conducting RCTs may be relatively low, such as for conditions whose development or amelioration can be observed over a short time period. Thus, I have been willing to support the order requirement of two RCTs for short-term weight loss claims because such studies can be conducted in a relatively short amount of time at a lower cost than for many other health claims.

My concern with this series of FTC orders is that they might be read to imply that two RCTs are required to substantiate any health- or disease-related claims, even for relatively-safe products, regardless of the costs of such studies. Given this risk, it seems likely that many manufacturers may forgo making such claims about these kinds of products, even if they may otherwise be adequately supported by evidence that does not comprise two RCTs.

Although raising the requirement for both the number and the rigor of studies required for substantiation for all health- or disease-related claims may increase confidence in those claims, the correspondingly increased burdens in time and money in conducting such studies may suppress information that would, on balance, benefit consumers. If we demand too high a level of substantiation in pursuit of certainty, we risk losing the benefits to consumers of having access to information about emerging areas of science and the corresponding pressure on firms to compete on the health features of their products. In my view, the Commission should apply the *Pfizer* balancing test in a more finely calibrated manner than they have in these orders to avoid imposing "unduly burdensome restrictions that might chill information useful to consumers in making purchasing decisions."[16]

[16] FTC Staff Comment Before the Food and Drug Administration In the Matter of Assessing Consumer Perceptions of Health Claims, Docket No. 2005N-0413 (2006), *available at* http://www.ftc.gov/be/V060005.pdf.

Conclusion

To be clear, I am not advocating in favor of permitting unsubstantiated disease claims. Rather, I am suggesting that consumers would on balance be better off if we clarified that our requirements permit a variety of health- or disease-related claims about safe products, such as foods or vitamins, to be substantiated by competent and reliable scientific evidence that might not comprise two RCTs. Although it is important to protect consumers from false and deceptive advertising, we must strive to set the boundaries in the right place in advertising enforcement to ensure that consumers will continue to have access to useful marketplace information, including information about emerging science and nutrition. Even with the best of intentions, we risk making consumers worse off if we draw the lines too expansively and deter the provision of valuable information.

To conclude on a positive note, I have confidence that, despite the concerns I have raised, as the Commission considers future cases involving health- and disease-related claims, my colleagues and I will work together to advance our agency mission to protect consumers and promote competition by ensuring consumers have access to useful marketplace information.

Thank you. I would be happy to take questions.