

Remarks of FTC Commissioner Maureen K. Ohlhausen
Electronic Retailing Association Event
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Thank you so much for your kind introduction. I appreciate the invitation to discuss important consumer protection topics affecting the direct to consumer marketing industry. Direct marketing and advertising are core issues for the Federal Trade Commission, and I would like to share with you how we at the Commission have approached our enforcement and business education priorities in these areas. Let me preface my remarks by saying that my comments are my own and do not necessarily reflect those of my colleagues on the Commission.

As a retailer, your company's success depends largely on the reputation of your brand. Trust is essential to the consumer-retailer relationship, and companies need to invest in that relationship by avoiding misleading or deceptive marketing. In a world full of subpar products and questionable Internet-sourced goods, it is important for retailers to represent their products accurately to better establish their reputations and build a lasting customer base. The modern communications landscape affords direct response marketers many opportunities to provide consumers what they want. The Internet is a great medium for putting relevant products in the hands of interested consumers. Direct consumer messaging and easy communication between sellers and buyers can facilitate economic growth and increased consumer welfare.

The Commission approaches its role in this sector using a variety of tools: law enforcement, policy and research, and business and consumer education. By not relying solely on one mode of agency action, the Commission is able to maximize consumer welfare while simplifying compliance for businesses by developing practical guidelines and best practices that apply across sectors.

Today, I would like to discuss the role of the FTC in policing the electronic retailing market for bad actors and what resources we offer companies to help them avoid misleading or deceptive advertising practices. I will conclude with a brief discussion of self-regulation and its increasing importance in the Internet space and some thoughts about where we can go from here.

Enforcement

As the nation's consumer protection agency, the FTC is committed to promoting truthful advertising with well-supported marketing claims. First and foremost, the Commission is a law enforcement agency. In the area of direct response marketing and electronic retailing, we have been tasked with protecting consumers under Section 5 of the FTC Act, which prohibits unfair or deceptive acts or practices. The Commission has interpreted what constitutes deceptive acts by promulgating rules addressing many specific marketing practices. These include the FTC's Endorsement Guidelines,¹ which prescribe necessary disclosures for endorsements or testimonials directed toward consumers and the .com Disclosure Guidelines,² which instruct advertisers on how to present disclosures on the web. The Commission's CAN-SPAM³ Rule under the CAN-SPAM Act⁴ imposes opt out obligations on email marketers and requires warning labels on sexually-oriented material. The Commission's Telemarketing Sales Rule,⁵ under the Consumer Fraud and Abuse Prevention Act,⁶ defines deceptive telemarketing practices and abusive conduct.

To protect consumers from deceptive practices, the Commission will file complaints against companies that market products in violation of section 5's prohibitions. Within the past year, the FTC has taken action against a number of marketers for deceptive advertising. Last August, the Commission announced two settlements with companies whose products promised far more than they delivered. In the *Ab Circle Pro* matter, we challenged a claim by an exercise equipment manufacturer that a consumer who exercised on their product for just three minutes a day would lose ten pounds in two weeks.⁷ As we all know, the only proven method of weight loss is a change in diet and/or an increase in physical activity.⁸ *Ab Circle Pro's* numbers just did not add up, and, because of the Commission's actions, the manufacturer agreed to offer consumers a refund on their purchases.

¹ Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255 (2012).

² Federal Trade Commission, .com Disclosure Guidelines, *available at* <http://www.ftc.gov/os/2013/03/130312dotcomdisclosures.pdf>.

³ FTC CAN-SPAM Rule, 16 C.F.R. § 316 (2012).

⁴ Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, 15 U.S.C. § 7701-7713 (2012).

⁵ FTC Telemarketing Sales Rule, 16 C.F.R. § 310 (2012).

⁶ Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6101-6108 (2012).

⁷ Federal Trade Commission, *Marketers of 'Ab Circle Pro' Device to Pay as Much as \$25 Million in Refunds to Settle FTC Charges*, <http://ftc.gov/opa/2012/08/abcirclepro.shtm>.

⁸ Federal Trade Commission, *Red Flag: Bogus Weight Loss Claims*, <http://www.ftc.gov/bcp/edu/microsites/redflag/falseclaims.html>.

At the same time, we took a hard look at representations made by Your Baby Can Read, LLC regarding its child education products.⁹ Your Baby Can Read's marketers claimed that babies could learn to read using their program and that children age three or four could learn to read advanced books, such as Charlotte's Web or Harry Potter. Ultimately, they failed to provide competent and reliable scientific evidence of these results and agreed to settle.

As the ERA recognizes in its Online Advertising Guidance,¹⁰ electronic retailers should be particularly careful to substantiate express or implicit statements regarding the medical effects of a product and claims about business opportunities. As the U.S. population ages and unemployment remains high in many regions, these are two sensitive areas for consumers where the Commission is keeping a watchful eye.

With regard to advertising enforcement in general, the FTC must strike a delicate balance: under-regulation may allow deceptive advertisers to take advantage of consumers, while overregulation runs the risk of discouraging the dissemination of truthful information to the public. Our role is to help ensure that consumers can make their own informed choices, not to prevent them from making choices we don't like.

Advertising also plays an important role in the competitive marketplace. As the Supreme Court has stated, "[s]o long as we preserve a predominantly free enterprise economy . . . the free flow of commercial information is indispensable."¹¹

In our recent POM Wonderful decision¹², which I authored, the Commission unanimously agreed that the defendants made unsubstantiated deceptive claims about their products. Our Final Order bars the POM defendants from making any disease-related claims unless they are supported by randomized, well-controlled, human clinical trials. The Order also prohibits misrepresentations regarding scientific studies and requires competent and reliable scientific evidence to support claims about a product's health benefits, performance, or efficacy.

⁹ Federal Trade Commission, *Ads Touting "Your Baby Can Read" Were Deceptive, FTC Complaint Alleges*, <http://ftc.gov/opa/2012/08/babyread.shtm>.

¹⁰ Electronic Retailing Association, *Online Marketing Guidelines* at 2, available at <http://www.retailing.org/files/OnlineMktgGuidelines.pdf>.

¹¹ *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).

¹² *Pom Wonderful, LLC*, No. 9344, 2013 WL 268926 (F.T.C. Jan. 16, 2013).

I did not, however, agree with my fellow Commissioners in all aspects of that opinion. For example, with regard to claim interpretation, I wrote separately to emphasize that extrinsic evidence must be introduced if implied claims are not facially clear in the advertisement.

If we are too quick to infer implied claims without extrinsic evidence that consumers take away such claims, we risk imposing a substantiation standard that is too high and would unduly limit the provision of potentially useful information to consumers. I also pointed out the importance of interpreting the FTC Act within the framework of other relevant federal legislation. Thus, we should respect First Amendment precedent and Congressional intent, embodied for example in the Dietary Supplement Health and Education Act (DSHEA)¹³, regarding the public's right to receive information about a product's general health benefits.

Another area where the Commission has been actively enforcing section 5 is in the marketing of business opportunities. An updated Business Opportunity Rule¹⁴ went into effect last year, which ensures that consumers have the information they need when considering a work-at-home program or other opportunity.¹⁵ Together with state law enforcement partners, the Commission has aggressively pursued direct retailers who misrepresent how much money people could make through a business opportunity.¹⁶ With employment prospects still weak in many areas of the country, low-income consumers often seek to provide for their families through these opportunities, only to find out later that earning additional cash can be much more difficult than expected. Although many of the retailers in these cases were scammers, these cases highlight the importance of presenting accurate information on a product to vulnerable consumer groups. Solutions to the problems of modern life do not come in neat packages, and advertisers should be careful not to make claims that they cannot support.

Consumer and Business Education

In addition to enforcement against bad actors, the FTC works to educate consumers through educational guides distributed to the public both in print and online. Consumers can browse the FTC's consumer information website topically to learn more about how to protect themselves in the modern marketplace. We

¹³ Pub. L. No. 103-417, 108 Stat. 4325 (codified as amended in scattered sections of 21 U.S.C.).

¹⁴ FTC Business Opportunity Rule, 16 C.F.R. § 437 (2012).

¹⁵ Federal Trade Commission, *FTC Adds New Protections for Consumers Seeking to Work from Home*, <http://www.ftc.gov/opa/2011/11/busopp.shtm>.

¹⁶ Federal Trade Commission, *FTC Expands Fight Against Deceptive Business Opportunity Schemes*, <http://www.ftc.gov/opa/2012/11/lostopp.shtm>.

constantly update our site to provide consumers with relevant information on a variety of topics.

The Commission also seeks to promote consumer welfare by providing the business community with guidelines and “best practices” documents. We have developed materials specifically for businesses through the Bureau of Consumer Protection’s Business Center, which hosts many resources to help businesses avoid misleading consumers and provide appropriate substantiation. We regularly conduct a systematic review of our guidance on advertising and marketing to ensure that our rules and guides are up-to-date, effective, and not overly burdensome.¹⁷

In March of this year, we revised our .com Disclosure Guidance to address new advertising practices that have emerged with a maturing Internet.¹⁸ We reaffirmed the platform-neutrality of the country’s consumer protection laws and the need to ground digital disclosure best practices in common sense.

Advertisers remain responsible for ensuring that all express and implied claims that an ad conveys to reasonable consumers are truthful and substantiated. If a product or advertisement needs explanation to ensure that the ad is truthful and not misleading, any disclosures need to be clear and conspicuous.

In 2009, the Commission amended its Endorsement Guidelines to reflect basic truth-in-advertising principles as they apply to endorsements and testimonials in advertising.¹⁹ This updated guidance requires that a marketer disclose the results that a consumer can generally expect when atypical results are presented in an endorsement or testimonial. Also, material connections between endorsers and advertisers must be disclosed. The .com Disclosure Guidance reaffirms the applicability of these principles to the new media increasingly used by businesses to connect with consumers. For example, when a celebrity endorses a product on a social media network like Twitter, the advertiser must consider the special constraints specific to that medium. The character limits inherent in the platform prompt advertisers to disclose material connections and typical results with brevity and clarity because even though the communications technology may change, the principles behind endorsement disclosures do not.

¹⁷ See Federal Trade Commission, *FTC Regulatory Review*, <http://www.ftc.gov/ftcregreview/>.

¹⁸ Federal Trade Commission, *.com Disclosures*, available at <http://www.ftc.gov/os/2013/03/130312dotcomdisclosures.pdf>.

¹⁹ Federal Trade Commission, *FTC Publishes Final Guides Governing Endorsements, Testimonials*, <http://www.ftc.gov/opa/2009/10/endortest.shtm>.

While the unparalleled interactivity of the web allows retailers to take their products directly to consumers, the rules of the advertising game remain the same. As long as human beings are part of a transaction, disclosure will remain a vital part of ensuring consumers are well informed when buying products.

Self-Regulation

This is not to say that the FTC is always the best entity to develop and enforce methods of applying these basic consumer protection principles to specific industries. The Commission has long supported industry self-regulation as an efficient way of securing consumer benefits and promoting a robust and competitive marketplace. Voluntary codes of conduct are particularly appropriate in dynamic sectors of the economy where traditional regulation would potentially stifle innovation and slow growth. Early on in the Internet Age, we encouraged the online behavioral advertising industry to adopt rules on the use of personal information through voluntary codes of conduct.

Many of these policies are paying off as we continue to see vibrant competition in the technology sector and the launch of efforts by industry to develop workable standards on information privacy. For example, the Digital Advertising Alliance (DAA) launched an icon program to help better empower consumers in tailoring their online advertising privacy settings. This year, the DAA is bringing that feature to the mobile environment.

The Department of Commerce's multistakeholder privacy process is making great strides in developing a code of conduct to govern mobile app transparency. The Department of Energy has launched its own process in the hope of having stakeholders voluntarily create and sign on to a code of conduct protecting privacy on the emerging smart grid. Often, the best way of applying old principles to new technologies is begin a discussion with companies, consumer groups, and industry experts to come up with innovative answers to difficult problems.

Conclusion

So what should electronic retailers be doing to ensure that their ads are neither false nor misleading? Much of the solution is common sense. First, businesses should implement comprehensive substantiation review of their advertisements before they are released. For live home-shopping productions, make sure that those demonstrations are accurate and that your claims are supported by facts that you yourself have checked. For health products, be sure

there is competent and reliable scientific evidence supporting any claims of health benefits. If claims refer to specific studies, make sure that the results of those studies are described accurately. For business opportunity marketing, make sure you explain the risks of a venture as well as its rewards. Remember that the buyers of your products are real people and that better information leads to better relationship with customers.

Preventing deceptive practices is the heart of the Commission's consumer protection mission. Deceptive and misleading marketing claims harm consumers and deplete hard-earned trust in the marketplace. We at the Commission are dedicated to protecting consumers from bad actors, while educating companies on how to avoid false and misleading behaviors.

As you plan for your advertising and marketing campaigns, step back for a minute and view your products from the perspective of a normal, everyday person. What are you selling and what will the average person's take-away be? It's important to stick to proven facts and honest presentations so that you can establish a reputation of trust and reliability that can be your greatest asset.

Thank you for inviting me to speak with you. I am happy to take questions.