Federal Trade Commission

CONSUMER PROTECTION ISSUES AT THE FTC:
THE YEAR BEHIND US, THE YEAR AHEAD

J. Thomas Rosch[1]
Commissioner, Federal Trade Commission

at the

American Bar Association's
Consumer Protection Conference
Washington, DC
February 3, 2011

I am pleased to be here today to talk about some of the recent consumer protection developments at the Federal Trade Commission. The agency has had a very busy and productive year, and I would like to discuss what I consider to be some of the highlights. I plan to cover three topics: recent rulemakings in the consumer financial protection area; the preliminary staff privacy report and my initial impressions about a do-not-track mechanism; and a couple of interesting (at least for me) issues that have arisen in our advertising cases.

I. Protecting Consumers in the Financial Marketplace

Although the worst of the economic recession may be behind us, the aftershocks are going to continue for the foreseeable future. Unfortunately, as consumers try to dig themselves

[1] The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisor, Beth Delaney, for her invaluable assistance in preparing these remarks.

out of debt and salvage their homes, there will be those who will try to capitalize on such financial vulnerability by deceptive or unfair conduct. Some of the Commission's recent rulemakings should help to reduce these activities.

A. Debt Relief Services Amendments to the Telemarketing Sales Rule

First, this past fall, the Debt Relief Services Amendments to the Telemarketing Sales Rule took effect.[2] This new rule, among other things, prohibits companies that sell debt relief services over the telephone from charging fees before settling or reducing a consumer's credit card or other unsecured debt. More specifically, this advance fee ban specifies that fees for debt relief services may not be collected until: the debt relief service successfully settles or changes the terms of at least one of the consumer's debts; there is a settlement agreement, debt management plan, or other agreement between the consumer and the creditor that the consumer has agreed to; ***and*** the consumer has made at least one payment to the creditor as a result of the agreement negotiated by the debt relief provider.

I had serious concerns about how the debt relief services industry was operating. One concern was the advance fee component. Almost all companies offering debt relief demanded and were paid a substantial amount, if not all, of their fees for their services up-front – before any services were rendered. Another concern stemmed from the business model itself – before the company tries to settle the debt, the consumer must stop paying the creditor and instead try to save a lump sum that the company will offer to the creditor as a settlement. A third concern related to the fact that despite having paid high fees to debt relief service providers, many consumers drop out of this type of program before any debts are actually settled.

---

[2] FTC Press Release, *FTC Issues Final Rule to Protect Consumers in Credit Card Debt*, (July 29, 2010), *available at* http://www.ftc.gov/opa/2010/07/tsr.shtm.

I do think that this type of business model skews incentives. Because debt relief services companies were paid up-front, they had an incentive to exaggerate the benefits they would deliver and an incentive to downplay or omit mention of the consequences the consumer would face (such as hardball debt collection practices, lawsuits, and reduced credit scores) while saving the lump sum rather than paying their bills. The up-front payment also sapped the firms' incentive to work hard to give consumers the benefits promised because if the consumer dropped out of the program, the firm lost nothing – it had already collected its fee.

Despite my concerns about this industry, I ultimately decided to vote against the issuance of this Rule. I did not write a dissenting statement, and I am not going to get into the specifics of my decision today because we have some debt settlement cases pending. However, I would like to talk a little bit about the importance of the rulemaking record in a rulemaking proceeding.

Unlike legislation enacted by Congress, our rules must be based on a rulemaking record. That means that the stronger the record, the bolder the rule can be, and vice versa. As many of you may know, I was at the agency in the 1970s when we were engaged in extensive rulemaking attempts. As a result, I take rulemaking very seriously and have learned some lessons from those battles 35 years ago. Thus, while I too want input from my colleagues and the staff, as well as all stakeholders – consumers, consumer advocacy groups, academics and researchers, State Attorneys General, and members of industry – ultimately I will vote for a particular proposed rule only insofar as its provisions are supported by the rulemaking record.

The *Katharine Gibbs* decision provides a good illustrative example.[3] In 1972, the Commission issued its Guides for Private Vocational and Distance Education Schools –

[3] *Katharine Gibbs School v. FTC*, 612 F.2d 658 (2d Cir. 1979).

guidelines for private vocational and home study schools that are still in effect today. However, notwithstanding the Guides, the Commission determined that abuses in this industry warranted further action, and to that end, in 1974, it published for comment and public hearing a proposed Trade Regulation Rule. The Commission issued its final rule, "Proprietary Vocational and Home Study Schools," in December 1978, which as the Statement of Basis and Purpose ("SBP") stated, was promulgated to "alleviate currently abusive practices against vocational and home study school students and prospective students."[4] The SBP explained that at issue were unfair and deceptive advertising, sales, and enrollment practices engaged in by some of the schools. After being promulgated, the Rule was immediately challenged – twelve petitions were received by the Second Circuit Court of Appeals, seeking review of the Rule. After finding failures to comply with both procedural and substantive rulemaking requirements, the court set aside the Rule and remanded it to the Commission.

In particular, the court found that the Commission had failed to "define with specificity in the Rule those acts and practices which are unfair or deceptive."[5] Instead, the court found the Commission guilty of circular reasoning in that "the Commission contented itself" with treating violations of its Rule (prescribed for the purpose of preventing unfair practices) as unfair practices in and of themselves.[6] The court's decision then examined and took issue with each component of the Rule – refund provisions, disclosure provisions, and cooling-off and constructive cancellation provisions. In addition to its failure to define acts and practices with

---

[4] Proprietary Vocational and Home Study Schools, Statement of Basis and Purpose, 43 Fed. Reg. 60,795 at 60,796 (Dec. 28, 1978).

[5] *Katharine Gibbs*, 612 F.2d at 662.

[6] *Id.*

specificity, the court also found that the Commission failed to have a rational connection between some of the Rule's requirements (for example, the refund provision) and the prevention of specifically described unfair and deceptive practices.[7]

I think the Commission has learned much since its rulemaking experiences in the 1970s, and I am impressed by the caliber of the rules that we promulgate. As a survivor of those early days, however, I must admit that I find it important to keep holding the agency's feet to the fire in perfecting and honing our abilities in building a rulemaking record. Put differently, I think a rule is only as strong as the rulemaking record supporting it.

B. Mortgage Advertising Practices Rule and Mortgage Assistance Relief Services Rule

The agency also has been very active on rulemaking proceedings related to the activities that occur throughout the "life-cycle" of a mortgage loan – for example, practices related to mortgage loan advertising and marketing as well as practices related to the offering of services to modify existing mortgages. These rulemaking proceedings were required by the Omnibus Appropriations Act of 2009,[8] and any rule resulting from these proceedings will apply only to entities within the FTC's jurisdiction under the FTC Act, which excludes banks, thrifts, and federal credit unions, among others.

As the first step in this rulemaking process, in June 2009, the FTC issued ***two*** Advance Notices of Proposed Rulemaking ("ANPR"): one relating to mortgage acts and practices

[7] *Id.* at 664.

[8] Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, § 626, 123 Stat. 524 (Mar. 11, 2009).

("MAPS") and the other relating to mortgage assistance relief services ("MARS").[9] This past September, the agency issued its proposed MAPS Rule, which would prohibit all material misrepresentations in advertising about consumer mortgages. The proposed rule lists nineteen examples of misrepresentations about fees, costs, obligations, and other aspects of credit that would be violations.[10]

The proposed MAPS Rule would apply to mortgage lenders, brokers, and servicers; real estate agents and brokers; advertising agencies; home builders; lead generators; rate aggregators; and other entities under the FTC's jurisdiction. The agency's enforcement program has included many cases against mortgage lenders, brokers, and others for allegedly deceptive mortgage advertising.

Currently, under the FTC Act, the Commission may bring actions against those under its jurisdiction who engage in deceptive mortgage advertising, and we may seek injunctive relief and other equitable relief, such as restitution and disgorgement. Under the proposed MAPS Rule, however, the FTC would be able to bring civil penalty actions against violators, in addition to injunctions and other equitable relief.[11] The forty-five day public comment period for the Notice of Proposed Rulemaking ("NPR") ended on November 15, 2010, and we have received

---

[9] Advance Notice of Proposed Rulemaking: Mortgage Acts and Practices, 74 Fed. Reg. 26,118 (June 1, 2009); Advance Notice of Proposed Rulemaking: Mortgage Assistance Relief Services, 74 Fed. Reg. 26,130 (June 1, 2009); FTC Press Release, *FTC Begins Rulemaking to Address Unfair and Deceptive Mortgage Practices* (May 29, 2009), *available at* http://www.ftc.gov/opa/2009/05/decepmortgage.shtm.

[10] Notice of Proposed Rulemaking: Mortgage Acts and Practices – Advertising Rule, 75 Fed. Reg. 60,352 (Sep. 30, 2010); FTC Press Release, *FTC Proposes Rule to Ban Deceptive Mortgage Ads* (Sep. 22, 2010), *available at* http://www.ftc.gov/opa/2010/09/nprm.shtm.

[11] The proposed MAPS Rule would also allow the states to bring actions for civil penalties for violations of the rule.

twenty-two comments in response. Staff is in the process of reviewing those comments and formulating a recommendation for a Final Rule.

The MARS Rule has moved on a slightly faster track. The Commission published the NPR for that Rule in March 2010,[12] and the final rule was issued on December 1st.[13] The goal of the MARS Rule is to protect distressed homeowners from mortgage relief scams that have sprung up during the mortgage crisis.

One of the most significant aspects of the MARS Rule is the advance fee ban. Under this provision, mortgage assistance relief companies may not collect any fees until they have provided consumers with a written offer from their lender or servicer that the consumer decides is acceptable, and a written document from the lender or servicer describing the key changes to the mortgage that would result if the consumer accepts the offer.

The MARS Rule requires companies to disclose key information to consumers to protect them from being misled and to help them make better informed purchasing decisions. In advertising and in communications directed at individual consumers (such as telemarketing calls), the companies must disclose that: they are not associated with the government, and their services have not been approved by the government or the consumer's lender; the lender may not agree to change the consumer's loan; and if companies tell consumers to stop paying their mortgage, they must also tell them that they could lose their home and damage their credit

---

[12] Notice of Proposed Rulemaking: Mortgage Assistance Relief Services, 75 Fed. Reg. 10,707 (Mar. 9, 2010).

[13] Final Rule: Mortgage Assistance Relief Services, 75 Fed. Reg. 75,092 (Dec. 1, 2010). *See also*, FTC Press Release, *FTC Issues Final Rule to Protect Struggling Homeowners from Mortgage Relief Scams*, (Nov. 19, 2010), *available at* http://www.ftc.gov/opa/2010/11/mars.shtm.

rating.

The MARS Rule also prohibits mortgage assistance relief companies from making any false or misleading claims about their services, including claims about the likelihood of consumers getting the results they seek; the company's refund and cancellation policies; or the amount of money a consumer will save by using their services.[14] In addition, importantly, the MARS Rule bars companies from telling consumers to stop communicating with their lenders or servicers.

I supported the Commission's adoption of the MARS Rule and its accompanying Statement of Basis and Purpose. Some explanation of my decision to vote in favor of the MARS Rule in light of my dissenting vote in the issuance of the Debt Relief Services Rule is probably in order.

Although I had concerns about certain aspects of the record in the debt relief services rulemaking proceeding relating to the need for an advance fee ban, I believe that the record in the MARS rulemaking proceeding supports a ban. In coming to this conclusion, I draw two distinctions. First, the business model for the provision of mortgage assistance relief services differs from debt relief services in that it does not require consumer participation in order to achieve a successful result. Rather, the likelihood of attaining a particular, promised result rests solely on the MARS provider's own efforts. Second, the length of time it takes to achieve a mortgage assistance relief result (and hence the duration of the advance fee ban) is much shorter

[14] Other prohibited misrepresentations include: the company's affiliation with government or private entities; the consumer's payment and other mortgage obligations; whether the company has performed the services it promised; whether the company will provide legal representation to consumers; the availability or cost of any alternative to for-profit mortgage assistance relief services; or the cost of the services.

than the time it typically takes to obtain settlements of a consumer's debts.

II. Preliminary Staff Privacy Report – Some Thoughts

Consumer privacy – always a priority at the FTC – continues to receive attention, especially on the policy front. Beginning in December 2009, the FTC held a series of "Privacy Roundtables" in Washington, DC and northern California.[15] The first roundtable focused on the risks and benefits of information-sharing practices, consumer expectations regarding such practices, behavioral advertising, information brokers, and the adequacy of existing legal and self-regulatory frameworks.[16] The second day-long roundtable, held on January 29, 2010 in Berkeley, California, examined how technology affects consumer privacy, including its potential to weaken and/or strengthen privacy protections. This roundtable also explored privacy implications of several evolving technologies, such as social networking, cloud computing, and mobile computing.[17] The third and final roundtable, held in March 2010 in Washington, DC, addressed Internet architecture and privacy issues, and included panel discussions focusing on health and other sensitive consumer information. This roundtable concluded with a panel that discussed the cumulative lessons learned from all three roundtables and possible directions

---

[15] FTC Press Release, *FTC to Host Public Roundtables to Address Evolving Consumer Privacy Issues*, (Sept. 15, 2009), *available at* http://www.ftc.gov/opa/2009/09/privacyrt.shtm.

[16] FTC Press Release, *FTC Releases Agenda for First Privacy Roundtable and Announces Date of Second Roundtable*, (Nov. 17, 2009), *available at* http://www.ftc.gov/opa/2009/11/privacyrt.shtm.

[17] FTC Press Release, *FTC Releases Agenda for Second Roundtable on Consumer Privacy and More Information for Third Roundtable*, (Jan. 21, 2010), *available at* http://www.ftc.gov/opa/2010/01/roundtable.shtm.

forward.[18] Public comment periods followed each of the roundtables.[19]

The roundtables and public comment process culminated in the December 2010 issuance of a preliminary staff report entitled, "Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers."[20] As indicated by its title, the preliminary Report proposes a new framework to protect consumer privacy; it also suggests implementation of a "do-not-track" mechanism so consumers can choose whether to allow the tracking of certain data, such as their online searching and browsing activities, in order to serve them targeted advertising. The Report contained a list of questions for comment, and the public comment period has been extended to February 18th.[21]

I agreed with the Commission's decision to issue the Report in order to continue the dialogue on consumer privacy issues and to solicit comment on a proposed new framework for how companies should protect consumers' privacy, but I wrote separately to explain my serious reservations about the proposal advanced in the Report. I would like to highlight some of the points that I raised in that statement.

First, insofar as the Report suggests that a new framework for consumer privacy should replace "notice" (or "harm") as the basis for Commission challenges relating to consumer

---

[18] FTC Press Release, *FTC Releases Agenda for Final Roundtable on Consumer Privacy*, (Mar. 10, 2010), *available at* http://www.ftc.gov/opa/2010/03/privacy.shtm.

[19] Public comments *available at* http://www.ftc.gov/os/comments/privacyroundtable/index.shtm.

[20] FTC Press Release, *FTC Staff Issues Privacy Report, Offers Framework for Consumers, Businesses, and Policymakers* (Dec. 1, 2010), *available at* http://www.ftc.gov/opa/2010/12/privacyreport.shtm (hereinafter "Report").

[21] FTC Press Release, *FTC Extends Deadline for Comments on Privacy Report Until February 18,* (Jan. 21. 2011), *available at* http://www.ftc.gov/opa/2011/01/privacyreport.shtm.

privacy protection, I think that is unnecessary. A privacy notice that is opaque or fails to disclose material facts (such as the fact that consumer information may be shared with third parties) is deceptive under Section 5. That is particularly true if the sharing of the information may cause tangible harm. To the extent that privacy notices have been buried, incomplete, or otherwise ineffective – and they have been – the answer is for the FTC to enhance efforts to enforce the "notice" model, not to replace it with a new framework. Moreover, I do not believe that Section 5 liability could be avoided by companies' eschewing a privacy notice altogether. Not only would that be competitive suicide, but it may also be deceptive in that it would entail a failure to disclose material facts.[22] In addition, to the extent that the Commission has used a "harm" model based on the potential for physical or financial harm, or intangible harm constituting a violation of a special statute, that model may be a useful and legitimate framework. However, the Commission could overstep its bounds if it were to begin considering "reputational harm" or "the fear of being monitored" or "other intangible privacy interests" generally when analyzing consumer injury. The Commission has specifically advised Congress that absent deception, it will not enforce Section 5 against alleged intangible harm.[23]

Second, I am concerned that the preliminary Report does not give enough weight to the

---

[22] The duty to disclose "material" facts would be triggered when the information was collected, used, or shared in a manner that "is likely to affect the consumer's conduct or decision with regard to a product or service." *See* FTC Policy Statement on Deception, *appended to Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174, 175 (1984). In some cases, disclosure would not have to be express. For example, using consumer information to provide order fulfillment would be disclosed by virtue of the transaction itself. *See also* Report at vi, 41, 52-53.

[23] Letter from the Federal Trade Commission to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation, United States Senate, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction, *reprinted in In re Int'l Harvester Co.*, 104 F.T.C. 949, 1070 (1984).

importance of the free flow of information to innovation. While the Report generally acknowledges that the increasing flow of information provides important benefits to consumers and businesses, as written, it leaves room in any final recommendation for a prohibition against dissemination of non-sensitive information to third parties generally, and of information collected through behavioral tracking specifically.

I hesitate to staunch the flow of information until we really know what consumers understand or want. My concern here is triggered both by efforts that would limit behavioral tracking across the board or, alternatively, a broad implementation of do-not-track mechanisms. Based on testimony by some workshop participants, the Report asserts that the use being made of online and offline consumer information is contrary to consumer understanding.[24] Although some consumers may hold that view, as the Report itself acknowledges, it is inaccurate to assert that consumer surveys establish that "a majority of consumers" feel that way.[25] As others have observed, consumer surveys vary considerably in this respect. Before making important policy decisions about the flow of consumer information, I believe we need more information on what drives consumer choice and whether consumers understand the full implications of that choice.

In my separate concurring statement discussing the preliminary privacy report, I noted that if the traditional "notice" law enforcement model is to be augmented by some "choice" mechanism, I would support a do-not-track mechanism if it were technically feasible and required consumers to "opt in" to use such a mechanism. However, my thinking on this topic continues to evolve. I am not yet prepared to fully embrace the newly proposed do-not-track

---

[24] *See* Report at 25-26, 29. The Report also alleges that "consumer surveys have shown that a majority of consumers are uncomfortable with being tracked online." *Id*. at 29.

[25] *Id.* at 29 n.72.

mechanisms offered by Microsoft, Mozilla and Google. As reported by the *New York Times*, the online advertising model that these large enterprises rely upon is different from that which other smaller enterprises rely upon.[26] For example, Microsoft and Google obtain revenue from search and display advertising, so a loss of revenue related to behavioral advertising would not have the same impact on their overall advertising business as it would on smaller firms that only offer display advertising.[27] Thus, I am concerned that these larger enterprises may use their technology – under the guise of privacy protection – to erect barriers to entry by which they can protect themselves from competition that may constrain their market power.

Additionally, as I just mentioned, I think that consumers must be warned that choices that limit the flow of all consumer information might result in consequences such as the reduction or elimination of free content on the Internet, or the loss of other benefits and efficiencies that relate to the collection of their preferences, such as ads that are "relevant" to their interests. In addition, I question the "aggregate" effect of widespread adoption of broad do-not-track and other information-limiting mechanisms. If such choices are made, what is the likelihood that free content or other benefits may disappear entirely? I have not noticed any attempts to adequately warn consumers about these possible downsides.

For these reasons, I embrace the public comment process and am hopeful that many different perspectives will be engaged in this debate.

---

[26] Tanzina Vega and Verne Koptytoff, *In Online Privacy Plan, the Opt-Out Question Looms*, New York Times, Dec. 5, 2010, *available at* http://www.nytimes.com/2010/12/06/business/media/06privacy.html?ref=tanzinavega.

[27] *Id. See also id.* ("Small publishers, however, rely heavily on ad networks and tailored advertising for revenue," while large publishers and content providers "with premium advertising space, use traditional sales methods to sell that space to marketers and leave the remaining space to be sold to ad networks").

III. Issues in Advertising

Now I would like to spend a few minutes discussing a couple of advertising issues that I find particularly interesting in light of some of the activities the agency has been involved in over the past year or so. These activities include the issuance of the Opinion of the Commission in *Daniel Chapter One* in December 2009,[28] followed by the affirmance of the Commission's Order by the D.C. Court of Appeals in December 2010.[29] They also include a series of notable cases we brought last year – namely, our actions involving The Kellogg Company,[30] Iovate,[31] Nestlé,[32] Dannon,[33] and NBTY.[34] David Vladeck is speaking later this morning on the

---

[28] Opinion of the Commission, *In re Daniel Chapter One and James Feijo*, Docket No. 9329 (Dec. 24, 2009), *available at* http://www.ftc.gov/os/adjpro/d9329/091224commissionopinion.pdf.

[29] *Daniel Chapter One v. FTC*, No. 10-1064, 2010 U.S. App. LEXIS 25496 (D.C. Cir. Dec. 10, 2010).

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

[31] FTC Press Release, *Dietary Supplement Maker to Pay $5.5 Million to Settle FTC False Advertising Charges*, (July 14, 2010), *available at* http://www.ftc.gov/opa/2010/07/iovate.shtm.

[32] FTC Press Release, *Nestlé Subsidiary to Settle FTC False Advertising Charges; Will Drop Deceptive Health Claims for BOOST Kid Essentials*, (July 14, 2010), *available at* http://www.ftc.gov/opa/2010/07/nestle.shtm.

[33] FTC Press Release, *Dannon Agrees to Drop Exaggerated Health Claims for Activia Yogurt and DanActive Dairy Drink*, (Dec. 15, 2010), *available at* http://www.ftc.gov/opa/2010/12/dannon.shtm.

[34] FTC Press Release, *FTC Settlement Prohibits Marketers of Children's Vitamins from Making Deceptive Health Claims about Brain and Eye Development*, (Dec. 13, 2010), *available*

"substantiation" aspect of the orders in those latter cases so I am not going to get into a lot of detail in that regard, but I will discuss some big picture topics that I think are raised by some of our recent activity.

A. Corrective Advertising

The first issue I would like to mention is corrective advertising. The Commission had just begun seeking corrective advertising as a remedy during my first stint at the FTC. In the early '70s, a raft of Commission orders required corrective advertising to remedy false claims ranging from a television set's superiority with respect to fire or explosion hazard – to sugar and cranberry juice as sources of "superior food energy"– to a vitamin's ability to make one work better.[35] However, these were all consent decrees. The Commission did not win a corrective advertising case in a litigated case until the D.C. Circuit Court of Appeals upheld such an order in *Warner-Lambert Co. v. FTC*, decided in 1977.[36]

---

at http://www.ftc.gov/opa/2010/12/nbty.shtm.

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

[36] 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

I believe that corrective advertising continues to be a remedy that the Commission should consider in national advertising cases. When evaluating whether corrective advertising would be appropriate, there are three factors that I think are important.

First, has the advertising of the problematic claims been of such an extent and duration that it has created an impression in the public mind that can only be corrected requiring the company to engage in remedial advertising? For example, a couple of years ago, I dissented from the Commission's settlement with Airborne Health, Inc., the maker of a popular effervescent tablet marketed as a cold prevention and treatment remedy, in part because the order did not include a requirement for corrective advertising.[37] In that case, to resolve a Section 13(b) challenge in federal court, Airborne agreed to pay up to $6.5 million in consumer redress to settle charges that it did not have adequate evidence to support its advertising claims. I dissented because I was concerned that the Stipulated Final Order allowed the defendants to deplete their existing inventory of paper cartons and display trays – packaging that contained the problematic representations. I believe that "run-out provisions" like this should not be included in the Order – once defendants sign the Order, they should not be allowed to continue to perpetuate misperceptions about their product by exhausting their inventory of deceptive packaging. In addition to striking the run-out provisions, I also believed that the only way to effectively remove lingering misperceptions from the product's extensive advertising campaign would have been to require the defendants to engage in corrective advertising.[38]

---

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

[38] *See, e.g.*, *Novartis Corp. v. FTC*, 223 F.3d 783 (D.C. Cir. 2000); *Warner-Lambert*, 562 F.2d 749; *In re Eggland's Best, Inc.*, 118 F.T.C. 340 (1994).

Second, is it possible for consumers themselves to determine the truth or falsity of the message that has been conveyed in the problematic advertising? Corrective advertising is probably less necessary in circumstances where consumers have tried the product and have been able to figure out for themselves that its performance falls short of that promised by the product's advertising. However, in cases where the advertising makes the kind of claim – for example, a health claim that the product will protect the consumer from a particular condition or disease – that is difficult or impossible for ordinary consumers to determine truth or falsity, I think corrective advertising is useful and appropriate.

I think the recently settled *Dannon* case is a good illustration of both of these types of claims. Dannon's advertising for Activia focused on "regularity" claims – an effect that arguably should be possible for consumers to determine for themselves. In comparison, Dannon's advertising for its DanActive product claimed that it helped people avoid catching colds or the flu. However, whether a consumer did or didn't catch a cold wouldn't necessarily establish that the product was or wasn't effective as advertised. For example, a consumer might think the product worked because the consumer did not have any colds or the flu, but perhaps the consumer wasn't actually exposed. On other hand, a consumer using the product could have caught a cold, and might think that the product was ineffective. But perhaps it was effective because only one cold was caught, and the consumer had been exposed to many colds.

Third, I think it is also important to evaluate whether or not, under the specific facts of each case, a corrective advertising message will be effective. In some instances, it is possible that well-intentioned remedial advertising could serve instead to reinforce the problematic claim, rather than correct it. Depending on the particular facts of the case, it might be useful to obtain extrinsic evidence – such as copy tests – to evaluate consumer takeaway regarding the proposed

corrective advertising. As the Commission has pointed out in some of the Analyses to Aid Public Comment, albeit in a somewhat different context, our experience and research show that it is very difficult to adequately qualify a disease risk-reduction claim in advertising to indicate that the science supporting the claimed effect is limited. In other words, reasonable consumers may interpret an advertisement to mean that the product will reduce the likelihood of getting a cold or the flu, even if respondent includes language indicating that the science supporting the effect is limited in some way.[39]

B. The FTC and the FDA – When Our Paths Cross

The final topic I would like to cover is the intersection between the laws and regulations of the Food and Drug Administration and those of the Federal Trade Commission. Over the last year or so, this is a topic that has been broached in several different contexts. I will discuss three instances that have come to my attention, and talk a little bit about how I view our co-existence.

One recent example was the appeal to the Commission of the ALJ's Initial Decision in *Daniel Chapter One*, issued in August 2009. There the ALJ found, among other things, that respondents had violated Sections 5(a) and 12 of the FTC Act by disseminating advertising that claimed that certain of their products ("Challenged Products") could prevent, treat, or cure cancer, inhibit tumors, or ameliorate the adverse effects of radiation and chemotherapy, without having a reasonable basis to substantiate those claims.[40] The ALJ issued an order that, among other things, prohibited respondents from making these specific claims about the Challenged

---

[39] *See, e.g.*, Analysis of Proposed Consent Order to Aid Public Comment, *In re The Dannon Company* (Dec. 15, 2010), *available at* http://www.ftc.gov/os/adjpro/d9329/091224commissionopinion.pdf.

[40] Initial Decision, *In re Daniel Chapter One and James Feijo*, Docket No. 9329 (Aug. 5, 2009), *available at* http://www.ftc.gov/os/adjpro/d9329/090811dcoinitialdecision.pdf.

Products, as well as other health-related claims about other products, unless such representations were true, non-misleading and, at the time they were made, respondents possessed and relied upon competent and reliable scientific evidence that substantiated the claims.[41]

On appeal, respondents argued, among other things, that the Initial Decision improperly required double-blind, placebo-controlled studies as substantiation, even though the Food Drug and Cosmetic Act ("FDCA") itself did not require such studies for structure/function claims for dietary supplements, which are allowed by the Dietary Supplement Health and Education Act (DSHEA), a 1994 amendment to the FDCA.

The Commission's Opinion noted that under the FDCA, a "structure/function" claim is defined simply as one that describes "the role of a nutrient or dietary ingredient intended to affect the structure or function in humans."[42] The Opinion went on to explain that the Respondents' representations that the Challenged Products would treat or cure cancer, prevent or shrink tumors, and ameliorate the side effects of radiation and chemotherapy did not simply describe the "role" that those four products would play in affecting the structure or function in humans, and accordingly, they were not merely "structure/function" claims under the DSHEA.[43] The Opinion also recognized that DSHEA expressly provides that even compliant "structure/function" claims are permitted only if they are "truthful and not misleading" and the

---

[41] The order also contained a provision that provided that respondents were not prohibited from making claims that were permitted by the FDA under labeling standards or approved drug applications, or regulations promulgated by the FDA pursuant to the Nutrition Labeling and Education Act of 1990 ("NLEA").

[42] Commission Opinion at 16, *citing* 21 C.F.R. § 101.93(f) (2009).

[43] *Id.*

manufacturer "has substantiation" that such claims are true.[44] Thus, the Opinion noted that the DSHEA amendment to the FDCA was not inconsistent with the FTC case law as applied by the ALJ. Indeed, even if the FDCA had departed from the FTC Act and its relevant case law, Respondents offered no authority that it would be binding on the Commission.

A second recent example illustrating an FTC/FDA intersection was the issuance of warning letters to four marketers of caffeinated alcohol drinks.[45] In the warning letters, marketers were informed that consumer safety is among the highest priorities of the FTC and that safety concerns have, in the past, contributed to the Commission's decision to take action against alcohol marketers. In the particular instance of caffeinated alcoholic beverages, the FTC had become aware of a number of recent incidents suggesting that alcohol containing added caffeine may present unusual risks to health and safety.

Simultaneous with the FTC's action, the FDA announced that it was sending letters to the same four companies, warning that, as used in their products, caffeine is an "unsafe food additive" under the FDCA. Our warning letters highlighted this very finding, pointing out to the marketers that the FDA's warning that caffeine is an "unsafe food additive," as used in their products, was a relevant consideration in the FTC's analysis of whether the marketing of caffeinated alcohol products is deceptive or unfair under the Federal Trade Commission Act. The letter also informed the marketers that historically the FTC has accorded significant weight to FDA findings regarding product safety and efficacy.

I think the language used in the warning letters illustrates one manner in which FDA

---

[44] *Id. citing* 21 U.S.C. § 343 (r)(6)(B) (2009).

[45] FTC Press Release, *FTC Sends Warning Letters to Marketers of Caffeinated Alcohol Drinks*, (Nov. 17, 2010), *available at* http://www.ftc.gov/opa/2010/11/alcohol.shtm.

findings and standards can be extremely helpful. In the areas where our jurisdiction is co-extensive, the FDA's determination one way or another on any particular issue is not binding on the Commission, however, it can be used very effectively to inform our decision to bring an action.

A third example of this intersection – and another illustration of how the FDA regulatory regime can be useful – is found in the revised language of some of the agency's recent orders. These orders contain more specific provisions that are designed to make the evaluation of the defendant's compliance with the order easier and more straightforward. For example, in the Nestlé order, with respect to "disease" claims, the order provides that Nestlé shall not represent that the covered product, "prevents or reduces the risk of upper respiratory tract infections, including, but not limited to, cold or flu viruses unless the representation is specifically permitted in labeling for such product by regulations promulgated by the FDA pursuant to the Nutrition Labeling and Education Act of 1990."[46]

---

[46] In cases where the company has made unsubstantiated claims about other health benefits, (other than disease prevention or reduction claims), the revised provisions require competent and reliable scientific evidence for substantiation and "competent and reliable scientific evidence shall consist of at least two adequate and well-controlled human clinical studies of the Covered Product, or of an Essentially Equivalent Product, conducted by different researchers, independently of each other, that conform to acceptable designs and protocols and whose results, when considered in light of the entire body of relevant and reliable scientific evidence, are sufficient to substantiate that the representation is true."

Finally, for other health benefit claims – namely ones that were not at issue in the present case – the revised order provisions require "competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true. For purposes of this provision, competent and reliable scientific evidence means tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield accurate and reliable results."

The Analysis to Aid Public Comment ("AAPC") does a good job of explaining the reasoning behind this provision: "respondent cannot claim that a covered product reduces the likelihood of getting a cold or the flu unless the FDA has issued a regulation authorizing the claim based on a finding that there is significant scientific agreement among experts qualified by scientific training and experience to evaluate such claims, considering the totality of publicly available scientific evidence. The AAPC goes on to explain that, as noted in the Commission's Enforcement Policy Statement on Food Advertising, "[t]he Commission regards the 'significant scientific agreement' standard, as set forth in the NLEA and FDA's regulations, to be the principal guide to what experts in the field of diet-disease relationships would consider reasonable substantiation for an unqualified health claim."[47] Thus, although the Enforcement Policy Statement does not say that the only way a food advertiser can adequately substantiate a disease risk-reduction claim is through FDA authorization, the consent order provision requiring FDA pre-approval before respondent makes a reduced cold or flu likelihood claim for its covered products in the future will facilitate compliance with and enforcement of the order and is reasonably related to the violations alleged.

Thanks for your time and attention today.

[47] Enforcement Policy Statement on Food Advertising (1994), *available at* http://www.ftc.gov/bcp/policystmt/ad-food.shtm.