



# FEDERAL TRADE COMMISSION ADVERTISING ENFORCEMENT

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## I. LEGAL FRAMEWORK

### A. Commission's Statutory Authority in Advertising Cases

1. Section 5 of the FTC Act, 15 U.S.C. § 45 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 prohibits the dissemination of misleading claims for food, drugs, devices, services or cosmetics.
3. Section 13(b) of the FTC Act, 15 U.S.C. § 53 authorizes the Commission to file suit in United States District Court to enjoin an act or practice that is in violation of any provision of law enforced by the FTC.

B. Deception: Deception Policy Statement, appended to Cliffdale Associates, Inc., 103 F.T.C. 110, 174 (1984), cited with approval in Kraft, Inc. v. FTC, 970 F.2d 314 (7th Cir. 1992), cert. denied, 507 U.S. 909 (1993). 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.

C. 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 causes or is likely to cause substantial consumer injury which is not reasonably avoidable by consumers themselves and which 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. Rep. No. 617, 103d Cong., 2d Sess. (1994), 140 Cong. Rec. H6006 (daily ed. July 21, 1994).

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## II. 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). 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).
- B. Fencing-In: “If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity.” FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952). Therefore, “those caught violating the Act must expect some fencing in.” FTC v. National Lead Co., 352 U.S. 419 (1957); see FTC v. Universal-Rundle Corp., 387 U.S. 244 (1967). Given the Commission’s expertise in the area, the Supreme Court has afforded it broad discretion in fashioning fencing-in provisions that will not be disturbed except “where the remedy selected has no reasonable relation to the unlawful practices found to exist.” Jacob Siegel Co. v. FTC, 327 U.S. 608, 612-13 (1946). Courts have upheld FTC orders encompassing all products the company markets or all products in a broad category, based on violations involving only a single product or group of products. ITT Continental Baking Co. v. FTC, 532 F.2d 207 (2d Cir. 1976). Among the factors the Commission will consider in determining the appropriate remedy are the seriousness of the present violation, the violator’s past record with respect to deceptive practices, and the potential transferability of the illegal practice to other products. Sears, Roebuck & Co. v. FTC, 676 F.2d 385, 391 (9th Cir. 1982). The weight given a particular factor or element will vary. The more egregious the facts with respect to a particular element, the less important it is that another negative factor be present. Id. at 391-92.
- C. Corrective Advertising: If merely prohibiting future misrepresentations will not dispel misperceptions conveyed through prior misrepresentations, the FTC 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. v. FTC, 223 F.3d 783 (D.C. Cir. 2000) (upholding Commission order requiring marketer of Doan’s pills to run corrective advertising to remedy deceptive claim that product is superior to other analgesics for treating back pain)
  - 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)

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

1. Representative disclosure cases:

- FTC v. Western Botanicals, Inc., No. CIV.S-01-1332 DFL GGH (E.D. Cal. July 11, 2001) (stipulated final order); and FTC v. Christopher Enterprises, Inc., No. 2:01 CV-0505 ST (D. Utah Nov. 29, 2001) (stipulated final order) (prohibiting sale of comfrey for internal use without proof of safety, challenging claims that product could safely treat serious diseases, requiring warnings in labeling and advertising that internal use can cause serious liver damage or death, and ordering consumer redress)
- Panda Herbal Int'l, Inc., 132 F.T.C. 125 (2001), and ForMor, Inc., 132 F.T.C. 72 (2001) (consent orders) (requiring warnings in labeling and advertising that St. John's Wort can have potentially dangerous interactions for patients taking certain prescription drugs and for pregnant women)
- Aaron Co., 132 F.T.C. 172 (2001) (consent order) (requiring safety warnings in labeling and advertising that products containing ephedra can have dangerous effects on central nervous system and heart, including heart attack, stroke, seizure, and death)
- FTC v. Met-Rx USA, Inc., No. SAC V-99-1407 (D. Colo. Nov. 15, 1999), and FTC v. AST Nutritional Concepts & Research, Inc., No. 99-WI-2197 (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., 128 F.T.C. 262 (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 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)

2. Representative direct notification cases:

- Brake Guard Products, Inc., 125 F.T.C. 138 (1998) (requiring marketer of purported after-market braking system to notify distributors and purchasers that FTC has determined ad claims to be deceptive); see also FTC v. Brake Guard Products, Inc., No. CO1-686P (W.D. Wash. May 31, 2001) (complaint for civil penalties)
- 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)

3. Representative consumer education cases:

- WebTV Networks, Inc., C-3988 (Dec. 12, 2000) (consent order) (in settlement of charges that company made deceptive claims about performance capabilities of WebTV, requiring consumer education campaign in magazines, retail stores, and online to inform consumers about determining advantages and disadvantages of Internet access devices as compared to computers)
- United States v. Macys.com, Inc., (D. Del. July 26, 2000) (in settlement of charges that company violated the Mail and Telephone Order Rule during the 1999 holiday season, imposing civil penalty of \$350,000 and requiring company to post banner ads on major search engines such as Yahoo!, Excite, AOL or Lycos that alert consumers about their rights when shopping online)
- United States v. Bayer Corp., No. CV 00-132 (NHP) (D.N.J. Jan. 11, 2000) (consent decree) (in settlement of charges that company made deceptive claims about use of aspirin for prevention of heart attacks and strokes in the general population, requiring \$1 million educational campaign to inform consumers of proper use of aspirin therapy and disclosure in ads, “Aspirin is not appropriate for everyone, so be sure to talk with your doctor before beginning an aspirin regimen”)
- 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) (in settlement of charges that advertiser made misleading claims about gasoline’s ability to clean engines and reduce maintenance costs, requiring consumer education campaign, including television ads and brochure)

- 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 copies of FTC's *Consumer's Guide to Buying a Franchise* to attendees)

E. Bans, bonds, and other remedies: To protect consumers in the future, district courts have banned individuals from certain industries, required them to post bonds before engaging in business, or ordered other remedies to ensure compliance. In addition, the Commission has upheld its authority to impose bonds. See, e.g., Telebrands, Corp., 140 F.T.C. 278 (2005) (Commission Decision); 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. 7 Day Marketing, Inc., No. CV08-01094-ER-FFM (C.D. Cal. Feb. 27, 2008) (permanent injunction) (entering \$14 million suspended judgment and banning individuals from marketing via infomercial or marketing any health-related product in any medium for deceptive claims for "7 Day Miracle Cleanse Program")
- FTC v. Neiswonger, No. 4:96CV02225 SNL (E.D. Mo. May 8, 2007) (banning repeat offender for life from engaging in telemarketing or selling any type of business opportunity)
- FTC v. International Research and Development Company of Nevada, No.04C 6901 (N.D. Ill. Aug. 22, 2006) (banning marketers of FuelMAX and SuperFuelMAX for life from sale of similar fuel saving or emissions-decreasing products)
- FTC v. American Bartending Institute, Inc., (C.D. Cal. Apr. 18, 2006) (stipulated final order) (banning repeat offender for life from telemarketing)
- FTC v. Kevin Trudeau, No. 98-C-0168 and No. 03-C-904 (N.D. Ill. Sept. 3, 2004) (stipulated final order) (banning defendant for life from appearing in, producing, or disseminating infomercials that advertise almost any type of product, service, or program to the public). See also FTC v. Kevin Trudeau, (N.D. Ill. Nov. 21, 2007) (memorandum opinion and order) (finding Kevin Trudeau in contempt of court for violating a 2004 permanent injunction when he misrepresented the contents of a purported weight loss book)
- FTC v. Tyme Lock 2000, Inc., No. CV-S-02-1078-JCM-RJJ (D. Nev. July 11, 2003) (stipulated final judgment) (banning principals for life from advertising, marketing, or selling any credit-related goods or services)

- FTC v. Sloniker, No. CIV 02 1256 PHX RCB (D. Az. Feb. 6, 2003) (stipulated final judgment) (banning principals for life from any future telemarketing activities)
- FTC v. American Urological Corp., No. 98-CVC-2199-JOD (N.D. Ga. Apr. 29, 1999) (final order for permanent injunction) (imposing \$6 million bond on marketer of Väegra, a dietary supplement purporting to treat impotence)
- FTC v. iMall, Inc., (C.D. Cal. Apr. 12, 1999) (banning principals from Internet-related business ventures and imposing \$500,000 performance bond before selling any business opportunity)
- United States v. Telebrands Corp., No. 96-0827-R (W.D. Va. Sept. 2, 1999) (consent decree) (ordering recidivist to pay \$800,000 civil penalty and hire FTC-approved monitor to audit compliance with the Mail or Telephone Order Rule)

F. Trade Name Excision: The Commission has the authority to forbid the future use of a brand name or trade name when less restrictive remedies, such as affirmative disclosures, would be insufficient to eliminate the deception conveyed by the name or would lead to a confusing contradiction in terms. ABS Tech Sciences, Inc., 126 F.T.C. 229 (1998) (enjoining company from further use of term “ABS” as part its trademark or trade name because consumers would likely confuse its product with factory-installed anti-lock breaking systems). See also Continental Wax Corp. v. FTC, 330 F.2d 475, 479-80 (2d Cir. 1964), aff’d 62 F.T.C. 1064 (1963); Thompson Medical Co., 104 F.T.C. at 837-39.

G. 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 “dishonest or fraudulent.”

1. Representative Section 13(b) cases:

- FTC v. BlueHippo Funding, LLC and BlueHippo Capital, LLC, No. 08-CIV-1819 (S.D.N.Y. Feb. 25, 2008) (up to \$5 million redress for selling computers and electronic equipment to consumers with bad credit without disclosing key terms and conditions of the transaction, in violation of Section 13(b), Section 5, the Mail Order Rule, the Truth in Lending Act, Electronic Fund Transfer Act, Regulation E, and Regulation Z)
- FTC v. International Product Design, No. 1:97-CV-01114-GBL-TCB (E.D. Va. Sept. 6, 2007) (ordering \$60 million redress for customers of purported invention promotion company)
- FTC v. Stefanchik, No.: CV04-1852 (W.D. Wash. May 21, 2007) (final judgment) (ordering \$17,775,369 redress for purchasers of course materials,

seminars, workshops, videotapes, etc., purporting to teach them how to buy and sell privately held mortgages)

- FTC v. Rexall Sundown, Inc., Civ. No. 00-706-CIV (S.D. Fla. Mar. 11, 2003) (stipulated final order) (up to \$12 million redress for deceptive efficacy representations for Cellasene, a purported anti-cellulite dietary supplement)
- FTC v. Smolev and Triad Discount Buying Service, Inc., No. 01-8922-CIV-Zloch (S. D. Fla. Oct. 24, 2001) (stipulated final order) (joint action by FTC and 40 states ordering \$9 million redress from buying clubs that misled consumers into accepting trial memberships and obtained consumers' billing information from telemarketers without authorization)
- FTC v. Enforma Natural Products, Inc., No. 04376JSL(CWx) (C.D. Cal. Apr. 26, 2000) (stipulated final order) (\$10 million redress from marketer of purported weight loss products)
- FTC v. American Urological Corp., No. 98-CVC-2199-JOD (N.D. Ga. Apr. 29, 1999) (permanent injunction) (\$18.5 million judgment against marketers of Vægra, a dietary supplement purporting to treat impotence)
- FTC v. SlimAmerica, Inc., No. 97-6072-Civ (S.D. Fla. 1999) (permanent injunction) (\$8.3 million redress from marketer of purported weight loss product)
- FTC v. Amy Travel Service, Inc., 875 F.2d 564 (7th Cir. 1988) (upholding district court's award of 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 court's authority to order redress under Section 13(b) of the FTC Act)

2. Representative Section 19 case:

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

3. Representative administrative consent orders requiring financial or other remedies:

- ValueVision International, Inc., 132 F.T.C. 338 (2001) (consent order) (requiring home shopping company to offer refunds to all purchasers of weight loss, cellulite, and baldness products)
- Weider Nutrition International, Inc., C-3983 (Nov. 17, 2000) (consent order) (\$400,000 redress for deceptive weight loss claims for PhenCal, a dietary supplement marketed as a safe alternative to prescription drug combination Phen-Fen)

- Dura Lube, Inc., D-9292 (May 5, 2000) (consent order) (\$2 million redress for deceptive efficacy claims for engine treatment)
- Apple Computer, Inc., 128 F.T.C. 190 (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)
- 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 Better Business Bureau's Children's Advertising Review Unit's policies)
- L & S Research Corp., 118 F.T.C. 896 (1994) (consent order) (\$1.45 million in disgorgement for deceptive claims for Cybergenics bodybuilding products)

H. 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. Bayer Corp., No. 07-01 (HAA) (D.N.J. Jan. 4, 2007) (consent decree) (\$3.2 million civil penalty for deceptive weight loss claims for One-A-Day WeightSmart, disseminated in violation of 1991 FTC order)
- United States v. NBTY, Inc., No. CV-05-4793 (E.D.N.Y. Oct. 12, 2005) (consent decree) (\$2 million civil penalty against company formerly known as Nature's Bounty for violating the terms of 1995 FTC order by making deceptive claims that Royal Tongan Limu was clinically proven to treat diabetes, cancer, Alzheimer's disease, and other serious conditions and that Body Success PM Diet Program reduces body fat, increases metabolism, and causes weight loss, even during sleep)
- United States v. Brake Guard Products, Inc., No. C01-686P (W.D. Wash. July 7, 2003) (consent decree) (\$100,000 civil penalty for violations of FTC order related to deceptive safety representations for after-market braking system)
- United States v. ValueVision International, Inc., No. 03-2890 (D. Minn. Apr. 17, 2003) (consent decree) (\$215,000 civil penalty for violations of FTC order related to unsubstantiated health claims for dietary supplements)



- United States v. Mazda Motor of America, Inc., (C.D. Cal. Sept. 30, 1999) (consent decree) (\$5.25 million civil penalty for violations of FTC and state orders related to car leasing ads)
- 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 weight loss products for violating FTC order barring deceptive 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 for violating FTC order requiring substantiation for disease, weight loss, and muscle building claims)

2. Representative trade regulation rule violation cases involving advertising:

- United States v. Prochnow, No. 1 02-CV-917 (N.D. Ga. Sept. 11, 2006) (permanent injunction) (\$5.4 million civil penalty and disgorgement of \$1.6 million for magazine seller's violations of the Telemarketing Sales Rule and violation of 1996 FTC consent order)
- United States v. Scholastic Inc. and Grolier Incorporated, Civil No. 1:05CV01216 (D.D.C. June 21, 2005) (consent order) (\$710,000 civil penalty for book club companies' violations of Negative Option Rule, Unordered Merchandise Statute, Telemarketing Sales Rule, and Section 5)
- United States v. Igia and Igia.com, No. 04-CV-3038 (S.D.N.Y. Apr. 21, 2004) (consent decree) (\$300,000 civil penalty against marketer of Epil-Stop depilatory product for violations of the Mail Order Rule)
- United States v. Deer Creek Products, Inc., No. 03-61592-CIV (S.D. Fla. Aug. 19, 2003) (consent decree) (suspended \$150,000 civil penalty against marketer of Big Mouth Billy Bass for violations of Mail Order Rule)
- United States v. Staples, Inc., No. 03-10958 GAO (D. Mass. May 22, 2003) (consent decree) (\$850,000 civil penalty for office supply company's violation of the Mail Order Rule through misleading "real time" inventory availability and delivery claims )
- United States v. Oxmoor House, Inc., No. CV-02-B-2735-S (N.D. Ala. Nov. 7, 2002).(consent decree) (\$500,000 civil penalty for publisher's violation of

Unordered Merchandise Statute, Negative Option Rule, and Telemarketing Sales Rule for misrepresenting terms of 30-day free trial membership in book club)

- United States v. Toysrus.com, Inc., (D.N.J.); United States v. Kay-Bee Toy, Inc., (D. Minn.); United States v. Macys.com, Inc., (D. Del.); United States v. CDnow, Inc., (E.D. Pa.); United States v. MiniDiscNow, Inc., (N.D. Cal.); United States v. The Original Honey Baked Ham Company of Georgia., (N.D. Ga.); and United States v. Patriot Computer Corp., (N.D. Tex.) (July 26, 2000) (consent decrees) (charging online marketers with violations of Mail Order Rule for shipping delays during the 1999 holiday season and imposing a total of \$1.5 million in civil penalties)
- United States v. Iomega Corp., No. 98-CV-00141C (D. Utah Dec. 9, 1998) (consent decree) (\$900,000 civil penalty for violations of Mail Order Rule)
- United States v. Dell Computer Corp., No. 98-CA-0210 (W.D. Tex. Apr. 2, 1998) (consent decree) (\$800,000 civil penalty for violations of Mail Order Rule)

I. 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. In 1997 the FTC announced Project Scofflaw, a program of criminal and civil enforcement against violators of FTC-obtained district court orders. Since then, more than twenty defendants have been sentenced to a total of 77 years in prison. Representative cases:

- FTC v. Global Marketing Group, Inc., No. 8:06-CV-02272 JSM-TGW (M.D. Fla. Feb. 15, 2008) (order finding corporate officer in contempt and issuing arrest warrant for multiple violations of TRO and PI related to cross-border payment-processing scheme)
- FTC v. Lane Labs-USA, No. 00CV3174 (D.N.J. Jan. 29, 2007) (application for an order to show cause why defendants should not be held in contempt filed) (alleging that corporation and corporate officer violated FTC order against by making deceptive claims for Fertil Male, a dietary supplement purporting to enhances male fertility)
- FTC v. Vocational Guides, Inc., No: 3-01-1070 (M.D. Tenn. Nov. 22, 2006) (ordering \$2.37 million redress and finding defendant guilty of civil contempt for misrepresenting the benefits of government information packages, in violation of a 2001 FTC-obtained order)
- United States v. Kenneth Taves, (C.D. Cal. May 10, 2004) (135-month sentence for unauthorized credit card charges and contempt of earlier FTC-obtained order)
- United States v. Robert Ferrara, 334 F.3d 774 (8th Cir. 2003), cert. denied, 124 S. Ct. 1127 (2004) (upholding 125-month sentence for six counts of criminal contempt arising from violation of court order barring violations of the FTC's Franchise Rule)

- 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”)

### III. 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., 126 F.T.C. 202 (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.
- D. 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., 125 F.T.C. 138 (1998); ABS Tech Sciences, Inc., 126 F.T.C. 229 (1998); see also ***Dietary Supplements: An Advertising Guide for Industry*** (Nov. 1998). Representative cases:
- 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 specific claims made in ad)
  - FTC v. Pantron I Corp., 33 F.3d 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 well-controlled clinical studies to substantiate certain drug claims)

#### IV. 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 a material misrepresentation, 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).

C. Advertising Agencies: An advertising agency may be 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 held to know what claims – express and implied – are conveyed to consumers by their ads. ITT Continental Baking Co., 83 F.T.C. 865, 968 (1973), aff'd as 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:

- Campbell Mithun, L.L.C., 133 F.T.C. 702 (2002) (consent order) (challenging agency's role in ads claiming that calcium in Wonder Bread could improve children's brain function and memory)
- Bozell Worldwide, Inc., 127 F.T.C. 1 (1999), and Martin Advertising, Inc., 127 F.T.C. 10 (1999) (consent orders) (challenging agencies' roles in advertisements containing deceptive representations of car leasing terms)
- Foote, Cone & Belding, Inc., 125 F.T.C. 528 (1998); Grey Advertising, Inc., 125 F.T.C. 548 (1998); and Rubin Postaer and Associates, Inc., 125 F.T.C. 572 (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)
- Jordan McGrath Case & Taylor, 122 F.T.C. 152 (1996) (consent order) (challenging ad agency's role in advertisements containing deceptive claims for Doan's pills)
- 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 Egglad's Best eggs on 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)

D. 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.,

128 F.T.C. 682 (1999) (consent order), and Shell Chemical Co., 128 F.T.C. 729 (1999) (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).

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

- FTC v. State of Illinois, State of Iowa, State of Nevada, State of North Carolina, State of North Dakota, State of Ohio, and State of Vermont, Plaintiffs, v. Your Money Access, LLC, (E.D. Pa. Dec. 11, 2007) FTC File No. 052-3122 (complaint filed) (charging a payment processor with violating federal and state laws by debiting consumers' bank accounts on behalf fraudulent telemarketers and online merchants)
- FTC v. Universal Processing, Inc., No.: SA CV05-6054FMC (VBKx) (Sept. 7, 2005) (stipulated permanent injunction) (holding payment processor liable for unauthorized debits to consumers' checking accounts made on behalf of company selling allegedly bogus pharmacy discount cards)
- FTC v. Modern Interactive Technology, Inc., No. CV 00-09358 GAF (CWx) (C.D. Cal. Mar. 1, 2005) (stipulated final order for permanent injunction ) (holding infomercial producer and two principals of the company liable for deceptive weight loss claims made for the Enforma system)
- FTC v. First American Payment Processing, Inc., No. CV 04-0074 PHX SRB (D. Az. Nov.3, 2004) (stipulated permanent injunction) (\$1.5 million redress for electronic payment processor's role in assisting fraudulent telemarketers by electronically debiting consumers' bank accounts in violation of the Telemarketing Sales Rule and the FTC Act)
- FTC v. No. 1025798 Ontario, Inc., d/b/a The Fulfillment Solutions Advantage, Inc., No.: 03-CV-910A (W.D.N.Y. Oct. 12, 2004) (stipulated final order) (holding fulfillment company liable for its role in marketing of deceptively advertised weight loss products)
- ValueVision International, Inc., 132 F.T.C. 338 (2001) (consent order) (holding home shopping company liable for its role in making and disseminating deceptive claims for weight loss, cellulite, and baldness products)
- FTC v. Lane Labs-USA, Inc., No. 00CV3174 (D.N.J. June 28, 2000) (stipulated final order) (applying common enterprise theory to hold both the product manufacturer and a company that distributed information about the use of the product liable for deceptive cancer treatment claims for BeneFin, a shark cartilage product)

- QVC, Inc., C-3955 (June 16, 2000) (consent order) (holding home shopping company liable for its role in making and disseminating deceptive cold prevention claims for zinc supplement)
- 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)
- 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)
- Lifestyle Fascination, Inc., 118 F.T.C. 171 (1994) (consent order) (holding cataloger liable for deceptive claims for fuel additive, pain reliever, and device advertised to treat addiction and depression)
- 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)
- General Nutrition, Inc., 111 F.T.C. 387 (1989) (consent order) (holding retailer liable for deceptive claims for dietary supplements)
- Walgreen Co., 109 F.T.C. 156 (1987) (holding retail drugstore chain liable for deceptive advertising of OTC pain reliever)

## V. 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 principle that because consumers may rely on the opinions of endorsers in making product decisions, product endorsements must be non-deceptive. Endorsements “may not contain any representations which would be deceptive or could not be substantiated if made directly by the advertiser.” 16 C.F.R. § 255.1(a). In other words, endorsements are not themselves substantiation for advertising claims; rather, they give rise to the need for the advertiser to possess competent and reliable evidence to support the underlying efficacy representations conveyed to consumers. 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 a material connection that must be disclosed); TrendMark Int’l, Inc., 126 F.T.C. 375 (1998) (consent order) (challenging consumer endorsers’ status as distributors of weight loss product or their spouses to be a material connection that must be disclosed).

1. Expert Endorsers: An “expert” is defined as “an individual, group, or institution possessing, as a result of experience, study, or training, knowledge of a particular

subject, which knowledge is superior to that generally acquired by ordinary individuals.” 16 C.F.R. § 255.0(d). Endorsers represented directly or by implication to be experts must have qualifications sufficient to give them the represented expertise. 16 C.F.R. § 255.3(a); see FTC v. Lark Kendall, No. 00-09358-AHM (AIJx) (C.D. Cal. Aug. 31, 2000) (challenging false representation that person who appeared on an infomercial touting a weight loss product was a nutritionist) (stipulated final order). 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. 16 C.F.R. § 255.3(b). Both the advertiser and the expert endorser may be held liable for deceptive claims made by the endorser. See Synchronal Corp., 116 F.T.C. 1189 (1993); (consent order) (holding both advertiser and expert endorsers liable for deceptive representations for a purported baldness remedy and cellulite treatment). Representative expert endorsement cases:

- Robert M. Currier, D.O., 134 F.T.C. 672 (2002) (consent order) (challenging deceptive representations made by eye doctor for SNOR-enz, a purported anti-snoring treatment)
- 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) (\$480,000 redress for deceptive claim that Jogging in a Jug cider beverage was approved by the Department of Agriculture)
- James McElhaney, M.D., 116 F.T.C. 1137 (1993) (consent order) (challenging deceptive representations made by a physician for a purported pain relief and arthritis treatment device)
- Steven Victor, M.D., 116 F.T.C. 1189 (1993), and Patricia Wexler, M.D., 115 F.T.C. 849 (1992) (consent orders) (challenging deceptive representations made by dermatologists for a purported baldness remedy)
- Ana Blau a/k/a Anushka, 116 F.T.C. 1189 (1993) (consent order) (challenging deceptive representations made by a spa owner for a purported cellulite remedy)
- 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)



2. 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 a 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).
  
  3. Celebrity Endorsers: Like any other endorsement or testimonial, celebrity endorsements must reflect the “honest opinions, findings, beliefs, or experience” of the celebrity. Advertisers must substantiate not only the accuracy of any claims made by the celebrity, but also any underlying efficacy claims conveyed to consumers through the celebrity endorsement. 16 C.F.R. § 255.1(a). A celebrity who is represented to use the product must, in fact, be a bona fide user. Advertisers may use an endorsement only as long as they have good reason to believe that the endorser continues to subscribe to the views presented. 16 C.F.R. § 255.1(b)-(c). See also FTC v. Garvey, 383 F.3d 891 (9th Cir. 2004) (holding that celebrity endorser possessed requisite level of substantiation).
- B. 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:
- United States v. Goodtimes Entertainment, Ltd., No. 03 CV 6037 (S.D.N.Y. Aug. 11, 2003) (consent decree) (challenging deceptive use of before-and-after photos in ads for Copa hair straightening product)
  
  - Arak-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 deceptive use of monofilament wire 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)

C. 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:

- KFC Corp., 138 F.T.C. 442 (2004) (consent order) (challenging deceptive claims about the relative nutritional value and healthiness of company's fried chicken as compared to a Burger King Whopper)
- Novartis Corp. v. FTC, 223 F.3d 783 (D.C. Cir. 2000) (upholding Commission finding that marketer of Down's pills had misrepresented that product is superior to other analgesics for treating back pain)
- London International Group, 125 F.T.C. 726 (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)

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

- Prince Lionheart, Inc., 138 F.T.C. 403 (2004) (consent order) (challenging unsubstantiated claims for the Love Bug, a device designed to clip onto a baby stroller and advertised to repel mosquitos and protect children from the West Nile Virus)
- FTC v. Tecnozone International, L.L.C., No. 03 CV 9000 (S.D.N.Y. Nov. 14, 2003) (stipulated final order) (\$85,000 redress for deceptive safety and efficacy claims for Tecno AO cell phone shield)
- FTC v. Vital Living Products, Inc., No. 3:02CV74-MU (W.D.N.C. Feb. 27, 2002) (stipulated final order) (challenging deceptive efficacy claims for a purported do-it-yourself test kit represented to detect anthrax bacteria and spores)

- Kris A. Pletschke d/b/a Raw Health, 133 F.T.C. 574 (2002) (consent order) (challenging deceptive claims that colloidal silver product could treat 650 different diseases, could eliminate all pathogens in the human body, and is medically proven to kill anthrax, Ebola virus, Hanta virus, and flesh-eating bacteria)
- FTC v. Rhino International, Inc., No. CV 03-3850 (E.D.N.Y. Aug. 6, 2003) (stipulated final order) (\$342,665 redress for deceptive safety and efficacy claims for the WaveScrambler cell phone shield); FTC v. Safety Cell, Inc., No. CV 03-3851 (E.D.N.Y. Aug. 6, 2003) (stipulated final order) (challenging deceptive safety and efficacy claims for the WaveGuard cell phone shield)
- FTC v. Comstar Communications, Inc., No. 02-CV-003483 (E.D. Cal. May 7, 2003) (stipulated final order); and FTC v. Interact Communications, Inc., No. 02-CV-80131 (S.D. Fla. Dec. 1, 2003) (stipulated final order) (challenging allegedly deceptive safety and efficacy claims for the WaveShield cell phone shield)
- FTC v. Western Botanicals, Inc., No. CIV.S-01-1332 DFL GGH (E.D. Cal. July 11, 2001) (stipulated final order); FTC v. Christopher Enterprises, Inc., No. 2:01 CV-0505 ST (D. Utah Dec. 6, 2001) (stipulated final order); Panda Herbal Int'l, Inc., 132 F.T.C. 125 (2001); ForMor, Inc., 132 F.T.C. 72 (2001), and Aaron Co., 132 F.T.C. 174 (2001) (consent orders) (requiring warnings in labeling and advertising about potentially serious health risks of improper use of comfrey, St. John's Wort, and ephedra)
- FTC v. Medimax, Inc., No. 99-1485-CIV (M.D. Fla. Mar. 22, 2000), and FTC v. Cyberlinx Marketing, Inc., No. CV-S-99-1564-PMP-LRL (D. Nev. Nov. 8, 1999) (stipulated final orders) (challenging false representation that home HIV test kits could accurately detect HIV virus)
- FTC v. Met-Rx USA, Inc., No. SAC V-99-1407 (D. Colo. Nov. 15, 1999), and FTC v. AST Nutritional Concepts & Research, Inc., No. 99-WI-2197 (C.D. Cal. Nov. 15, 1999) (stipulated final orders) (challenging unsubstantiated safety claims for purported body-building supplements containing androgen and other steroid hormones)
- Conopco, Inc. d/b/a Unilever Home and Personal Care USA, C-3914 (Jan. 7, 2000) (consent order) (challenging antimicrobial and disease prevention claims for Vaseline Intensive Care Anti-Bacterial Hand Lotion)
- Brake Guard Products, Inc., 125 F.T.C. 138 (1998), and ABS Tech Sciences, Inc., 126 F.T.C. 229 (1998) (holding that safety claims for after-market braking systems were deceptive)
- Global World Media Corp., 124 F.T.C. 426 (1997) (consent order) (challenging safety claims for Herbal Ecstasy, an 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)

E. “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:

- United States v. The Stanley Works, No. 3:06cv883(JBA) (D. Conn. June 9, 2006) (\$205,000 civil penalty to settle charges that company falsely claimed its Zero Degree ratchets were Made in USA)
- Leiner Health Products, Inc., 133 F.T.C. 485 (2002); A&S Pharmaceutical Corp., C-4036; LNK International, Inc., 133 F.T.C. 501 (2002); Pharmaceutical Formulations, Inc., 133 F.T.C. 537 (2002); Perrigo Company, 133 F.T.C. 559 (2002) (consent orders) (challenging deceptive Made in USA label claims for private brand OTC analgesics)
- Jore Corp., 131 F.T.C. 585 (2001) (consent order) (challenging deceptive Made in USA claims for power tool accessories)
- Black & Decker Corp., 131 F.T.C. 439 (2001) (consent order) (challenging deceptive Made in USA claims for Kwikset locks)
- Physicians Formula Cosmetics, Inc., 128 F.T.C. 676 (1999) (consent order) (challenging deceptive Made in USA claims for Physicians Formula skincare products and cosmetics)
- The Stanley Works, 127 F.T.C. 897 (1999) (consent order) (challenging deceptive Made in USA claims for mechanics tools)
- American Honda Motor Co., Inc., 127 F.T.C. 461 (1999) (consent order) (challenging deceptive Made in USA claims for lawn mowers)

F. Coupons, Rebates, Gift Cards, “Free” Offers, Continuity Plans, and Other Promotions: Representations regarding coupons, rebates, gift cards, “free” offers, continuity plans, and other promotions are subject to the same standards of truthfulness and accuracy as other product claims. In addition to Section 5 of the FTC Act, marketers may also be subject to the requirements of the Mail or Telephone Order Merchandise Rule, the Telemarketing Sales Rule, the Negative Option Rule, and the Unordered Merchandise Statute.

1. **Rebates**. On April 27, 2007, the FTC sponsored “The Rebate Debate,” a national workshop on complying with Section 5 and other relevant laws and rules when advertising the availability of rebates. Representative cases:

- Soyo, Inc., C-4193 (Apr. 27, 2007) (consent order) (challenging company’s practice of delaying rebates for purchasers of computer motherboards and

other products despite representation that company would mail rebate checks within “10 to 12 weeks”)

- InPhonic, C-4192 (Apr. 27, 2007) (consent order) (challenging online mobile phone retailer’s failure to disclose adequately before purchase that consumers would have to wait at least three to six months to submit rebate requests and would have to wait at least six to nine months after their purchase to get their rebate)
- CompUSA Inc., 139 F.T.C. 357 (2005), and Priti Sharma and Rajeev Sharma, 139 F.T.C. 343 (2005) (consent orders) (alleging that manufacturer and retailer failed to pay consumer rebates in a timely fashion and requiring retailer to pay rebates for bankrupt manufacturer when retailer continued to advertise the availability of manufacturer’s rebates despite knowing that manufacturer was not fulfilling rebate requests)
- FTC v. Cyberrebate.com, Inc., No. 04-3616 (E.D.N.Y. Aug. 24, 2004) (stipulated final order) (challenging company’s practice of failing to honor rebate promises)
- Philips Electronics North America Corp., 134 F.T.C. 532 (2002), and OKie Corp., 134 F.T.C. 511 (2002) (consent orders) (alleging that companies misrepresented the time within which they would deliver rebates and unilaterally modified the terms of their rebate programs after they had already begun)
- America Online, Inc. and CompuServe Interactive Services, Inc., 137 F.T.C. 117 (2004) (consent order) (challenging companies’ failure to deliver timely \$400 rebates to eligible consumers)
- FTC and People of the State of New York v. UrbanQ, No. CV-0333147 (E.D.N.Y. June 26, 2003) (stipulated permanent injunction) (\$600,000 in consumer refunds stemming from failure to provide advertised rebates and related deceptive representations)
- 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 rebates to purchasers of scanners)
- United States v. Iomega Corp., No. 1:98CV00141C (D. Utah Dec. 9, 1998) (imposing \$900,000 civil penalty for failure to fulfill rebate and premium requests in violation of the Mail Order Rule)

2. **Other forms of promotion.** Representative cases:

- United States v. Member Source Media, Inc., No.: CV-08 0642 (N.D. Cal. Jan. 30, 2008) (\$200,000 civil penalty for violation of CAN-SPAM Act and deceptive representation that recipient of spam email had won “free” prizes)
- United States v. Adteractive, Inc., No. CV-07-5940 SI (N.D. Cal. Nov. 28, 2007) (stipulated final judgment) (\$650,000 civil penalty for violation of CAN-SPAM Act and failure to disclose that consumers have to spend money to receive the so-called “free” gifts)
- FTC v. EdebitPay, LLC, No. CV-07-4880 ODW (AJWx) (C.D. Cal. Aug. 7, 2007) (temporary restraining order) (challenging marketers of Visa- and MasterCard-branded stored-value cards from allegedly making unauthorized debits from consumers’ bank accounts)
- Darden Restaurants, C-4183 (Apr. 3, 2007) (consent order) (challenging company’s failure to clearly and conspicuously disclose dormancy fees for non-use of Olive Garden, Red Lobster, Bahama Breeze, and Smokey Bones gift cards)
- Kmart Corp., C-4197) (Mar. 12, 2007) (challenging company’s failure to clearly and conspicuously disclose dormancy fees for non-use of gift card and falsely representations that cards would never expire)
- FTC v. Consumerinfo.com., Inc. d/b/a Experian Consumer Direct, No. CV-SACV05-801 AHS(ML,Gx) (C.D. Cal. Feb. 21, 2007)(supplemental stipulated judgment and order) (\$300,000 disgorgement for violating terms of existing FTC order regarding disclosures about “free” credit reports); and (C.D. Cal. Aug. 16, 2005) (stipulated final judgment) (\$950,000 payment and refunds to consumers for deceptive marketing “free” credit reports without disclosing to consumers that they would be enrolled in credit report monitoring service and charged \$79.95 annually)
- FTC v. Think All Publishing, No.: 4:07-CV-11 (E.D. Tex. Jan. 25, 2007) (preliminary injunction with asset freeze) (challenging allegedly deceptive practice of advertising “free” software CDs but billing consumers’ credit cards for them without authorization based on a statement buried in the computer software licensing agreement)
- FTC v. Berkeley Premium Nutraceuticals, Inc., No. 1:06-CV-51 (S.D. Ohio Feb. 2, 2006) (complaint filed) (alleging that marketers offered consumers “free” samples of dietary supplements only to enroll them in an automatic shipment program and bill them without their authorization)
- United States v. Scholastic Inc. and Grolier Incorporated, No. 1:05CV01216 (D.D.C. June 21, 2005) (consent order) (\$710,000 civil penalty for book club companies’ violations of Negative Option Rule, Unordered Merchandise Statute, Telemarketing Sales Rule, and Section 5)

- FTC v. Conversion Marketing, Inc., No. SACV 04-1264 (C.D. Cal. Jan. 17, 2006) (stipulated order) (\$474,000 in redress and civil penalties for advertiser's practice of offering "free samples" of weight loss and tooth-whitening products and then debited consumer's accounts and enrolled them in automatic shipment programs without their knowledge or authorization)
- United States v. Mantra Films, Inc., No. CV-03-9184 RSWL (C.D. Cal. July 30, 2004) (stipulated order) (\$1.1 million civil penalty and redress in settlement of charges that marketers of "Girls Gone Wild" videos violated Section 5, the Electronic Fund Transfer Act, and the Unordered Merchandise Statute by billing consumers for products without their express consent)
- FTC v. Preferred Alliance, Inc., No.: 03-CV-0405 (N.D. Ga. Feb. 12, 2003) (complaint) (challenging allegedly deceptive negative option marketing of buying club memberships)
- United States v. Micro Star Software, Inc., (S.D. Cal. May 22, 2002) (consent decree) (ordering \$90,000 civil penalty for company's failure to disclose adequately that its 30-day "no risk" trial offer obligated consumers to continuous unordered shipments of software and a \$49.95 non-refundable membership fee)
- FTC v. Smolev and Triad Discount Buying Service, Inc., No. 01-8922-CIV-Zloch (S. D. Fla. Oct. 24, 2001) (stipulated final order) (joint action by FTC and 40 states ordering \$9 million in redress from buying clubs that misled consumers into accepting trial memberships and obtained consumers' billing information from telemarketers without authorization)
- FTC v. Creative Publishing International, Inc., (D. Minn. May 30, 2001) (consent decree) (ordering \$200,000 civil penalty for publisher's failure to disclose adequately that acceptance of "free trial" offer unknowingly enrolled consumers in book club)
- Value America, Inc., C-3976, Office Depot, Inc., C-3977, and BUY.COM, Inc., C-3978 (Sept. 8, 2000) (consent orders) (challenging promotions for "free" and "low-cost" computers that failed to disclose the true costs of and important restrictions on the offers, including that consumers had to sign a contract for three years of service from a particular Internet service provider)
- Bumble Bee Seafoods, Inc., C-3954 (June 16, 2000) (consent order) (challenging "75¢ off next purchase" promotion that did not disclose until consumers had already bought product that coupon was good only for purchase of five cans of tuna and requiring company to undertake new coupon promotion with \$200,000 payout to consumers)
- Benckiser Consumer Products, Inc., 121 F.T.C. 644 (1996) (consent order) (challenging deceptive "cause-related marketing" campaign in which advertiser falsely claimed that a portion of proceeds from its EarthRite line of products would be donated to non-profit environmental groups)

G. Advertising and Marketing Directed at Spanish-Speaking Consumers: On May 12-13, 2004, the FTC hosted a national workshop to explore strategies for effective education and law enforcement to protect Hispanic consumers from fraud and deceptive advertising. The Commission followed up with community workshops in other cities. To complement its law enforcement initiatives, the FTC launched a Spanish-language consumer fraud awareness campaign, “¡Ojo! Mantente alerta contra el fraude. Infórmate con la FTC” (“Be on the alert against fraud. Stay informed with the FTC.”), and a special website, [www.ftc.gov/ojo](http://www.ftc.gov/ojo). Representative cases:

- FTC v. Del Sol LLC, No.: CV-05-3013 GAF(RCx) (C.D. Cal. Dec. 14, 2006) (\$235,000 redress and \$1.6 million suspended judgment for Do Not Call violations and deceptive Spanish-language telemarketing of bogus “prizes”)
- FTC v. Unicyber Technology, No. CV-04-1569 LGB (MANx) (C.D. Cal. Mar. 25, 2005) (stipulated final judgment) (\$400,000 redress and \$4.6 million avalanche clause for deceptive representations about the cost, availability, and quality of low-cost computers advertised on national Spanish-language television)
- FTC v. Crediamerica Group d/b/a Latin Shopping Network, No. 05-20504-CIV-Martinez (S.D. Fla. Feb. 24, 2005) (stipulated final judgment) (\$47,000 redress and \$2.9 million avalanche clause for deceptive claims about availability and quality of low-cost computers)
- FTC v. Alternative Medical Technologies, Inc., (S.D. Fla. Apr. 27, 2004) (stipulated final order) (challenging deceptive weight loss claims for X-TOX 10 and deceptive smoking cessation claims for X-TOX 80, disseminated via Spanish-language media)
- FTC v. Latin Hut, Inc., No. 04-CV-0830- BTM (RBB) (S.D. Fla. Apr. 22, 2004) (stipulated final order) (\$149,425 redress for deceptive claims for Parche Para Bajar Peso and Iman De Grasa, purported weight loss products, and Total Bust, a purported breast augmentation supplement)

## VI. 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 or depictions in an ad are clear enough to permit the Commission to conclude with confidence that an 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).
- C. 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 answer questions designed to elicit the claims they took from an ad – 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 sound. 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.
- D. Disclosures in Ads: Advertisements often contain fine-print footnotes or video superscripts that attempt to disclaim, limit, modify, or explain claims made elsewhere in the ad. Advertisers cannot use fine print to contradict other statements in an ad or to clear up misimpressions the ad would otherwise leave. Deception Policy Statement, 103 F.T.C. at 180-81. Similarly, accurate information in a footnote or text will likely not remedy a false headline because reasonable consumers may glance only at the headline. Id.
1. To be effective, disclosures must be clear and conspicuous. E.g., Thompson Medical Co., 104 F.T.C. 648, 842-43 (1984), aff’d, 791 F.2d 189 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987) (requiring simultaneous audio and visual disclosure of certain information). See also United States v. Bayer Corp., No. CV 00-132 (NHP) (D.N.J. Jan. 11, 2000) (consent decree) (requiring audio and visual disclosure of information when ads make certain representations about the benefits of aspirin in the prevention of heart attacks).
  2. In evaluating the effectiveness of disclosures, the Commission considers factors like:

- Prominence: whether the qualifying information is prominent enough for consumers to notice and read (or hear)
  - Presentation: whether the qualifying information is presented in easy-to-understand language that does not contradict other things said in the ad and is presented at a time when consumers' attention is not distracted elsewhere
  - Placement: whether the qualifying information is located in a place and conveyed in a format that consumers will read (or hear)
  - Proximity: whether the qualifying information is located in close proximity to the claim being qualified.
3. The Commission has convened workshops and issued policy statements to reiterate the “clear and conspicuous” standard. *See, e.g., Disclosure Exposure: An FTC-NAD Workshop on Effective Disclosures in Advertising* (May 22, 2001); *Dot Com Disclosures: Information about Online Advertising* (May 3, 2000); *Joint FTC-FCC Policy Statement on the Advertising of Dial-Around and Other Long-Distance Services to Consumers* (Mar. 1, 2000); *Improving Consumer Mortgage Disclosures: An Empirical Assessment of Current and Prototype Disclosure Forms: A Bureau of Economics Staff Report* (June 13, 2007)
4. 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.*, 128 F.T.C. 151 (1999) (consent order); *Micron Electronics, Inc.*, 128 F.T.C. 137 (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). On September 11, 2007, the FTC sent more than 200 warning to mortgage brokers and lenders – and media outlets carrying their ads for home mortgages – that their claims may violate Section 5 of the FTC Act and the Truth in Lending Act. The Commission alleged that the ads touted very low monthly payments or interest rates, without adequate disclosure of other important loan terms.
5. Print disclosures: In print ads and point-of-sale materials, the Commission has frequently found fine-print footnotes or blocks of text to be inadequate to disclaim or modify a claim made elsewhere in the promotion. Representative cases:
- *Budget Rent-A-Car Systems, Inc.*, C-4212 (Jan. 4, 2008) (consent order) (challenging car rental company's failure to adequately disclose a fuel fee of as much as \$9.50 automatically charged to customers who drove fewer than 75 miles”
  - *Palm, Inc.*, 133 F.T.C. 715 (2002) (consent order) (challenging ads for personal digital assistants that represented that products came with built-in wireless access to the Internet and email while revealing in fine-print note printed down the side of the ad “Application software and hardware add-ons

may be optional and sold separately. Applications may not be available on all Palm handhelds”)

- Gateway Corp., 131 F.T.C. 1208 (2001) (consent order) (challenging ads for “free” or flat-fee internet services that disclosed in a fine-print footnote that many consumers would incur significant additional telephone charges)
  - Hewlett-Packard Co., 131 F.T.C. 1086 (2001), and Microsoft Corp., 131 F.T.C. 1113 (2001) (consent orders) (challenging ads for personal digital assistants that represented that products came with built-in wireless access to the Internet and email while revealing in fine print “Modem required. Sold separately.”)
  - Value America, Inc., C-3976, Depot, Inc., C-3977, and BUY.COM, Inc., C-3978 (Sept. 8, 2000) (consent orders) (challenging promotions for low-cost computer systems that disclosed true costs of the offer and important restrictions in fine-print footnotes)
  - Häagen-Dazs Co., 119 F.T.C. 762 (1995) (consent order) (challenging effectiveness of fine-print footnote modifying claim that frozen yogurt was “98% fat free”)
  - Stouffer Food Corp., 118 F.T.C. 746 (1994) (holding that sodium content claims for Lean Cuisine products were false and unsubstantiated and not cured by fine-print footnote)
6. Television disclosures: Video superscripts that are difficult to understand, superimposed over distracting backgrounds, compete with audio elements, or are placed in parts of the ad less likely to be remembered have been found to be ineffective in modifying a claim made in the body of the ad. Thompson Medical Co., 104 F.T.C. at 797-98. Representative cases:
- 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).
  - 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); Mazda Motor of America, Inc., 123 F.T.C. 312 (1997); Toyota Motor Sales, U.S.A., Inc., 125 F.T.C. 39 (1998); and Volkswagen of America, Inc., 125 F.T.C. 74 (1998) (consent orders) (requiring clear and conspicuous disclosure of terms in ads for car leases, defined as “readable [or audible] and understandable to a reasonable consumer”)
  - Frank Bommarito Oldsmobile, Inc., 125 F.T.C. 1 (1998); Beuckman Ford, Inc., 125 F.T.C. 59 (1998); Suntrup Buick-Pontiac-GMC Truck, Inc., 125 F.T.C. 91 (1998); and Lou Fusz Automotive Network, Inc., 125 F.T.C. 111 (1998) (consent orders) (requiring clear and conspicuous disclosure of terms

in ads for car leases, defined as “readable [or audible] and understandable to a reasonable consumer”)

- Foote, Cone & Belding, Inc., 125 F.T.C. 528 (1998);  Grey Advertising, Inc., 125 F.T.C. 548 (1998);  Rubin Postaer and Associates, Inc., 125 F.T.C. 572 (1998);  Bozell Worldwide, Inc. 127 F.T.C. 1 (1999); and  Martin Advertising, Inc., 127 F.T.C. 10 (1999) (consent orders) (challenging advertising agencies’ roles in ads containing deceptive representations of car leasing terms)
  - Kraft, Inc., 114 F.T.C. at 124 (Initial Decision) (holding that complicated superscript – “one ¾ ounce slice has 70% of the calcium of five ounces of milk” – does not cure deceptive calcium content claim for cheese slices)
7.  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 online with a focus on the clarity and conspicuousness of online disclosures. The Commission also sent letters to search engine companies on June 27, 2002, regarding the clear and conspicuous disclosure of paid placements.  See  Letter from Heather Hipsley, Acting Director of FTC’s Division of Advertising Practices, to Gary Ruskin, Executive Director of Commercial Alert, <http://www.ftc.gov/os/closings/staff/commercialalertletter.htm>.

## VII. 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. On July 30, 2004, FTC staff filed a comment with the FDA encouraging the agency to revise regulations to allow more accurate health-related information for consumers.

D. Representative health claim cases:

- Tropicana Products, Inc., 140 F.T.C. 176 (2005) (consent order) (challenging unsubstantiated representations that drinking 2-3 glasses a day of “Healthy Heart” orange juice would produce dramatic effects on blood pressure, cholesterol, and homocysteine levels, thereby reducing the risk of heart disease and stroke)
- KFC Corp., 138 F.T.C. 422 (2004) (consent order) (challenging deceptive claims about the relative nutritional value and healthiness of company’s fried chicken and its compatibility with popular weight-loss programs)
- Unither Pharma, Inc., and United Therapeutics Corp., 136 F.T.C. 145 (2003) (consent order) (challenging claims that food bar containing amino acid reduces the risk of heart disease and reverses damage to the heart)
- Interstate Bakeries Corp., 133 F.T.C. 687 (2002) (consent order) (challenging claims that calcium in Wonder Bread could improve children’s brain function and memory)
- Conopco, Inc., 123 F.T.C. 131 (1997) (consent order) (challenging heart-health claims for Promise margarine)
- United States v. Egglund’s Best, Inc., No. 96 CV-1983 (E.D. Pa. Mar. 12, 1996) (stipulated permanent injunction) (\$100,000 civil penalty for violation of previous order challenging claims about product’s effect on 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)
- Campbell Soup Co., 115 F.T.C. 788 (1991) (consent order) (challenging heart-health claims for soups that are high in sodium)
- 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)

E. Representative nutrient content claim cases:

- Pizzeria Uno Corp., 123 F.T.C. 1038 (1997) (consent order) (challenging misleading low-fat representations for Thinzzetta pizzas)
- Mrs. Fields Cookies, Inc., 121 F.T.C. 599 (1996) (consent order) (challenging low-fat claims for 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 products)
- Stouffer Food Corp., 118 F.T.C. 746 (1994) (holding that sodium content claims for Lean Cuisine products were deceptive)
- 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 that calcium content claims for Kraft Singles cheese slices were deceptive)

## VIII. OVER-THE-COUNTER DRUGS, MEDICAL DEVICES AND TREATMENTS, DIETARY SUPPLEMENTS, and WEIGHT-LOSS PRODUCTS

- 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:
- United States v. Bayer Corp., No. CV 00-132 (NHP) (D.N.J. Jan. 11, 2000) (consent decree) (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. v. FTC, 223 F.3d 783 (D.C. Cir. 2000) (upholding Commission finding that marketer of Doan’s pills misrepresented that product is superior to other analgesics for treating back pain)
  - Pfizer, Inc., 126 F.T.C. 847 (1998); Del Pharmaceuticals, Inc., 126 F.T.C. 775 (1998); and Care Technologies, Inc., 126 F.T.C. 830 (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)
  - United States v. Sterling Drug, Inc., No. CA90-1352 (D.D.C. June 12, 1990) (consent decree) (\$375,000 civil penalty for unsubstantiated claims for Midol, in violation of previous order)
- C. Devices, Medical Treatments, and Other Health-Related Promotions: Section 15 of the FTC Act defines the term “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 actions involving devices and other health-related promotions:
- FTC v. Q-Ray Company, No. 03C 3578 (N.D. Ill. Sept. 20, 2006) (memorandum opinion and order) (between \$15 million and \$87 million redress for deceptive pain relief claims for metal bracelet)
  - United States v. Walsh Optical, Inc., No.: 06-3591 (D.N.J. Aug. 7, 2006) (\$40,000 civil penalty for failing to verify consumers’ contact lens prescriptions, in violation of the Contact Lens Rule)
  - FTC v. Myfreemedicine.com, LLC, No. CV5 1607 (W.D. Wash. Oct. 17, 2005) (asset freeze entered) (challenging allegedly deceptive practice of representing that consumers who paid company \$199 could get free prescription medicine)
  - FTC v. Media Maverick, Inc., No. 04-3395-SVW (CWx) (C.D. Cal. Oct. 25, 2004) (stipulated final order) (\$400,000 redress for deceptive pain relief claims for the Balance Bracelet)

- Contact Lens Rule, 16 C.F.R. Part 31. Pursuant to the Fairness to Contact Lens Consumers Act of 2003, the Commission issued the Contact Lens Rule, which imposed new prescription release and verification requirements on prescribers and sellers. On August 15, 2007, FTC staff sent warning ten warning letters to prescribers of contact lenses for allegedly failing to release prescription information to their patients, requiring their patients to purchase contact lenses from them, or imposing additional fees on their patients before releasing the prescriptions.
- FTC v. Smart Inventions, Inc., No. CV 04-4431 Mm(ex) (C.D. Cal. Sept. 18, 2007) (stipulated final order for permanent injunction) (up to \$2.5 million redress for deceptive claims for Biotape, adhesive strips advertised to relieve pain)
- FTC v. Pharmacycards.com, No. CV-S-04-0712-RCJ-RJJ (D. Nev. May 27, 2004) (temporary restraining order issued) (challenging company's practice of allegedly making unauthorized withdrawals from consumers' checking accounts for unordered "discount pharmacy cards")
- FTC v. Seville Marketing, Ltd., No. C04-1181L (W.D. Wash. May 19, 2005) (stipulated final judgment) (challenging efficacy claims for at-home HIV test kits advertised as 99.4% accurate, but with error rates of 59.3%)
- Laser Vision Institute, 136 F.T.C. 1 (2003) (consent order); and LCA-Vision, Inc. d/b/a LasikPlus, 136 F.T.C. 41 (2003) (consent order) (challenging representations by purveyors of LASIK that the procedure would eliminate the need for glasses, contact lenses, reading glasses, and bifocals and would eliminate the risk of haloing and glare that can be caused by LASIK)
- FTC v. CSCT, Inc., No. 03 C 00880 (N.D. Ill. Feb. 17, 2004) (stipulated final judgment) (in conjunction with Canadian and Mexican health authorities, challenging anti-cancer claims made by a British Columbia company for electromagnetic treatments in its Tijuana, Mexico, clinic)
- FTC v. Dr. Clark Research Ass'n, No. 1:03CV0054 (N.D. Ohio Dec. 3, 2004) (stipulated final judgment) (ordering full refunds to consumers who purchased devices and dietary supplements deceptively advertised to treat cancer and other serious illnesses)
- FTC v. Walker, No. C02-5169 RJB (W.D. Wash. Oct. 28, 2002) (stipulated final judgment) (challenging efficacy claims for purported cancer treatments)
- FTC v. Sani-Pure Food Laboratories, No. 02-CV-4608 (D.N.J. Oct. 4, 2002) (final order) (challenging role of testing laboratory in providing false test results for a purported do-it-yourself home anthrax test)
- FTC v. BioPulse International, Inc., No. C023511 (N.D. Cal. July 23, 2002) (stipulated final judgment) (as part of ongoing Operation Cure.All, challenging deceptive cancer treatment claims made by California company)



for insulin-induced hypoglycemic sleep therapy and acoustic light wave therapy offered in its Tijuana, Mexico, clinic)

- FTC v. Vital Living Products, Inc., No. 3:02CV74-MU (W.D.N.C. Feb. 27, 2002) (stipulated final order) (challenging deceptive efficacy claims for a purported do-it-yourself test kit represented to detect the presence of anthrax bacteria and spores)
- FTC v. Western Dietary Products Co., No. C01-0818R (W.D. Wash. June 14, 2001) (permanent injunction), and Jaguar Enterprises, 132 F.T.C. 229 (2001) (consent order) (as part of third phase of Operation Cure.All, challenging deceptive representations that electronic therapy devices could treat AIDS, Alzheimer's disease, cancer, and other serious conditions)
- FTC v. Medimax, Inc., No. 99-1485-CIV (M.D. Fla. Mar. 22, 2000) (stipulated final order), and FTC v. Cyberlinx Marketing, Inc., No. V-S-99-1564-PMP-LRL (D. Nev. Nov. 8, 1999) (stipulated final order) (holding that Internet marketers falsely represented that HIV home test kits could accurately detect HIV virus, ordering full restitution, imposing lifetime ban on sale of unapproved devices, and requiring certain defendants to post \$500,000 bond before selling any medical devices)
- Magnetic Therapeutic Technologies, Inc., 128 F.T.C. 380 (1999) (consent order) (as part of first phase of Operation Cure.All, challenging claims that purported magnetic therapy devices could treat a multitude of diseases and symptoms, including cancer, high blood pressure, HIV, multiple sclerosis, and diabetic neuropathy)
- American College for Advancement in Medicine, 127 F.T.C. 890 (1999) (consent order) (challenging representations that chelation therapy is an effective treatment for arteriosclerosis)
- London International Group, 125 F.T.C. 726 (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)
- Zygon International, Inc., 122 F.T.C. 195 (1996) (consent order) (\$195,000 redress for deceptive claims for The Learning Machine, a device purported to accelerate learning and enable users to lose weight, quit smoking, increase their I.Q., and learn foreign languages overnight)
- 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)

D. Dietary Supplements, Herbal Products, and Related Advertising Claims: 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 *Dietary Supplements: An Advertising Guide for Industry*, describing how the basic principles of advertising law apply to the marketing of dietary supplements. Representative cases:

- Springboard and Pro Health Labs, C-4203; Elation Therapy, Inc., C-4204; Women's Menopause Health Center, C-4208; The Green Willow Tree LLC, C-4207; Health Science International, Inc., C-4205; Progesterone Advocates Network, 4206; and Herbs Nutrition Corporation, D-9325 (2008) (consent orders) (challenging deceptive representations for alternative hormone replacement therapy products)
- FTC v. Pacific Herbal Sciences, Inc., (C.D. Cal. May 29, 2007) (stipulated final judgment) (\$172,500 redress for deceptive weight loss, anti-aging, and disease treatment claims for HGH Revolution and Natural Rejuvenator HGH-R, oral sprays sold via spam that supposedly contained human growth hormone)
- FTC v. Sunny Health Nutrition Technology & Products, No. 8:06-CV-2193-T-24EAJ (M.D. Fla. Apr. 24, 2007 and Nov. 28, 2006) (stipulated final order) (\$1.9 million redress for deceptive claims for HeightMax, a dietary supplement purporting to make teens and young adults taller, including application of avalanche provision upon a finding that company had hidden assets)
- FTC v. Seasilver USA, Inc., No. CV-S-03-0676-RLH (LRL) (D. Nev. July 24, 2006) (\$120 million order for company's failing to comply with an earlier order requiring them to pay \$3 million in consumer redress). See also FTC v. Seasilver USA, Inc., No. CV-S-03-0676-RLH (LRL) (D. Nev. June 19, 2003) (stipulated final judgment) (challenging deceptive claims for Seasilver, a dietary supplement advertised as effective in the treatment of 650 diseases, including AIDS and cancer)
- FTC v. Garden of Life, Inc., No. 06-80226-CIV-Middlebrooks/ Johnson (S.D. Fla. Mar. 9, 2006) (stipulated final order) (\$225,000 redress and \$47 million suspended judgment for deceptive representations for Primal Defense, RM-10, Living Multi, and FYI, dietary supplements advertised to lower cholesterol; treat disorders such as asthma, irritable bowel syndrome, chronic fatigue syndrome, arthritis, lupus, colds, and Crohn's disease; and reduce risk factors for diabetes)
- FTC v. Berkeley Premium Nutraceuticals, Inc., No. 1:06-CV-51 (S.D. Ohio Feb. 2, 2006) (complaint filed) (alleging that marketers made deceptive claims for Avlimil, a purported treatment for female sexual dysfunction, and Rogisen, a purported treatment for night vision problems)

- United States v. NBTY, Inc., No. CV-05-4793 (E.D.N.Y. Oct. 12, 2005) (\$2 million civil penalty against company formerly known as Nature's Bounty for violating the terms of a 1995 FTC order by making deceptive claims that Royal Tongan Limu was clinically proven to treat diabetes, cancer, Alzheimer's disease, and other serious conditions and that Body Success PM Diet Program reduces body fat, increases metabolism, and causes weight loss, even during sleep)
- FTC v. Direct Marketing Concepts, Inc., No. 04-CV-11136-GAO (D. Mass. Oct. 6, 2005) (stipulated final order against certain defendants) (\$80,000 redress for deceptive representations that Supreme Greens could prevent or treat serious medical conditions such as cancer)
- FTC v. Emerson Direct, Inc., No 2-05-CV-377-AM-33 (M.D. Fla. Aug. 23, 2005) (stipulated final order) (\$1.3 million redress for deceptive claims that Smoke Away dietary supplement kit would allow smokers to quit smoking quickly, easily, permanently, and without cravings or other side effects and for deceptive use of purported expert endorsements)
- FTC v. Creaghan Harry, No. 04C-4790 (N.D. Ill. June 15, 2005) (stipulated final judgment) (\$485,000 redress and \$5.9 million suspended judgment for unsubstantiated anti-aging claims for purported human growth hormone product and for violations on the CAN-SPAM Act)
- FTC v. Braswell, No. CV 03-3700 DT (PJWx) (C.D. Cal. June 8, 2005, Jan. 6, 2006 and Jan. 30, 2006) (stipulated final judgment) (total of more than \$5 million redress, \$1 performance bond, and lifetime ban from the direct marketing of the direct response marketing of foods, unapproved drugs, and dietary supplements for deceptive claims that supplements could treat illnesses such as asthma, diabetes, Alzheimer's disease, overweight, and sexual dysfunction)
- FTC v. Great American Products, Inc., No. 3:05-CV-00170-RV-MD (N.D. Fla. May 20, 2005), aff'd, 200 Fed. Appx. 897 (4th Cir. 2006) (up to \$20 million redress for unsubstantiated anti-aging claims for purported human growth hormone product, deceptive format for radio and television infomercials, and violations of the Telemarketing Sales Rule)
- FTC v. Gero Vita International, No. CV 03-3700-DT (PJWx) (C.D. Cal. Mar. 30, 2005) (stipulated final order) (while litigation remains pending against other defendants, \$605,000 redress and \$30 million suspended judgment from certain defendants for deceptive claims that products could cure or treat numerous illnesses, including asthma, diabetes, Alzheimer's disease, overweight, and sexual dysfunction)
- United States v. Body Wise International, Inc., No. SACV-05-43 (DOC) (Anx) (C.D. Cal. Jan. 18, 2005) (stipulated order) (\$3.5 million civil penalty to FTC and State of California for deceptive representations that AG-Immune

dietary supplement treats numerous diseases, including cancer, HIV/AIDS and asthma, in violation of a 1995 FTC order)

- FTC v. Sagee U.S.A. Group, Inc., No.CV04 10560 GPS (CWx) (C.D. Cal. Aug. 10, 2006) (modified stipulated final judgment and order) (\$10,396 redress and lifetime ban from selling health-related products for deceptive claims about a purported diabetes treatment, in violation of an FTC order). See also FTC v. Sagee U.S.A. Group, Inc.,(C.D. Cal. Jan. 5, 2005) (stipulated final judgment) (challenging claims in Chinese-language ads that dietary supplement sagee could treat Alzheimer’s disease, epilepsy, Parkinson’s disease, senile dementia, stroke, and other serious conditions)
- FTC v. National Urological Group, Inc., No. 1:04-CV-3294 (N.D. Ga. Nov. 10, 2004) (complaint filed) (challenging allegedly deceptive effectiveness and safety of Thermalean and Lipodrene, purported weight-loss products with ephedra, and Spontane-ES, a purported erectile dysfunction product with yohimbine)
- FTC v. VisionTel Communications LLC, No. 1:04CV01412 (D.D.C. Aug. 26, 2004) (stipulated final judgment) (\$750,000 redress for deceptive efficacy and safety claims for Impulse Female Herbal Blend and Maximus Male Herbal Blend, dietary supplements advertised to treat sexual dysfunction, and two weight loss products)
- FTC v. Hitech Marketing, Scientific Life Nutrition, and Rejuvenation Health Corp., No. 04C-4790 (N.D. Ill. July 27, 2004) (temporary restraining order) (challenging claims for Supreme Formula HGH and Youthful Vigor HGH, allegedly bogus human growth hormone products sold via spam)
- Nutramax Laboratories, Inc., 138 F.T.C. 380 (2004) (consent order) (challenging deceptive claims that Senior Moment dietary supplement could prevent memory loss and restore memory function)
- Dynamic Health Of Florida, LLC, D-9317 (June 16, 2004) (consent order) (challenging deceptive libido-enhancement representations for Fabulously Feminine, a dietary supplement containing L-arginine, ginseng, damiana leaf, ginkgo biloba leaf, and horny goat weed)
- United States v. QVC, Inc., C-3955 (Mar. 24, 2004) (complaint filed) (charging the country’s largest home shopping channel with violating previous FTC order by, among other allegations, making allegedly deceptive claims that Bee-Alive royal jelly can significantly improve energy, strength, or stamina in people suffering from fibromyalgia, lupus, and Epstein Barr virus)
- Vital Basics, Inc., 137 F.T.C. 254 (2004), and Creative Health Institute, Inc., 137 F.T.C. 350 (2004) (consent orders) (more than \$1 million redress for deceptive claims that Focus Factor could improve focus, concentration, or

memory in children, adults, and older persons, and for deceptive sexual performance claims for V-Factor)

- United States v. Estate of Michael Levey, No. CV 03-4670 GAF (AJWx) (C.D. Cal. Mar. 9, 2004) (consent decree) (\$2.2 million redress for deceptive weight loss and arthritis cure claims for dietary supplements)
- Unither Pharma, Inc., and United Therapeutics Corp., 136 F.T.C. 145 (2003) (consent order) (challenging claims that food bar containing amino acid reduces the risk of heart disease and reverses damage to the heart)
- FTC v. Kevin Trudeau, No. 98 C 0168 and No. 03 C 904 (N.D. Ill. Sept. 4, 2004) (stipulated final order) (banning defendant for life from most infomercials and ordering \$2 million redress for deceptive claims that Coral Calcium Supreme can treat cancer, multiple sclerosis, heart disease, and other serious diseases); FTC v. Robert Barefoot, No. 03 C 904 (N.D. Ill. Jan. 22, 2004) (stipulated final order) (challenging allegedly deceptive claims that Coral Calcium Supreme can treat cancer, multiple sclerosis, heart disease, and other serious diseases)
- United States v. ValueVision International, Inc., No. 03-2890 (D. Minn. Apr. 17, 2003) (consent decree) (\$215,000 civil penalty for violations of FTC order related to unsubstantiated health claims for dietary supplement)
- Snore Formula, Inc., 136 F.T.C. 214 (2003) (consent order) (challenging unsubstantiated claims about product's efficacy in preventing sleep apnea and significantly reducing snoring)
- FTC v. Vital Dynamics, Inc., No. 029816FMC(MBX) (C.D. Cal. Dec. 26, 2002), and FTC v. Ernest, No. 03-437RSWL(SHSx)(C.D. Cal. Jan. 17, 2003) (stipulated orders) (challenging deceptive breast enlargement representations for Isis System made by company and product developer)
- FTC v. Blue Stuff, Inc., No. Civ-02-1631W (W.D. Okla. Nov. 18, 2002) (stipulated final order) (\$3 million redress for deceptive claims for Blue Stuff pain reliever and two dietary supplements advertised to reduce cholesterol and reverse bone loss)
- Kris A. Pletschke d/b/a Raw Health, 133 F.T.C. 574 (2002) (consent order) (challenging deceptive claims that colloidal silver product could treat 650 different diseases, could eliminate all pathogens in the human body, and is medically proven to kill anthrax, Ebola virus, Hanta virus, and flesh-eating bacteria)
- Natural Organics, Inc., 132 F.T.C. 589 (2001) (consent order), Efamol Nutraceuticals, Inc., C-3958 (May 23, 2000) (consent order), and New Vision International, Inc., 127 F.T.C. 278 (1999) (consent order) (challenging efficacy claims for dietary supplements marketed to treat Attention Deficit Disorder and hyperactivity)

- FTC v. Liverite Products, Inc., No. SA 01-778 AHS (ANx) (S.D. Cal. Aug. 21, 2001) (stipulated final order) (challenging deceptive claims that dietary supplement was effective in treating hepatitis C, cirrhosis, and hang-overs and could prevent liver damage and other side effects from use of HIV drugs, hepatitis C medications, chemotherapy, interferon, and anabolic steroids)
- FTC v. Western Botanicals, Inc., No. CIV.S-01-1332 DFL GGH (E.D. Cal. July 11, 2001) (stipulated final order ); and FTC v. Christopher Enterprises, Inc., No. 2:01 CV-0505 ST (D. Utah Dec. 6, 2001) (stipulated final order) (prohibiting sale of comfrey for internal use without proof of safety, challenging claims that product could safely treat serious diseases, and requiring warnings in labeling and advertising that internal use can cause serious liver damage or death)
- Panda Herbal Int'l, Inc., 132 F.T.C. 125 (2001) (consent order) (challenging claims that product containing St. John's Wort could safely treat AIDS, tuberculosis, hepatitis B, and other serious conditions and requiring warning in future promotional materials that St. John's Wort can have potentially dangerous interactions for pregnant women and patients taking certain prescription drugs)
- ForMor, Inc., 132 F.T.C. 72 (2001) (consent order) (challenging claims that products containing St. John's Wort, colloidal silver, shark cartilage, and other substances could safely treat AIDS, tuberculosis, cancer, dysentery, whooping cough, and similar serious conditions and requiring warning in future promotional materials that St. John's Wort can have potentially dangerous interactions for patients taking certain prescription drugs and for pregnant women)
- Aaron Co., 132 F.T.C. 174 (2001) (consent order) (challenging claims that products containing colloidal silver could treat cancer, multiple sclerosis, and AIDS, that products containing chitin could cause weight loss without diet and exercise, and requiring safety warnings on future promotional materials for products containing ephedra)
- MaxCell BioScience, Inc., 132 F.T.C. 1 (2001) (consent order) (challenging claims that products containing DHEA could reverse the aging process and treat or prevent age-related diseases such as atherosclerosis, arthritis, high blood pressure, and elevated cholesterol and ordering \$150,000 redress)
- Tru-Vantage International, L.L.C., 133 F.T.C. 229 (2002) (consent order) (challenging deceptive anti-snoring and sleep apnea treatment claims for Snorenz, a dietary supplement consisting of oils and vitamins)
- SmartScience Laboratories, Inc., C-3980 (Nov. 7, 2000) (challenging pain relief claims for Joint Flex, a topically applied cream containing glucosamine and chondroitin sulfate)

- FTC v. Rexall Sundown, Inc., Civ. No. 00-706-CIV (S.D. Fla. Mar. 11, 2003) (stipulated final order) (up to \$12 million redress for deceptive efficacy representations by the marketers of Cellasene, a purported anti-cellulite dietary supplement)
- FTC v. Lane Labs-USA, Inc., No. 00 CV 3174 (D.N.J. June 28, 2000) (stipulated final order) (\$1 million judgment for unsubstantiated cancer treatment claims for BeneFin, a shark cartilage product, and SkinAnswer, an anti-skin cancer cream)
- Natural Heritage Enterprises, C-3941 (May 23, 2000) (consent order) (challenging claims that essiac tea, a mixture of burdock and rhubarb root, sheep sorrel, and slippery elm bark, was effective in curing cancer, diabetes, AIDS/HIV, and feline leukemia)
- CMO Distribution Centers of America, Inc., C-3942 (May 23, 2000) (consent order) (challenging claims that product containing cetylmyristoleate could treat arthritis and other conditions and had been proven through clinical testing and recognized by the medical community to be a breakthrough in arthritis treatment)
- EHP Products, Inc., C-3940 (May 23, 2000) (consent order) challenging claims that product containing cetylmyristoleate could prevent and treat rheumatoid arthritis, osteoarthritis, and other conditions, and that scientific studies and the issuance of patents proved effectiveness of product)
- J & R Research, Inc., C-3961 (July 25, 2000) (consent order) (challenging claims that dietary supplement containing pycnogenol was effective in treating Attention Deficit Disorder, cancer, heart disease, arthritis, diabetes, and multiple sclerosis)
- FTC v. Rose Creek Health Products, Inc., No. CS-99-0063-EFS (E.D. Wash. May 1, 2000) (consent decree) (\$375,000 redress for deceptive claims that Vitamin O could prevent cancer, pulmonary disease, and other conditions by providing oxygen to the body)
- Quigley Corp., C-3926 (Feb. 10, 2000) (consent order), and QVC, Inc., C-3955 (June 16, 2000) (consent order) (challenging unsubstantiated claims that Cold-Eeze zinc supplement would prevent colds, relieve allergy symptoms, and reduce the severity of cold symptoms in children)
- FTC v. Met-Rx USA, Inc., No. SAC V-99-1407 (D. Colo. Nov. 15, 1999), and FTC v. AST Nutritional Concepts & Research, Inc., No. 99-WI-2197 (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 disclosures in labeling and advertising of the risks of breast enlargement, testicle shrinkage, and infertility in males, and increased facial and body hair, voice deepening, and clitoral enlargement in females)

- Body Systems Technology, Inc., 128 F.T.C. 299 (1999) (as part of first phase of Operation Cure.All, challenging deceptive claims regarding effectiveness of shark cartilage in the prevention and treatment of cancer and effectiveness of uña de gato, or Cat’s Claw, in the treatment of cancer, HIV/AIDS, and arthritis.)
- FTC v. American Urological Corp., No. 98-CVC-2199-JOD (N.D. Ga. Apr. 29, 1999) (permanent injunction) (\$18.5 million judgment against marketers of Väegra, a purported impotence treatment)
- Bogdana Corp., 126 F.T.C. 37 (1998) (consent order) (challenging claims that Cholestaway and Flora Source could lower blood pressure, reduce cholesterol, and treat AIDS and chronic fatigue syndrome)
- Nutrivida, Inc., 126 F.T.C. 339 (1998) (consent order) (challenging deceptive representations for shark cartilage product purported to treat cancer, arthritis, diabetes, and other serious conditions)
- Venegas, Inc., 125 F.T.C. 266 (1998) (consent order) (challenging deceptive representations that product containing wheat germ, bran, soybean extract, and seaweed could treat diabetes, anemia, high blood pressure, and other serious conditions)
- 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. Apr. 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 and menopause products)
- FTC v. Redhead, No. 93-1232-JO (D. Ore. June 20, 1994) (stipulated permanent injunction) (challenging deceptive claims that algae-based product could treat AIDS)
- United States v. General Nutrition Corp., No. 94-686 (W.D. Pa. Apr. 28, 1994) (stipulated permanent injunction) (\$2.4 million civil penalty for unsubstantiated disease prevention, weight loss, and muscle building claims for dietary supplements)

E. Weight Loss and Fitness: The FTC has challenged deceptive weight loss claims for products, services, and exercise devices through traditional law enforcement actions and industry outreach and education.



1. Industry Guidance. Commission staff 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*. In September 2002, FTC staff issued *Report on Weight Loss Advertising: An Analysis of Current Trends*, a study of common deceptive themes found in ads for diet products. The Commission held a workshop in November 2002 to consider additional efforts to combat fraud in weight loss advertising and issued a follow-up report, *Deception in Weight Loss Advertising: Seizing Opportunities and Building Partnerships to Stop Weight Loss Fraud*, in December 2003. The agency also published *Red Flags: A Reference Guide for Media on Bogus Weight Loss Claim Detection*, a brochure to assist publishers and broadcasters screen out patently false ads before they are disseminated. In April 2005, the FTC released a report studying industry compliance with Commission calls for more effective self-regulation. According to *2004 Weight-Loss Advertising Survey: A Report From the Staff of the Federal Trade Commission*, the percentage of ads for weight loss products that contain claims that the Commission considers to be patently false dropped from almost 50% in 2001 to 15% in 2004.
2. Childhood Obesity. On July 14-15, 2005, the FTC and the Department of Health & Human Services sponsored a national workshop, *Perspectives on Marketing, Self-Regulation, and Childhood Obesity*, to discuss industry self-regulation concerning the marketing of food and beverages to children, as well as initiatives to educate children and parents about nutrition. The agencies issue a joint report on May 2, 2006. On June 1, 2007, the FTC's Bureau of Economics issued a staff report, *Children's Exposure to Television Advertising in 1977 and 2004: Information for the Obesity Debate*. The FTC and HHS sponsored a second joint workshop on July 18, 2007, *Weighing In: A Check-Up on Marketing, Self-Regulation, and Childhood Obesity*.
3. Representative weight loss and fitness cases:
  - FTC v. Sili Neutraceuticals, LLC, No. 07C 4541 (N.D. Ill. Feb. 4, 2008) (permanent injunction) (\$2.5 million redress for using illegal email to disseminate deceptive claims for hoodia weight-loss products and human growth hormone anti-aging products)
  - FTC v. Centro Natural Services, Inc., No. SACV06-989 JVS (RNBx) (C.D. Cal. Jan. 30, 2008) (stipulated final order) (\$2.3 million suspended judgment for deceptive weight loss claims for Centro Natural de Salud Obesity Treatment)
  - FTC v. Diet Coffee, Inc., No. 1:08-CV-0094-JSR-DCF (S.D.N.Y. Jan. 15, 2008) (stipulated final order) (\$923,910 suspended judgment for deceptive weight loss claims for "diet coffee" containing hoodia)
  - United States v. Bayer Corp., No. 07-01(HAA) (D.N.J. Jan. 4, 2007) (consent decree) (\$3.2 million civil penalty for deceptive weight loss claims for One-A-Day WeightSmart, disseminated in violation of an earlier FTC order)

- Telebrands, Inc. v. FTC, 457 F.3d 354 (4th Cir. 2006), aff'g, 140 F.T.C. 278 (2005) (upholding Commission finding that marketer of electronic abdominal belt made false and deceptive weight loss and muscle development claims)
- FTC v. Chinery, No. 05-3460 (GEB) (D.N.J. Jan. 4, 2007) (stipulated final order) (between \$8 million and \$12.8 million redress for deceptive weight loss claims for Xenadrine EFX, deceptive consumer testimonials, and failure to disclose material financial connection between advertiser and endorsers); Cytodyne, LLC, 140 F.T.C. 191 (2005) (consent order) (\$100,000 redress for deceptive weight loss claims for Xenadrine EFX, deceptive consumer testimonials, and failure to disclose material financial connection between advertiser and endorsers)
- FTC v. Window Rock Enterprises, Inc., No.: CV04-8190 DSF (JTLx) (C.D. Cal. Jan. 4, 2007 and Sept. 21, 2005) (stipulated final orders) (\$12 million in cash and assets for deceptive claims that CortiSlim and CortiStress can cause weight loss and reduce the risk of, or prevent, serious health conditions)
- TrimSpa, Inc., C-4185 (Jan. 4, 2007) (consent order) (\$1.5 million redress for deceptive claims for that one of TrimSpa's ingredients, *hoodia gordonii*, enables users to lose weight by suppressing the appetite)
- Basic Research, D-9318 (May 11, 2006) (consent order) (\$3 million redress for deceptive representations for Leptoprin, Anorex, Dermalin, and other purported weight loss products and PediaLean, a purported weight loss product for children)
- Telebrands, Inc., 140 F.T.C. 278 (2005), aff'd, 457 F.3d 354 (4th Cir. 2006) (upholding Commission decision that marketers of Ab Force made deceptive claims that product causes weight, inches, or fat loss, causes well-defined abdominal muscles, or is an effective alternative to regular exercise)
- FTC v. Kingstown Associates, Ltd., BVW Associates, Inc., Gary Bush, David Varley, and Laurence White, No.: 03-CV-910A (W.D.N.Y. Sept. 15, 2005) (stipulated final order) (\$150,000 redress for deceptive weight loss claims for Hydro-Gel Slim Patch and Slenderstrip and order banning United Kingdom defendants from making, advertising, or selling any dietary supplement, food, drug, or weight loss product)
- FTC v. FiberThin LLC, (S.D. Cal. June 14, 2005) (stipulated final order) (\$1.5 million redress and \$41 million suspended judgment for deceptive weight loss and metabolism enhancement claims for FiberThin, Propolene, Excelerene, and MetaboUp)
- FTC v. SG Institute of Health & Education, Inc., No. 04-61627 (S.D. Fla. Dec. 15, 2004) (stipulated final order), and FTC v. Transdermal Products International Marketing Corp., No. 04-CV-5794 (E.D. Pa. Aug. 20, 2007)

(order) (\$180,000 redress for role of manufacturer and retailer in making deceptive claims for purported weight loss patches)

- FTC v. National Institute for Clinical Weight Loss, Inc., No. 1:04-CV-3294 (N.D. Ga. Nov. 10, 2004) (complaint filed) (challenging allegedly deceptive effectiveness and safety of Thermalean and Lipodrene, purported weight-loss products with ephedra)
- ***Operation Big Fat Lie:*** See, e.g., FTC v. AVC Marketing, Inc., No. 04C 6915 (N.D. Ill. June 20, 2005) (stipulated final judgment) (\$400,000 redress for deceptive weight loss claims for “Himalayan Diet Breakthrough); FTC v. Iworx, No. 2:04-CV-00241-GPS (D. Me. May 19, 2005) (stipulated final judgment) (\$100,000 redress and \$20 million avalanche clause from marketer of UltraLipoLean); FTC v. CHK Trading Corp., No. 04-CV-8686 (S.D.N.Y.); FTC v. Femina, Inc., No. 04-61467 (S.D. Fla.) (complaints filed) (Nov. 9, 2004) (challenging allegedly deceptive weight loss claims for a variety of products, including gel-ä-thin, 1-2-3 Reduce Fat, Silhouette Patch, Fat Seltzer Reduce, Xena RX, Reduce Gel Magic, Hanmeilin Cellulite Cream, Body-Trim, Bio-Trim, Chinese Diet Tea, Bio-Slim Patch, and Himalayan Diet Breakthrough)
- FTC v. Harry Siskind, No. SA02CA1151EP (W.D. Tex. Oct. 22, 2004) (stipulated final order) (\$155 million judgment against former president of Mark Nutritionals for falsifying financial statements in an effort to hide assets from the FTC)
- FTC v. Slim Down Solution, LLC, No. 03-80051-DIV-Paine/Johnson (S.D. Fla. Oct. 19, 2004) (modified order) (challenging deceptive claims that Slim Down Solution and its main ingredient, D-glucosamine, could block dietary fat absorption and cause consumers to lose weight without dieting)
- FTC v. Pinnacle Marketing, No. 04-CV-185-PC (D. Maine Aug. 26, 2004) (stipulated final judgment) (\$212,000 redress for deceptive claims for Ultra Carb weight loss product)
- FTC v. VisionTel Communications LLC, No. 1:04CV01412 (D.D.C. Aug. 26, 2004) (stipulated final judgment) (\$750,000 redress for deceptive claims for Chito Trim and Turbo Tone weight loss products and two dietary supplements advertised to treat sexual dysfunction)
- FTC v. Kamarfu Enterprises, Inc., No. 04-21280 (S.D. Fla. June 17, 2004) (stipulated final order) (\$30,000 redress for deceptive claims for 1-2-3 Diet Kit, a weight loss product advertised in Spanish-language media)
- Dynamic Health Of Florida, LLC, D-9317 (Apr. 6, 2006) (consent order) (challenging deceptive representations for Pedia Loss, a purported weight loss product for children); Jonathan Barasch, 138 F.T.C. 355 (2004) (consent

order) (challenging role of corporate officer in the marketing of Pedia Loss, a purported weight loss product for children)

- United States v. QVC, Inc., (E.D. Pa. Mar. 24, 2004) (complaint filed) (charging the country's largest home shopping channel with violating previous FTC order by, among other allegations, making allegedly deceptive weight loss claims for For Women Only Zero Fat and Zero Carb pills and Lite Bites products and with violating the FTC Act for allegedly deceptive cellulite treatment claims for Lipofactor Cellulite Target Lotion)
- FTC v. Advanced Patch Technologies, Inc., No. 1:04-CV-0670 (N.D. Ga. Mar. 9, 2004) (stipulated final judgment) (more than \$1 million redress for false weight loss claims for Peel Away the Pounds diet patch)
- FTC v. The Fountain of Youth Group, No. 3:04-CV-47-J-99HTS (M.D. Fla. Jan. 28, 2004) (stipulated final order) (\$6 million suspended judgment for deceptive weight loss claims for Skinny Pills, Skinny Pills for Kids, and other diet products)
- FTC v. Universal Nutrition Corp., No. 1-03-CV-3822 (N.D. Ga. Dec. 9, 2003) (stipulated final judgment) (\$1 million redress for deceptive weight loss claims for ThermoSlim, a purported diet product containing ephedra and other ingredients)
- FTC v. Beauty Visions Worldwide, No. 03 CV 0910 (SC) (W.D.N.Y. Oct. 12, 2004) (stipulated final order) (\$72,422 redress and \$1.4 million avalanche clause for fulfillment house's role in marketing Hydro-Gel Slim Patch and Slenderstrip, seaweed-based patches advertised to weight loss without diet or exercise)
- FTC v. Savvier, Inc., No. LACV 03-8159 FMC (C.D. Cal. Sept. 1, 2004) (stipulated final judgment) (\$2.6 million redress for deceptive weight loss representations for BodyFlex products, including claim that users will lose 4 to 14 inches in the first seven days)
- FTC v. No. 9068-8425 Quebec, Inc., No. 1:02:CV-1128 (N.D.N.Y. July 10, 2003) (stipulated final order) (\$40,000 redress and \$12 million suspended judgment for deceptive weight loss claims for Quick Slim Fat Blocker and Cellu-Fight diet products)
- United States v. Estate of Michael Levey, No. CV-03-4670 GAF (AJWx) (C.D. Cal. July 1, 2003) (\$2.2 million redress for deceptive safety and efficacy claims for ephedra-based weight loss products)
- FTC v. USA Pharmacal Sales, Inc., (M.D. Fla. July 1, 2003) (stipulated final judgment) (\$175,000 redress for deceptive safety and efficacy claims for ephedra-based weight loss products)

- FTC v. Health Laboratories of North America, Inc., (D.D.C. July 1, 2003) (stipulated final judgment) (\$195,000 redress for deceptive safety and efficacy claims for ephedra-based weight loss products)
- FTC v. Mark Nutritionals, Inc., No. SA02CA1151EP (W.D. Tex. Dec. 8, 2003) (stipulated final order) (\$1 million redress in state and federal actions and \$1 million bond for deceptive representations for Body Solutions, a purported diet product marketed primarily through endorsements by radio personalities)
- FTC v. United Fitness of America, No. CVS 020648-KJD (D. Nev. July 21, 2003) (stipulated final judgment and order) (\$5 million redress for deceptive fat loss and muscle building claims for Fast Abs electronic abdominal exercise belts); FTC v. Hudson Berkley Corp., No. CVS 020649-PMP (D. Nev. July 1, 2003) (judgment and order for permanent injunction) (holding defendants jointly and severally liable for \$83 million redress for deceptive fat loss and muscle building claims for Abtronic electronic abdominal exercise belts); FTC v. AbFlex USA, Inc. and Ab Energizer, L.L.C., No. 02CV888H-AJB (S.D. Cal. stipulated final order Apr. 22, 2005) (\$1.4 redress for deceptive fat loss and muscle building claims for electronic abdominal exercise belts)
- Weider Nutrition International, Inc., C-3983 (Nov. 17, 2000) (consent order) (\$400,000 redress for deceptive weight loss and safety claims for dietary supplement PhenCal advertised as a safe and effective alternative to the prescription drug combination Phen-Fen)
- FTC v. Enforma Natural Products, Inc., No. 04376JSL(CWx) (C.D. Cal. Apr. 26, 2000) (stipulated final order) (\$10 million redress from marketer of the Enforma System – chitosan-based Fat Trapper and pyruvate-based Exercise in a Bottle – deceptively represented to block absorption of fat, increase body’s ability to burn fat, and cause weight loss); see also FTC v. Enforma Natural Products, Inc., No. 04376JSL(CWx) (C.D. Cal. Jan. 18. 2005) (stipulated final order) (resolving contempt proceedings by banning defendants for life from advertising or marketing weight loss products)
- Herbal Worldwide Holding Corp., 126 F.T.C. 356 (1998) (consent order) (challenging deceptive weight loss claims for product containing chitin, psyllium, glucomannan, and apple pectin)
- TrendMark International, Inc., 126 F.T.C. 365 (1998) (consent order) (challenging deceptive weight loss and cholesterol-reduction claims for chitin product)
- FTC v. SlimAmerica, Inc., No. 97-6072-Civ (S.D. Fla. 1999) (permanent injunction) (\$8.3 million redress from marketer of purported 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) (challenging weight loss claims for SeQuester, Lipitrol, Fat Burner, Smelt-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., 125 F.T.C. 333 (1998) (consent order) (challenging deceptive claims for weight loss program)
- Weight Watchers International, Inc., 124 F.T.C. 610 (1997) (consent order) (challenging deceptive claims for weight loss program)
- Nutrition 21, 124 F.T.C. 1 (1997) (consent order) (challenging deceptive weight loss claims for products containing chromium picolinate)
- NordicTrack, Inc., 121 F.T.C. 907 (1996) (consent order) (challenging deceptive weight loss study claims for exercise device)
- Schering Corp., 118 F.T.C. 1030 (1994) (consent order) (challenging deceptive weight loss and fiber content claims for Fiber-Trim tablet)
- Nutria/System, Inc., 116 F.T.C. 1408 (1993) (consent order) (challenging deceptive claims for weight loss program)

## IX. ENVIRONMENTAL AND ENERGY-RELATED ADVERTISING

- A. ***Guides for the Use of Environmental Marketing Claims***, 16 C.F.R. § 260. After public hearings, the Commission issued Environmental Marketing Guides in 1992 and revised them in 1996 and 1998. The Guides offer interpretations of how Commission caselaw applies to “green” marketing claims. 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. They 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. On November 26, 2007, the FTC announced an accelerated regulatory review of its environmental marketing guidelines. The FTC hosted a January 8, 2008, conference addressing the marketing of carbon offsets and renewable energy certificates (RECs) and an April 30, 2008, conference on green packaging claims.

B. Representative degradability cases:

- Archer Daniels Midland Co., 117 F.T.C. 403 (1994) (consent order) (challenging deceptive biodegradable and landfill benefit claims for plastic products containing corn starch additive)
- Mobil Oil Corp., 116 F.T.C. 113 (1993) (consent order) (challenging deceptive biodegradable and landfill benefit claims for Hefty trash bags)

C. Representative recyclability cases:

- LePage's, Inc., 118 F.T.C. 31 (1994) (consent order) (challenging deceptive recyclable claims for 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 deceptive biodegradable and recyclable claims for Chinet plates where few facilities exist to recycle food-contaminated waste)

D. Representative cases challenging claims regarding ozone/CFCs:

- Creative Aerosol Corp., 119 F.T.C. 13 (1995) (consent order) (challenging deceptive "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 deceptive environmental claims for Aussie hair products that contained VOCs that can contribute to smog formation)

E. Representative cases challenging environmental health or safety claims:

- FTC v. TradeNet Marketing, Inc., No. 99-944-CIV-T-24B (M.D. Fla. Apr. 21, 1999) (consent order) (challenging deceptive 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 deceptive 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 deceptive 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 deceptive 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 deceptive claims for pesticide-free produce sold in grocery stores)

F. Representative cases challenging energy savings or performance claims:

- FTC v. International Research and Development Company of Nevada, No.04C 6901 (N.D. Ill. Aug. 22 2006) (\$4.2 million redress and lifetime ban for deceptive fuel-saving and emission-reduction claims for FuelMAX and Super FuelMAX)
- Dura Lube, Inc., D-9292 (May 5, 2000) (consent order) (challenging deceptive claims that engine treatment could reduce wear, prolong engine life, reduce emissions, and increase gas mileage by up to 35%)
- Castrol North America Inc., 128 F.T.C. 682 (1999) (consent order), and Shell Chemical Co., 128 F.T.C. 729 (1999) (challenging deceptive power and acceleration claims for Syntec fuel additives)
- Ashland, Inc., 125 F.T.C. 20 (1998) (consent order) (challenging misleading claims about Valvoline TM8 Engine Treatment's ability to reduce engine wear and improve fuel economy)
- Exxon Corp., 124 F.T.C. 249 (1997) (consent order) (challenging misleading claims about gasoline's ability to clean engines and reduce maintenance costs)
- United States v. STP Corp., No. 78 Civ. 559 (CBM) (S.D.N.Y. Dec. 1, 1995) (stipulated order) (\$888,000 civil penalty for violation of order prohibiting deceptive claims for motor oil additives)
- Unocal Corp., 117 F.T.C. 500 (1994) (consent order) (challenging unsubstantiated performance claims for higher octane fuels)
- Osram Sylvania, Inc., 116 F.T.C. 1297 (1993) (consent order) (challenging deceptive claim that Energy Saver light bulbs will save energy, conserve natural resources, and lower consumers' electricity costs when company failed to disclose that product provided less light than the light bulbs they are designed to replace)
- General Electric Co., 116 F.T.C. 95 (1992) (consent order) (challenging deceptive claim that Energy Choice light bulbs will help save energy, eliminate pollution, and lower consumers' electricity costs when company failed to disclose that product provided less light than the light bulbs they are designed to replace)



## X. 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 it 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.
3. Representative tobacco cases:
  - Stoker, Inc., 131 F.T.C. 1139 (2001) (alleging that company violated the Smokeless Tobacco Act by failing to place health warnings in conspicuous and legible type and in a conspicuous and prominent place on smokeless tobacco packaging)
  - Swisher International, Inc., C-3964; Havatampa, Inc., C-3965; Consolidated Cigar Corp., C-3966; General Cigar Holdings, Inc., C-3967; John Middleton, Inc., C-3968; Lane Limited, C-3969; and Swedish Match North America, C-3970 (Aug. 25, 2000) (consent orders) (requiring nation's seven largest cigar companies to include warnings about significant adverse health risks of cigar use in their advertising and packaging)
  - Santa Fe Natural Tobacco Company, Inc., C-3952 (June 16, 2000) (consent order) (challenging claim that Natural American Spirit cigarettes are safer than other cigarettes because they contain no additives)
  - Alternative Cigarettes, Inc., C-3956 (June 16, 2000) (consent order) (challenging claim that Pure, Glory, Herbal Gold, and Magic cigarettes are safer than other cigarettes because they contain no additives)
  - R.J. Reynolds Tobacco Co., 128 F.T.C. 262 (1999) (consent order) (challenging deceptive 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 deceptive 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 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)

## XI. 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.
- B. Education and Outreach. On October 18, 2006, the FTC announced its *www.dontserveteens.gov* initiative, in cooperation with Department of Treasury’s Alcohol and Tobacco Tax and Trade Bureau, other government agencies, consumer groups, and industry associations.
- C. Representative alcohol cases:
- Allied Domecq Spirits and Wine Americas, Inc. d/b/a Hiram Walker, 127 F.T.C. 368 (1999) (consent order) (challenging misrepresentation of Kahlua White Russian pre-mixed cocktail as a low-alcohol beverage)
  - Beck’s North America, Inc., 127 F.T.C. 379 (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)

## **XII. COMPUTER-RELATED PRODUCTS and SERVICES**

- A. The FTC has brought a series of Section 5 actions challenging deceptive claims about computers, software, Internet service providers, and related products. See also Section XV infra.
- B. Representative cases:
- Bonzi Software, Inc., C-4126 (consent order) (Oct. 13, 2004) (challenging deceptive representations that InternetALERT software significantly reduced the risk of Internet attacks and unauthorized access into computers)
  - FTC v. Network Solutions, Inc., Civ. No. 03 1907 (D.D.C. Sept. 12, 2003) (stipulated final order) (alleging that largest company that provides domain name registration services to consumers unlawfully tricked consumers into transferring their Internet domain name registrations to the company)
  - America Online, Inc., 137 F.T.C. 117 (2004) (consent order) (challenging company's practice of continuing to bill internet service subscribers after they asked to cancel their subscriptions)
  - Palm, Inc., 133 F.T.C. 715 (2002) (consent order) (challenging ads for personal digital assistants that represented that products came with built-in wireless access to the Internet and e-mail while revealing in a four-point disclosure "Application software and hardware add-ons may be optional and sold separately. Applications may not be available on all Palm handhelds")
  - FTC v. Netpliance, Inc., No. A-01-CA 420SS (W.D. Tex. July 2, 2001) (consent decree) (challenging deceptive claims about performance capabilities of the Netpliance internet access device, requiring clear and conspicuous disclosure of additional internet service fees and long-distance telephone charges, imposing \$100,000 civil penalty for violations of the Mail and Telephone Order Rule, and ordering company to refund amounts illegally charged to consumers' credit cards)
  - Gateway Corp., 131 F.T.C. 1208 (2001) (consent order) (challenging deceptive ads for free or flat-fee internet services that disclosed in a fine-print footnote that many consumers would incur significant additional telephone charges)

- Juno Online Services, Inc., 131 F.T.C. 1249 (2001) (consent order) (challenging deceptive representations about the actual cost to consumers of the company’s free and fee-based dial-up Internet access services, including the failure to honor cancellations during a purported free trial period)
- Hewlett-Packard Co., 131 F.T.C. 1086 (2001), and Microsoft Corp., 131 F.T.C. 1113 (2001) (consent orders) (challenging deceptive claims that personal digital assistance came with built-in wireless access to the Internet and email while revealing in fine print “Modem required. Sold separately.”)
- Sharp Electronics Corp., 131 F.T.C. 560 (2001) (consent order) (challenging deceptive upgradability claims for handheld personal computers and requiring company to provide low-cost upgrade to purchasers)
- WebTV Networks, Inc., C-3988 (Dec. 12, 2000) (consent order) (challenging deceptive claims about performance capabilities of the WebTV system and requiring clear and conspicuous disclosure of long distance telephone charges that some consumers may incur, reimbursement to subscribers for phone charges they incurred in the past, and a consumer education campaign to inform consumers about how to determine the advantages and disadvantages of using Internet access devices as compared to computers)
- BUY.COM, Inc., C-3978, Value America, Inc., C-3976, and Office Depot, Inc., C-3977 (Sept. 8, 2000) (consent orders) (challenging promotions for free and low-cost computer systems that failed to disclose the true costs of and important restrictions on the offers, including that consumers had to sign a contract for three years of service from a particular Internet service provider)
- Tiger Direct, Inc., 128 F.T.C. 517 (1999) (consent order) (alleging that mail order seller of computers misrepresented terms of warranties)
- Apple Computer, Inc., 128 F.T.C. 190 (1999) (consent order) (challenging practice of charging computer purchasers for technical support despite advertising that services were free)
- Dell Computer Corp., 128 F.T.C. 151 (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 fine print)
- Micron Electronics, Inc., 128 F.T.C. 137 (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 fine print)
- Gateway 2000, Inc., 126 F.T.C. 888 (1998) (consent order) (\$290,000 redress for deceptive claims regarding company’s money-back guarantee policy and on-site warranty services)

- America Online, Inc., 125 F.T.C. 403 (1998); Prodigy Services Corp., 125 F.T.C. 430 (1998); and CompuServe, Inc., 125 F.T.C. 451 (1998) (consent orders) (challenging deceptive representations about terms and conditions of free trial offers for online services)
- Apple Computer, Inc., 124 F.T.C. 184 (1997) (consent order) (challenging claims 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' modems creates a substantial risk of data transmission failure)

### XIII. INFOMERCIALS

- A. Program-length commercials were illegal until a 1984 change to FCC law lifted regulations limiting the number of commercial minutes per hour. To date, the Commission has brought more than 125 cases against infomercial marketers challenging one of 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, Telemarketing Sales Rule, unordered merchandise, unauthorized use of credit cards, etc.
- B. Representative infomercial cases:
- FTC v. Window Rock Enterprises, Inc., No. CV04-8190 DSF (JTLx) (C.D. Cal. Oct. 5, 2004) (complaint filed) (challenging allegedly deceptive format of defendants' infomercials and allegedly deceptive claims that CortiSlim and CortiStress can cause weight loss and reduce the risk of, or prevent, serious health conditions)
  - FTC v. Kevin Trudeau, No. 98 C 0168 and No. 03 C 904 (N.D. Ill. Sept. 4, 2004) (stipulated final order) (banning defendant for life from most infomercials and ordering \$2 million redress for deceptive claims that Coral Calcium Supreme can treat cancer, multiple sclerosis, heart disease, and other serious diseases)
  - United States v. Goodtimes Entertainment, Ltd., No. 03 CV 6037 (S.D.N.Y. Aug. 11, 2003) (\$300,000 redress and civil penalties for deceptive efficacy)

claims for Copa hair straightening product, unauthorized enrollment of consumers in continuity programs, and Mail Order Rule violations)

- FTC v. Blue Stuff, Inc., No. Civ-02-1631W (W.D. Okla. Nov. 18, 2002) (stipulated final order) (\$3 million redress for deceptive claims for Blue Stuff pain reliever and two dietary supplements advertised to reduce cholesterol and reverse bone loss)
- FTC v. Kevin Trudeau, (N.D. Ill. Jan. 13, 1998) (stipulated order for permanent injunction and final order) (\$1 million redress for deceptive claims about memory program, speed reading program, addiction treatment product, and other merchandise)
- 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 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 redress for deceptive claims and products demonstrations)

#### XIV. 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. See also Section XVI *infra*. 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 \$11,000. The rule is enforceable by the FTC, and also by the 50 state attorneys general, who can get orders that apply nationwide against fraudulent telemarketers.

B. ***Do Not Call:*** On December 18, 2002, the Commission announced final amendments to the TSR, including a National Do Not Call Registry, 16 C.F.R. § 310 (2003). Registration began on June 27, 2003 and now exceeds 90 million phone numbers. The United States Court of Appeals for the Tenth Circuit upheld the constitutionality of the Registry in Mainstream Marketing Services v. FTC, 358 F.3d 1228 (10th Cir.), cert. denied, 125 U.S. 47 (2004).

1. The Rule:

- allows consumers to enroll in a national do-not-call registry, requires telemarketers to scrub their lists regularly of consumers who do not wish to receive such calls, and impose civil penalties for violations of the amendments;
- imposes new restrictions on the practice of call abandonment;
- requires telemarketers to transmit Caller ID information;
- pursuant to the USA PATRIOT Act, requires telemarketers calling to solicit charitable contributions to disclose promptly the name of the organization making the request and that the purpose of the call is to ask for a charitable contribution; and
- bans unauthorized billing and prohibits telemarketers from processing any billing information for payment without the express informed consent of the customer or donor.

2. Representative Do Not Call Rule cases:

- United States v. ADT Security Services, Inc., FTC File No. 042-3091 (S.D. Fla. Nov. 7, 2007); United States v. Ameriquest Mortgage Co., FTC File No. 042-3082 (C.D. Cal. Nov. 7, 2007); United States v. Craftmatic Industries, Inc., FTC File No. 042 3094 (E.D. Pa. Nov. 7, 2007); United States v. Guardian Communications, Inc., FTC File No. 052-3166 (C.D. Ill. Nov. 7, 2007); United States v. Direct Security Services, Inc., FTC File No. 042 3091 (D. Kan. Nov. 7, 2007); United States v. Alarm King, Inc., FTC File No. 042 3091 (C.D. Cal. Nov. 7, 2007) (stipulated judgments) and United States v. Global Mortgage Funding, Inc., No.: SA CV 07-1275 DOC (PJW) (C.D. Cal.

Nov. 7, 2007) (complaint filed) (\$7.7 million total civil penalties for violation of Do Not Call Rule)

- United States v. The Broadcast Team, No. 6:05-CV-01920-PCF-JGG (M.D. Fla. Feb. 2, 2007) (\$1 million civil penalty for telemarketer's improper use of prerecorded messages, in violation of Do Not Call Rule)
- United States v. Scorpio Systems, No. 06-1928 (MLC) (D.N.J. May 8, 2006) (complaint filed) (alleging that telemarketer violated Do Not Call Rule by using bogus caller ID information)
- United States v. Bookspan, No. 06 786 (E.D.N.Y. Feb. 23, 2006) (stipulated judgment) (\$680,000 civil penalty to settle charges that Book-of-the-Month Club Partnership called over 100,000 consumers on Do Not Call Registry and continued calling customers who specifically asked not to be called)
- United States v. Entrepreneurial Strategies, Ltd., No.: 2:06-CV-15 (WCO) (N.D. Ga. Jan. 24, 2006) (stipulated final order) (\$13,454 civil penalty in first case for violations of the "Assisting and Facilitating" provision of the Telemarketing Sales Rule by setting up sham nonprofit corporation to evade requirements of the Do Not Call Registry)
- United States v. FMFG, Inc., No.: 3:05-CV-00711(D. Nev. Jan. 6. 2006) (complaint filed) (alleging that company called consumers on the Do Not Call Registry purporting to be conducting a sleep survey when, in fact, it was selling beds)
- United States v. DirecTV, Inc., No. SACV05 1211 (C.D. Cal. Dec. 13, 2005) (\$5.3 million civil penalty for Do Not Call violations by satellite television company and companies it hired to engage in telemarketing)
- United States v. Braglia Marketing Group, No. CV-S-04-1209- DHW-PAL (D. Nev. Feb 15, ) (stipulated judgment) (\$3500 civil penalty and suspended judgment of \$526,000 for Do Not Call violations)
- United States v. Flagship Resort Development Corp., No. CV-S-04-1209-DHW-PAL (D. Nev. Feb 15, 2005) (stipulated judgments) (\$500,000 civil penalty for Do Not call violations)

C. 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. Representative cases:



- FTC v. 800 Connect, Inc., No. 03-60150 (S.D. Fla. Feb. 3, 2003) (stipulated final judgment) (\$735,000 redress for charging consumers without their consent for directory information services after callers misdialed toll-free numbers for legitimate companies such as Federal Express or Sovereign Bank)
- FTC v. Access Resource Services, Inc., No. 02-60226-CIV (S.D. Fla. Nov. 4, 2002) (stipulated final judgment) (\$500 million in debt forgiveness and \$5 million in additional disgorgement from operators of Miss Cleo psychic lines for violations of the Pay-Per-Call Rule)

D. ***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 issued 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.

E. **Prepaid Phone Cards:** The Commission has taken action against deceptive practices in the marketing of prepaid phone cards, including the failure to disclose additional fees and costs to consumers. In addition, the FTC has challenged deceptive earnings representations made by companies selling business opportunities involving prepaid phone cards. Representative cases:

- FTC and State of New York v. Trans-Asian Communications, Inc., Civ. No. 97 Civ. 5764 (S.D.N.Y. Mar. 17, 1998) (stipulated final judgment and permanent injunction) (challenging representations made by seller of prepaid phone cards, requiring defendant to post \$1 million performance bond, and ordering payment of \$40,000)
- FTC v. PT-1 Communications, Inc., (S.D.N.Y. Feb. 25, 1999) (stipulated order) (ordering \$300,000 monetary relief for deceptive representations that pre-paid phone cards provided 19¢ per minute long-distance calling within the United States while imposing undisclosed connect fees)
- ***Operation Vend Up Broke:*** On September 3, 1998, the FTC and law enforcement officials from 10 states announced 40 actions against the purveyors of fraudulent vending business opportunities, included vending machines that sell pre-paid telephone cards, that made groundless promises of substantial profits.

## XV. INTERNET ADVERTISING

A. The Commission applies the same well-established principles of substantiation to Internet advertising as it applies in any other media. On May 3, 2000, FTC staff issued a working paper, ***Dot Com Disclosures: Information about Online Advertising***, providing guidance to

businesses on how the Commission’s rules and guides apply to advertising and sales on the Internet. To date, the FTC has brought more than 600 law enforcement actions challenging deceptive practices on the Internet and has conducted a dozen national and international “surf days” to monitor online advertising representations.

B. Representative cases:

- FTC v. Digital Enterprises, Inc. d/b/a movieland.com, No: CV06-4923 CAS (AJWx) (C.D. Cal. Sept. 13, 2007) (stipulated final order) (\$500,000 redress for company’s practice of falsely claiming that consumers owed money for downloading movies and then barraging consumers with pop-ups demanding payment to make the pop-ups go away)
- FTC v. D Squared Solutions, L.L.C., No. AMD 03 CV310 (D. Md. Aug. 9, 2004) (stipulated final order) (challenging company’s practice of sending repeated Windows Messenger Service pop-up ads to sell pop-up blocking software)
- United States v. Toysrus.com, Inc., (D.N.J.); United States v. Kay-Bee Toy, Inc., (D. Minn.); United States v. Macys.com, Inc., (D. Del.); United States v. CDnow, Inc., (E.D. Pa.); United States v. MiniDiscNow, Inc., (N.D. Cal.); United States v. The Original Honey Baked Ham Company of Georgia., (N.D. Ga.); and United States v. Patriot Computer Corp., (N.D. Tex.) (July 26, 2000) (consent decrees) (as part of Project TooLate.com, charging online marketers with violations of the Mail Order Rule for shipping delays during the 1999 holiday season and imposing \$1.5 million in civil penalties)
- FTC v. J.K. Publications, Inc., No. CV-99-0044 ABC (AJWx) (C.D. Cal. Sept. 4, 2000) (\$37.5 million judgment against company that bought lists of credit card numbers from a California bank and fraudulently charged consumers – many of whom did not own computers – for visits to adult websites they had not made)
- FTC and State of New York v. Crescent Publishing Group, No. 00-CV-6315 (S.D.N.Y. Nov. 5, 2001) (stipulated final judgment) (\$30 million redress against operators of adult websites such as playgirl.com and highsociety.com for advertising free tour of websites while billing consumers’ credit cards unauthorized monthly fees)
- FTC v. Rennert, No. CV-S-00-0861-JBR (D. Nev. July 6, 2000) (stipulated final order) (challenging deceptive representations about purported online pharmacy)
- FTC v. Lane Labs-USA, Inc., No. 00 CV 3174 (D.N.J. June 28, 2000) (stipulated final order) (challenging deceptive use of embedded terms such as “non-toxic cancer therapy,” “cancer treatment” and “cancer survivor” in metatags for website featuring unsubstantiated cancer treatment claims for BeneFin, a shark cartilage product)

- Natural Heritage Enterprises, C-3941 (May 23, 2000) (consent order) (challenging company’s deceptive use of metatags, mouseover text, and hyperlinks in online ads representing that essiac tea, a combination of herbal ingredients, could treat cancer, diabetes, and HIV/AIDS)
- FTC v. Periera, (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 browsers’ “back” and “exit” commands so that users’ efforts to leave the adult sites opens additional windows of explicit material)
- FTC v. iMall, Inc., (C.D. Cal. Apr. 12, 1999) (stipulated final judgment) (\$4 million 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. 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)
- FTC v. Corzine, No. CIV-S-94-1446 (E.D. Cal. Sept. 12, 1994) (stipulated permanent injunction) (first FTC law enforcement action involving deceptive claims conveyed to consumers via the Internet)

C. **Spam:** The FTC has challenged practices related to the sending of unsolicited commercial email as violations of Section 5. The agency held a public workshop in April 2003 to address law enforcement and technological solutions and is working on rulemakings pursuant to the December 2003 passage of the CAN-SPAM Act. On July 2, 2004, the FTC announced a Memorandum of Understanding with law enforcement agencies in the UK and Australia to cooperate on the fight against spam. On September 16, 2004, the Commission published *A CAN-SPAM Informant Reward System: A Federal Trade Commission Report to Congress*, a consideration of whether a reward system could be designed to improve the effectiveness of CAN-SPAM enforcement. On October 11, 2004, 19 agencies from 15 countries announced the Action Plan on Spam Enforcement. In addition, the FTC and National Institute of Standards and Technology hosted an *Email Authentication Summit* on November 9-10, 2004, to explore the development of technology that could reduce spam.

On December 16, 2004, the Commission issued final regulations to facilitate the determination of whether an e-mail message has a commercial primary purpose and is subject to the provisions of the CAN-SPAM Act. See 16 C.F.R. § 316. With the cooperation of 35 law enforcement partners from 20 countries, the FTC announced on May 24, 2005, Operation Spam Zombies to target illegal spammers who tap into consumers' home computers and use them to send millions of pieces of illegal spam. According to an FTC staff report issued on November 28, 2005, *Email Address Harvesting and the Effectiveness of Anti-Spam Filters*, ISP filters block as much as 95% of unsolicited e-mail. On April 23-24, 2007, the FTC convened a public workshop, *Proof Positive: New Directions in ID Authentication*, to explore methods to reduce identity theft through enhanced authentication. Representative spam cases:

- United States v. Member Source Media, Inc., No.: CV-08 0642 (N.D. Cal. Jan. 30, 2008) (\$200,000 civil penalty for deceptive representation that recipient of spam email had won “free” prizes)
- FTC v. Sili Neutraceuticals, LLC, No. 07C 4541 (N.D. Ill. Aug. 23, 2007) (stipulated preliminary injunction) (challenging violations of the CAN-SPAM Act and Section 5 for allegedly using illegal email to disseminate deceptive claims for hoodia weight-loss products and human growth hormone anti-aging products)
- FTC v. Yesmail, Inc., No. 06-6611 (N.D. Cal. Nov. 6, 2006) (\$50,717 civil penalty for company’s violation of CAN-SPAM Act when company’s own anti-spam software filtered out certain “reply to” unsubscribe requests from recipients, which resulted in company’s failure to honor unsubscribe requests)
- FTC v. Cleverlink Trading Limited, No. 05C 2889 (N.D. Ill. Sept. 14, 2006) (stipulated final judgment) (\$400,000 disgorgement for sending “date lonely wives” spam that contained misleading headers and subject lines, did not contain a link to allow consumers to opt out of receiving future spam, did not contain a valid address, and did not contain the disclosure that it was sexually explicit, in violation of the CAN-SPAM Act)
- United States v. Kodak Imaging Network, Inc., No. C-06-3117 (N.D. Cal. May 11, 2006) (\$26,331 civil penalty for sending commercial e-mail message that failed to contain an opt-out mechanism, failed to disclose in the e-mail message that consumers have the right to opt-out of receiving further mailings, and failed to include a valid physical postal address, in violation of the CAN-SPAM Act)
- United States v. Jumpstart Technologies, No. C-06-2079 (MHP) (N.D. Cal. Mar. 23, 2006) (\$900,000 civil penalty for disguising commercial e-mails as personal messages and for misleading consumers as to the terms and conditions of its FreeFlixTix promotion, in violation of the CAN-SPAM Act)
- FTC v. Matthew Olson and Jennifer Leroy, No. C05-1979 (JCC) (W.D. Wash. Dec. 20, 2005) (complaint filed); FTC v. Brian McMullen, No. 05C 6911

(N.D. Ill. Dec. 20, 2005) (complaint filed); and FTC v. Zachary Kinion, No. 05C 6737 (N.D. Ill. Dec. 20, 2005) (complaint filed) (alleging that defendants hijacked consumers' computers and used them to send spam with false "from" information and misleading subject lines)

- FTC v. Global Web Promotions Pty Ltd., No.: 04C 3022 (N.D. Ill. Sept. 20, 2005) (\$2.2 million redress for deceptive claims for purported human growth hormone product sold via spam)
- FTC v. Global Net Solutions, Inc., No. CV-S-05-0002-PMP-LRL (D. Nev. Aug. 5, 2005) (TRO issued) (\$621,000 penalty and imposition of affiliate monitoring program for violating the CAN-SPAM Act and the FTC's Adult Labeling Rule by failing to include the required label for sexually explicit content; displaying sexually explicit content in the e-mail itself; using misleading header information; using misleading subject lines; failing to include the required opt-out notice; failing to have a functioning opt-out mechanism; failing to identify e-mails as advertisements or solicitations; and failing to provide a valid physical postal address)
- FTC v. Phoenix Avatar, LLC, No. 04C 2897 (N.D. Ill. Mar. 31, 2005) (stipulated final judgment) (in FTC's first CAN-SPAM Act case, \$230,000 suspended judgment for illegal spam advertising bogus diet patches)
- FTC v. GM Funding, Inc., No. SACV 02-1026 DOC (MLGx)(C.D. Calif. Nov. 20, 2003) (stipulated judgment) (challenging spoofing – the use of forged e-mail headers – as a violation of Section 5)
- FTC v. Walker, No. C02-5169 RJB (W.D. Wash. Oct. 28, 2002) (stipulated final order) (challenging bogus cancer cure marketed via spam)
- ***Operation Netforce***: On April 2, 2002, the Commission joined eight state law enforcers and four Canadian agencies in bringing Operation Netforce, a combined 63 law enforcement actions targeting deceptive spam and Internet fraud. The agencies sent more than 500 warning letters to the senders of deceptive spam. Netforce partners also tested whether "remove me" or "unsubscribe" options in spam were being honored and sent letters to more than 75 spammers warning them that deceptive removal claims in unsolicited e-mail are illegal.
- FTC v. Universal Direct, No. C-3-02-145 (S.D. Ohio Sept. 26, 2003) (stipulated final judgment) (challenging deceptive pyramid chain letter scheme marketed via spam)

## XVI. PRIVACY and DATA SECURITY

- A. The Commission continues to examine consumer privacy issues raised both by Internet advertising and advertising in other media through Reports to Congress, public workshops, and law enforcement.
- B. ***Do-Not-Call Registry***: On June 27, 2003, amendments to the Telemarketing Sales Rule establishing a national Do-Not-Call registry, 16 C.F.R. § 310 et seq. (2003), became effective. See infra, Section XIV.
- C. ***Spyware and Adware***. On April 19, 2004, the FTC convened a public workshop to consider the consumer protection and privacy implications of the use of spyware, adware, and related technologies. On March 7, 2005, the FTC issued a staff report, ***Monitoring Software on Your PC: Spyware, Adware, and Other Software***, summarizing the issues and drawing some conclusions from information presented at the workshop. Representative cases:
- DirectRevenue LLC, C-4194 (Feb. 16, 2007) (consent order) (\$1.5 million disgorgement for company's unfair and deceptive practice of downloading adware onto consumers' computers without clear and conspicuous disclosure and obstructing its removal)
  - Sony BMG Music Entertainment, C-4195 (Jan. 30, 2007) (consent order) (challenging company's practice of selling CDs without telling consumers they contained software that limited the devices on which the music could be played, restricted the number of copies that could be made, and contained technology that monitored consumers' listening habits to send them marketing messages)
  - Zango, Inc., C-4186 (Nov. 3, 2006) (consent order) (\$3 million disgorgement to settle charges that company formerly known as 180solutions, Inc., used unfair and deceptive methods to download adware and obstruct consumers from removing it)
  - FTC v. ERG Ventures, No. CV-00578-LRH-VPC (D. Nev. Oct. 1, 2007) (stipulated final order) (\$330,000 redress for company's practice of downloading Motor Media spyware programs onto millions of computers without consumers' consent, degrading their computers' performance, tracking their Internet activity, and exposing them to disruptive ads)
  - FTC v. Enternet Media, No. CV05-7777CAS (AJWx) (C.D. Cal. Sept. 6, 2006) (stipulated final order) (\$2 million redress for company's practice of downloading spyware and adware on consumers' computers through the promise of free lyric files, browser upgrades, and ring tones and affiliates' promise of free background music for blogs)
  - FTC v. Seismic Entertainment Productions, Inc., No. 04-CV-0377-JD (D.N.H. May 4, 2006) (stipulated final order) (\$4 million redress to settle charges that

spyware company used a purported anti-spyware program to hijack computers, change their settings, barrage them with pop-up ads, and install adware and other software programs that monitor consumers' web surfing)

- FTC v. Odysseus Marketing, Inc., No. 05-330 (D.N.H. Oct. 5, 2005) (stipulated final order) (imposing \$500,000 performance bond and \$1.75 million suspended judgment for company's practice of offering free software that claimed to make consumers anonymous when using peer-to-peer file sharing programs without disclosing that program installed other harmful software)
- Advertising.com, Inc., C-4147 (consent order) (Sept. 16, 2005) (challenging company's free distribution of SpyBlast, software advertised to protect consumers against hacker attacks, without clearly and conspicuously disclosing that adware was bundled with the software)
- FTC v. Trustsoft, Inc., Civ. No. H 05 1905 (S.D. Tex. Jan. 5, 2006) (stipulated final order) (\$1.9 million redress for deceptive claims that Spykiller software had remotely "scanned" computers for spyware)
- FTC v. Maxtheater, Inc., No. 05 -CV-0069-LRS (E.D. Wash. Dec. 5, 2005) (stipulated final order) (\$76,000 redress for practice of offering spyware detection scans that falsely detected spyware in an effort to sell consumers ineffective anti-spyware products)

D. Other activities related to consumer privacy:

1. ***Behavioral Advertising: Tracking, Targeting & Technology.*** On November 1, 2007, the FTC sponsored a town hall meeting to address consumer protection issues raised by tracking of consumers' activities online to target online advertising.
2. ***Peer-to-Peer File Sharing Technology: Consumer Protection and Competition Issues.*** On December 15-16, 2004, the FTC convened a public workshop to explore consumer protection and competition issues associated with the distribution and use of peer-to-peer (P2P) file-sharing and followed up with a June 23, 2005, staff report. Representative cases:
  - FTC v. MP3downloadcity.com, No. CV-05-7013 CAS (FMOx) (C.D. Cal. May 25, 2006) (stipulated final judgment) (\$15,000 redress for deceptive claims that service would allow users of peer-to-peer file-sharing programs to transfer copyrighted materials without violating the law)
3. ***OnGuardOnline.gov:*** On September 27, 2005, the FTC – in partnership with cybersecurity experts, online marketers, consumer advocates, and other federal agencies – launched a new multimedia, interactive consumer education campaign to help consumers stay safe online.

4. ***Privacy Online: Fair Information Practices in the Electronic Marketplace: A Federal Trade Commission Report to Congress*** (May 2000). Issuing the third in a series of Reports to Congress about online privacy, the Commission announced the results of a national survey demonstrating that only 20% of the busiest commercial sites implement all four fair information practices – **Notice, Choice, Access and Security**. The FTC recommended that Congress enact legislation to ensure a minimum level of privacy protection for online consumers and to establish basic standards of practice for the collection of information online.
  
  5. ***Online Profiling***: 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. The Commission followed up on June 13, 2000, with ***Online Profiling: A Report to Congress*** and ***Online Profiling: A Report to Congress: Part 2*** on July 27, 2000. Part 2 of the Report applauded the Network Advertising Initiative (NAI) for developing an innovative self-regulatory proposal to address the privacy concerns consumers have about online profiling. The Report also calls for Congress to enact legislation to provide privacy protection for consumers with regard to online profiling practices to serve to complement the NAI self-regulatory structure by guaranteeing compliance by non-member network advertising companies. On March 13, 2001, the Commission held a workshop to explore how businesses merge and exchange detailed consumer information and how such information is used commercially.
  
  6. ***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. The Report also identified four core principles of fair information practices: Notice, Choice, Access, and Security.
- E. Representative law enforcement action related to consumer privacy and data security:
- FTC v. Accusearch, Inc., No. 06-CV-0105 (D. Wyo. Jan. 28, 2008) (court decision ordering \$200,000 disgorgement from information broker who advertised and sold confidential consumer telephone records to third parties without the consumers’ knowledge or consent)
  
  - United States v. American United Mortgage Co., No.: 07C 7064 (N.D. Ill. Dec. 18. 2007) (\$50,000 civil penalty for mortgage company’s practice of leaving loan documents with consumers’ sensitive information in and around an unsecured dumpster)
  
  - Guidance Software, C-4187 (consent order) (Nov. 16, 2006) (alleging that company’s failure to take reasonable security measures to protect sensitive customer data contradicted the security promises made on its website)
  
  - FTC v. Integrity Security & Investigation Services, Inc., No.: 2:06-CV-241-RGD-JEB (E.D. Va. Oct. 4, 2006) (stipulated final order)



(challenging company's selling of confidential customer phone records to third parties as an unfair trade practice)

- FTC v. Information Search, Inc., No. 1:06-CV-01099-AMD (D. Md. May 3, 2006) (complaint filed) (alleging that defendants – and additional defendants in separate actions filed in United States District Court in Wyoming, Florida, and California – obtained and sold consumers' confidential telephone records in violation of federal law)
- CardSystems Solutions, Inc., C-4168 (Feb. 23, 2006) (consent order) (challenging as an unfair trade practice companies' failure to take appropriate security measures to protect the sensitive information of tens of millions of consumers, resulting in millions of dollars in fraudulent purchases)
- United States v. ChoicePoint Inc., No.1-06-CV-198 (N.D. Ga. Jan. 26, 2006) (stipulated final judgment) (\$10 million civil penalty and \$5 million redress for data security breach that led to the compromise of the financial records of more than 163,000 consumers and violations of the Fair Credit Reporting Act)
- DSW, Inc., D-4157 (Dec. 1, 2005) (consent order) (challenging as an unfair trade practice shoe store's failure to take appropriate security measures to protect sensitive consumer information)
- Superior Mortgage Corp., 140 F.T.C. 926 (2005) (consent order) (challenging mortgage company's failure to provide reasonable security for sensitive customer data and false claim that it encrypted data submitted online as violations of FTC Safeguards Rule and Section 5 of the FTC Act)
- BJ's Wholesale Club, 140 F.T.C. 465 (2005) (consent order) (challenging as an unfair trade practice warehouse store's failure to take appropriate security measures to protect sensitive consumer information)
- CartManager International, C-4135 (Apr. 26, 2005) (consent order) (alleging that company that provides "shopping cart" software to online merchants rented personal information about merchants' customers to marketers, knowing that such disclosure contradicted merchants' privacy policies)
- Petco Animal Supplies, Inc., 139 F.T.C. 102 (2005) (consent order) (challenging security flaws on company's website that allowed access to consumers' personal information, including credit card numbers)
- FTC v. Seismic Entertainment Productions, Inc., No. 04-CV-0377-JD (D.N.H. Oct. 12, 2004) (complaint filed) (challenging spyware company's alleged practice of hijacking computers, changing their settings, barraging them with pop-up ads, and installing adware and other software programs that monitor consumers' web surfing)

- Bonzi Software, Inc., 138 F.T.C. 738 (2004) (consent order) (challenging deceptive representations that InternetALERT software significantly reduced the risk of Internet attacks and unauthorized access into computers)
- Gateway Learning Corp., 138 F.T.C. 443 (2004) (consent order) (alleging that marketer of Hooked On Phonics products promised in its privacy policy to protect consumers' personal information and then changed its policy and sold personal information without consumers' consent)
- Tower Records/Books/Video and TowerRecords.com, 137 F.T.C. 444 (2004) (consent order) (challenging security flaws on company's website that allowed access to consumers' personal information)
- Guess?, Inc., and Guess.com, Inc., 136 F.T.C. 507 (2003) (consent order) (alleging that security flaws on company's website placed consumers' credit card numbers at risk to hackers)
- Educational Research Center of America, Inc., 135 F.T.C. 578 (2003) (consent order) (alleging that companies' practices of collecting personal information from students as young as ten claiming that it would be used solely for education-related services and then selling it to commercial marketers was a violation of Section 5)
- National Research Center For College and University Admissions, 135 F.T.C. 13 (2003) (consent order) (alleging that companies' practices of collecting personal information from millions of high school students claiming that they would share it only with colleges, universities, and others providing education-related services and then selling it to commercial marketers was a violation of Section 5)
- Microsoft Corp., 134 F.T.C. 709 (2002) (consent order) (challenging deceptive claims regarding the privacy and security of personal information collected from consumers through Microsoft's Passport web services)
- Eli Lilly and Co., 133 F.T.C. 763 (2002) (consent order) (challenging unauthorized disclosure of sensitive personal information collected from consumers through company's Prozac.com website)
- FTC v. Toysmart.com, No. 00-11341-RGS (D. Mass. July 21, 2000) (stipulated consent agreement) (settling request to enjoin a bankrupt company from selling confidential information collected from customers on its website after representing in its published privacy policy that information would never be disclosed to third parties)
- FTC v. Rennert, No. CV-S-00-0861-JBR (D. Nev. July 6, 2000) (stipulated final order) (requiring company operating a purported online pharmacy to post a privacy policy that discloses the types of personal identifying information it is collecting, the uses that will be made of the data, and the means by which a

consumer may access, review, modify, or delete his or her personal information, and prohibiting the defendants from selling, renting, or disclosing personal information that was collected from their customers)

- Liberty Financial Companies, Inc., 128 F.T.C. 240 (1999) (challenging company's practice of collecting identifiable personal information about family finances from children at its "Young Investors" website despite representing that information would be compiled anonymously)
- GeoCities, 127 F.T.C. 94 (1999) (consent order) (alleging the company misrepresented purposes for which it collected personal identifying information from children and adults on its website)

F. Children's Privacy Online: Passed in 1998, the Children's Online Privacy Protection Act (COPPA), 15 U.S.C. § 6501 (1999), requires websites to obtain verifiable parental consent before collecting, using, or disclosing personal information from children. The Act directed the FTC to promulgate rules and to review and approve guidelines that would serve as safe harbors. On February 27, 2007, the FTC issued *Implementing the Children's Online Privacy Protection Act: A Report to Congress*.

1. ***Children's Online Privacy Protection Act Rules***: After notice and comment, the FTC issued final rules effective April 21, 2000, outlining the procedures for websites to use in obtaining parental consent before collecting, using, or disclosing personal information from children. 15 C.F.R. § 312. The rules apply to operators of commercial websites 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 children's information will be disclosed to third parties, allow parents the opportunity to review their children's personal information 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.
2. ***COPPA Safe Harbors***: On February 1, 2001, the FTC approved the Children's Advertising Review Unit of the Council of Better Business Bureaus as the first "safe harbor" program under the terms of COPPA. Safe harbor programs are industry self-regulatory guidelines that, if adhered to, are deemed to comply with the Act. The Commission has since approved safe harbors for the Entertainment Software Rating Board, TRUSTe Internet privacy seal program, and Privo, Inc.
3. Representative COPPA cases:
  - United States v. Industrious Kid, Inc., No. CV-08-0639 (N.D. Cal. Jan. 30, 2008) (consent decree) (\$130,000 civil penalty for COPPA violations by social networking website specifically targeting kids and "tweens")

- United States v. Xanga.com, Inc., No. 06-CIV-6853(SHS) (S.D.N.Y. Sept. 7, 2006) (\$1 million civil penalty for allowing visitors to create more than 1.7 million accounts on social networking site although they provided a birth date indicating they were under 13)
- United States v. UMG Recordings, Inc., No. CV-04-1050 JFW (Ex) (C.D. Cal. Feb. 17, 2004) (consent decree) (\$400,000 civil penalty for music company's knowing collection of personal information from children online without first obtaining parental consent and for engaging in the same activities on a website directed to children)
- United States v. Bonzi Software, No. CV-04-1048 RJK (Ex) (C.D. Cal. Feb. 17, 2004) (consent decree) (\$75,000 civil penalty for interactive software marketer's knowing collection of personal information from children online without first obtaining parental consent)
- United States v. Hershey Foods Corp., No. 4:CV03-350 (M.D. Pa. Feb. 26, 2003) (consent decree) (\$85,000 civil penalty for company's use of a method of obtaining parental consent that did not meet COPPA Rule standards)
- United States v. Mrs. Fields Famous Brands, Inc., No. 2:03CV205-JTG (D. Utah Feb. 26, 2003) (consent decree) (\$100,000 civil penalty for company's collection of personal information from more than 84,000 children, without first obtaining parental consent)
- United States v. The Ohio Art Co., (N.D. Ohio Apr. 22, 2002) (consent decree) (\$35,000 civil penalty for company's violation of COPPA by collecting personal information from children on its Etch-a-Sketch website without obtaining parental consent)
- United States v. American Pop Corn Co., No. C02-4008DEO (N.D. Iowa Feb. 14, 2002) (\$10,000 civil penalty for company's violation of COPPA by collecting personal information from children on its Jolly Time Popcorn website without obtaining parental consent)
- United States v. Lisa Frank, Inc., No. 01-1516-A (E.D. Va. Oct. 2, 2001) (consent decree) (\$30,000 civil penalty for website operator's violation of COPPA by collecting personally identifying information from children under 13 years of age without parental consent and requiring operators to delete all personally identifying information collected from children online at any time since the COPPA Rule's effective date)
- United States v. Monarch Services, Inc. and Girls' Life, Inc. (D. Md. Apr. 19, 2001); United States v. BigMailbox.com, Inc., No. 01-605-1 (E.D. Va. Apr. 19, 2001); and United States v. Looksmart, Ltd., No. 01-606-A (E.D. Va. Apr. 19, 2001) (consent decrees) (\$100,000 civil penalty for website operators' violations of COPPA by collecting personally identifying information from children under 13 years of age without parental consent and requiring

operators to delete all personally identifying information collected from children online at any time since the COPPA Rule's effective date)

## XVII. GLOBAL COMMERCE

- A. ***OECD Workshop on Consumer Dispute Resolution and Redress in the Global Marketplace:*** On April 19-20, 2005, the FTC hosted a workshop to examine approaches to consumer dispute resolution and redress around the world. Co-sponsored by the Organization for Economic Cooperation and Development (OECD), the workshop examined ways in which consumers in the 30 OECD member countries can resolve disputes and seek redress for problems that arise in transactions with foreign merchants.
- B. ***Health Claims Surf Days:*** In 1997 and 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 email notices regarding the Commission's policy on advertising substantiation. On May 10, 2002, the Commission announced the results of a health claims surf day involving 19 members of the International Marketing Supervision Network, a coalition of consumer protection law enforcement agencies from around the world. As a result of the surf, the FTC sent over 280 advisory letters to domestic and foreign sites that were identified as making questionable claims for health-related products or services. On May 9, 2003, the FTC and FDA announced the results of a joint surf to combat misleading claims for products advertised to treat Severe Acute Respiratory Syndrome (SARS). On October 19, 2006, the FTC and FDA, in cooperation with government agencies in Mexico and Canada, launched a drive to stop deceptive Internet advertisements for products misrepresented as treatments for diabetes. The campaign included 180 warning letters and advisories.
- C. ***Partnerships to Combat Cross-Border Fraud:*** On February 19, 2003, the Commission convened a two-day international workshop on cross-border fraud and issued ***Cross-Border Fraud Trends***, a report compiled from complaints received by the FTC's Consumer Sentinel database. On June 17, 2003, the Commission and representatives of OECD announced new guidelines for combating cross-border fraud.
- D. ***Operation Top Ten Dot Cons:*** On October 31, 2000, the FTC announced 251 law enforcement actions against online scammers brought by five federal agencies, 23 state attorneys general, and nine foreign countries. The top ten scams – including Internet auction fraud, credit card cramming, pyramid schemes, business opportunity scams, and health fraud – were culled from Consumer Sentinel, a database of more than 300,000 consumer complaints established by the FTC and accessible to more than 250 consumer protection agencies in the U.S., Canada, and Australia. The FTC and the United Kingdom's Department of Trade and Industry and Office of Fair Trading also announced an information sharing and coordination agreement to combat cross-border fraud.
- E. ***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.

- F. ***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.***

## XVIII. SELF-REGULATORY INITIATIVES

- A. **Advertising 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 the 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. In addition, the Commission issued ***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. **Voluntary Screening of Weight Loss Advertisements:** The Commission sponsored a workshop in November 2002 to consider initiatives to combat deception in weight loss advertising, including more effective in-house screening by broadcasters and publishers. In December 2003, the FTC issued ***Red Flags: A Reference Guide for Media on Bogus Weight Loss Claim Detection***, a brochure to assist publishers and broadcasters screen out patently false ads before they are disseminated. As part of ***Operation Big Fat Lie***, a November 2004 law enforcement sweep of companies selling allegedly bogus weight loss products, the FTC contacted the newspapers and magazines that disseminated ads for the products encouraging them to adopt more effective in-house clearance standards. In April 2005, the FTC released a report studying industry compliance with Commission calls for more effective self-regulation. According to ***2004 Weight-Loss Advertising Survey: A Report From the Staff of the Federal Trade Commission***, the percentage of ads for weight loss products that contain representations the Commission considers to be patently false – “red flag” claims – dropped from almost 50% in 2001 to 15% in 2004.
- C. **Marketing Practices of the Entertainment Industry:** In June 1999, the President and members of Congress asked the FTC to conduct a study to determine whether members of the entertainment industry market violent adult-rated material to children. On September 11, 2000, the Commission issued ***Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries***, which concluded that members of the industry promote products they themselves acknowledge warrant parental caution in venues where children make up a substantial percentage of the audience and that the advertisements are intended to attract children and teenagers. The Report further found that while the entertainment industry has taken steps to identify content that may not be appropriate for children, companies still routinely target children under 17 in their marketing of products their own ratings systems deem inappropriate or warrant parental caution due to violent content. The FTC found

evidence of marketing and media plans that expressly target children under 17, and promote and advertise products in media outlets most likely to reach that age group. The Report concluded that the industry should establish or expand codes that prohibit target marketing to children and impose sanctions for violations, increase compliance at the retail level, and increase parental understanding of the ratings and labels.

1. The Commission issued a follow-up report on April 24, 2001, stating that the motion picture and electronic game industries had made some progress in limiting ads in popular teen media and in providing rating information in advertising, but raising continued concerns about the music industry.
2. At the request of members of Congress, an additional report was issued on December 5, 2001. The report concluded that the motion picture and electronic game industries have “made commendable progress in limiting their advertising to children of R-rated movies and M-rated games and in providing rating information in advertising.” The Commission’s review of ad placements by the music industry, however, found that “it has continued to advertise explicit content recordings in most popular teen venues in all media,” although there were “improvements in the music industry’s disclosure of parental advisory label information in its advertising.”
3. The Commission issued a third follow-up report on June 28, 2002, finding progress in advertising disclosures by the marketers of movies, music, and electronic games, but continued placement of ads in some media with large teen audiences.
4. On October 14, 2003, the Commission issued the results of a “mystery shopper” undercover survey investigating the effectiveness of self-regulatory programs designed to prevent the sale to children of entertainment products deemed by the industries to be unsuitable for them. According to the survey, 69% of the teenage shoppers were able to buy M-rated games; 83% were able to buy explicit-labeled recordings; 81% were successful in purchasing R-rated movies on DVD; and 36% were successful in purchasing tickets for admission to an R-rated film at movie theaters.
5. The Commission sponsored a public workshop on October 29, 2003, to discuss the state of self-regulation in the entertainment industry and children’s access to products that have been rated as potentially inappropriate for them or have been labeled with a parental advisory. On March 17, 2004, the Commission announced the expansion of its consumer complaint system to categorize and track complaints about media violence, including complaints about the advertising, marketing, and sale of violent movies, electronic games, and music.
6. The Commission issued a fourth follow-up report on July 8, 2004. The report showed continued progress in providing rating information in ads and improvement in limiting sales of R-rated movie tickets, but little overall change in industry ad placement.
7. On March 30, 2006, the Commission issued the results of its latest mystery shopper survey. Forty-two percent of the secret shoppers – children between the ages of 13

and 16 – who attempted to buy an M-rated video game without a parent were able to purchase one, compared with 69% in the 2003 mystery shopper survey.

8. On April 12, 2007, the FTC issued *Marketing Violent Entertainment to Children: A Fifth Follow-Up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries: A Report to Congress*. According to the FTC, despite general compliance with voluntary industry standards, entertainment companies continue to market some R-rated movies, M-rated video games, and explicit-content recordings on television shows and websites with substantial teen audiences. In addition, the FTC found that while video game retailers have made significant progress in limiting sales of M-rated games to children, movie and music retailers have made only modest progress limiting sales.
9. Representative cases:
  - Take-Two Interactive Software, Inc. and Rockstar Games, Inc., File No. 052-3158 (June 8, 2006) (consent orders) (alleging that marketers of videogame *Grand Theft Auto: San Andreas* failed to disclose that game discs contained potentially viewable material that was sexually explicit, resulting in its subsequent re-rating by the Entertainment Software Ratings Board from “Mature” to “Adults Only”)

#### D. Marketing Practices of the Alcohol Industry

1. 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. The Commission recommended that the industry:
  - create independent review boards to consider complaints from consumers and competitors;
  - raise the current standard that permits advertising placement in media where just over 50% of the audience is 21 or older; and
  - 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.
2. On September 9, 2003, the Commission issued *Alcohol Marketing and Advertising: A Federal Trade Commission Report to Congress*. In response to congressional inquiries about flavored malt beverages, the Commission concluded that marketers have generally complied with 2002 voluntary alcohol codes regarding ad placement. According to the report, the Commission will continue to monitor new placement standard requiring that adults constitute 70% of the audience for advertising and the effectiveness of third-party and other external review programs.