National Advertising Division Annual Conference
New York, NY

Remarks of Thomas Pahl
Acting Director, FTC Bureau of Consumer Protection

(October 3, 2017)

I. Introduction[1]

Good morning. I would like to start by thanking the National Advertising Division and Lee Peeler for inviting me. It is truly a pleasure to have the opportunity to meet with this group as the Bureau of Consumer Protection's Acting Bureau Director. The Commission has a long history of dedication to national advertising cases and is a longtime supporter of self-regulation in advertising. Deceptive and unfair advertising practices not only undermine the ability of consumers to make well-informed decisions about goods and services, but they also make it more difficult for businesses to compete effectively through truthful and non-misleading representations about the goods and services they advertise. The FTC regards the Council of Better Business Bureaus' programs under the Advertising Self-Regulatory Council – including the NAD, CARU, ERSP, and NARB – as models in national advertising enforcement. We value all your hard work and partnership in helping protect a free market economy by challenging false and misleading national advertising that harms both consumers and competition.

Next, I would like to congratulate Ms. Laura Brett as NAD's new Director. Having worked diligently for over 5 years as an NAD attorney handling complex advertising matters and previously maintaining her own private practice, Ms. Brett is an outstanding choice to oversee

[1] The views expressed today are my own and do not necessarily represent the views of the Federal Trade Commission or any Commissioner. Although she was unable to be here today, I want to give a special thanks to Devin Domond for assisting in preparation of these remarks.

NAD's efforts to address the numerous competitor and consumer complaints about deceptive and unsubstantiated national advertising, and not-to-forget NAD's self-initiated proceedings, that your program handles each year.

I also would like to congratulate and welcome the new CARU Director, Ms. Dona Fraser. I believe Ms. Fraser's expertise in children's privacy issues and years of experience with self-regulation from serving with the Entertainment Software Ratings Board will make her a valuable asset to the CBBB's self-regulatory community.

Acting Chairman Ohlhausen and I are looking forward to working with both of you and continuing to provide support to your self-regulatory programs in any way that we can. We hope to have continued discussions on how the Commission and your programs can increase our collaborative efforts to tackle deceptive advertising in the nation's marketplace.

II. Bureau of Consumer Protection Advertising Enforcement Agenda

I understand that you will hear from Associate Director for Advertising Practices, Mary Engle, later today. I am sure she will welcome any questions you may have that involve her Division's review of NAD or other self-regulatory referrals and factors in determining whether to recommend FTC enforcement action.

What I plan to focus on this morning first is how the FTC is applying Acting Chairman Ohlhausen's positive consumer protection agenda in the context of national advertising. The three elements I will highlight are: (1) promoting and supporting self-regulation; (2) increasing guidance for advertisers – especially small businesses – by, for example, establishing ground rules for new advertising techniques; and (3) focusing on protecting consumers who may be particularly vulnerable or may have been ignored – by fighting unfair and deceptive advertising

targeting critical consumer audiences. These elements provide critical guidance and direction in the Bureau of Consumer Protection's national advertising enforcement agenda. I want to finish my remarks with some observations about how I think that the Commission should approach national advertising enforcement at a time when the agency is focused primarily on fighting fraud.

A. Promoting/Supporting Industry Self-Regulation

First, let's talk about something dear to all of our hearts – the importance of promoting industry self-regulation – the hard work that all of you do every day. The FTC continues to emphasize that together, industry self-regulation and appropriate government oversight provide valuable efficiencies and benefits.

Self-regulation benefits industry because it allows industry to develop solutions that conform to actual industry practices. It also permits industry to move more quickly in response to changes in dynamic markets and technologies than ordinarily would be possible through government legislation, rulemaking, or enforcement.

Government agencies such as the FTC also benefit greatly from industry self-regulation. Self-regulation can be a very effective tool for addressing problematic conduct, thereby freeing up the FTC to focus its attention and scarce resources on more egregious conduct that causes substantial consumer harm.

Most importantly, industry self-regulation benefits consumers. When industry can halt false or misleading claims early through a self-regulatory process, it reduces the risk that these claims will cause harm to consumers or competition. Moreover, rigorous and clear self-regulatory standards and guidance provided to industry prevents harm to consumers.

When the FTC Bureau of Consumer Protection supports industry self-regulation, it gives bite to self-regulation's bark. The FTC's role in connection with industry self-regulation is to carefully review every self-regulatory referral we receive and recommend enforcement actions in appropriate cases.

When reviewing self-regulatory referrals, BCP staff's first goal is to encourage advertisers to avail themselves to the industry's self-regulatory processes. In the past two years, FTC staff has resolved nearly a dozen NAD referrals simply by contacting the companies and encouraging them to work with the NAD to bring their advertising into line with NAD's recommendations and industry standards without the need to recommend further FTC action.[2]

Although sometimes it may require FTC staff to engage in more substantive discussions to help guide companies into making sure that their advertising does not violate the FTC Act, FTC staff often encourages the companies to make changes similar to those that the NAD or other self-regulatory programs recommended.

For example, earlier this year, in response to an NAD referral about NexGrill Industries, Inc.'s performance claims for its Evolution Infrared Plus Grill and representation that the grill used "patented" heat plates, FTC staff met with company representatives to discuss the claims challenged by NAD. Following multiple discussions with FTC staff, NexGrill discontinued the claim that its heat plates were patented, instead referring to "patent pended" technology. In

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[2] Resolution of Referrals From the National Advertising Division (NAD) of the Council of Better Business Bureaus (Oct. 8, 2015 resolution letter to date), https://www.ftc.gov/enforcement/cases-proceedings/closing-letters-and-other-public-statements/resolution-of-referrals-from-nad.

addition, NexGrill agreed to modify or discontinue certain product performance claims to ensure that its claims do not overstate its testing results, such as agreeing to replace claims that the grill "eliminates" flare-ups to "decreases" or "reduces" flare-ups.[3]

In the uncommon circumstances where industry self-regulation and limited government involvement fails, the FTC may need to take enforcement action. Due to limited resources and enforcement priorities, the Commission cannot pursue All NAD referrals. However, to the Commission FTC staff is committed to recommending enforcement actions where appropriate against advertisers following referrals from advertising self-regulators.

For example, after COORGA Nutraceuticals Corporation refused to participate in NAD's process, the FTC sued the company and its principal in federal district court for making false and deceptive claims that their dietary supplement could reverse and prevent gray hair.[4] On summary judgment, the court issued an order requiring COORGA and its principal to pay over $391,000, and prohibiting them from making similar claims in the future without competent and reliable scientific evidence.

If the Commission serves as a regulatory backstop when industry self-regulation fails, it sends a strong message to advertisers that they should take compliance with industry self-regulatory standards very seriously. Under Acting Chairman Ohlhausen's positive consumer protection agenda, the FTC is firmly committed to continuing to serve as such a backstop.

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[3] Letter from Devin Willis Domond, Chief of Staff for Advertising Practices, to Andrea C. Levine, Esq., Senior Vice President, Director, National Advertising Division (Apr. 14, 2017), https://www.ftc.gov/system/files/documents/public_statements/1213483/nexgrill_resolution_letter_4-24-17.pdf.

[4] *FTC v. COORGA Nutraceuticals Corp.*, 2:15-cv-00072-SWS (D. Wyo. Sept. 12, 2016) (final order), https://www.ftc.gov/system/files/documents/cases/160923coorgajudgment.pdf.

Increasing Guidance for Advertisers – Establishing Ground Rules for New Advertising Techniques

A second element in Acting Chairman Ohlhausen's positive consumer protection agenda is increasing guidance for advertisers, including through making sure that we establish clear ground rules for businesses with the development of new advertising techniques – such as today's influencer marketing.

Guidance ensures that companies who legitimately want to comply with the law can do so. Not only does this save businesses time and money, but it conserves FTC resources as well. Issuing guidance to bring companies into compliance is far less expensive than the litigation costs of bringing enforcement actions against multiple companies for similar violations.

1. Recently Clarified Guidance to Help Businesses Understand How Already Existing Guidance Applies to New Advertising Techniques – Marketing through "Influencers"

Last month, the FTC announced its first enforcement action against individual social media influencers. Our administrative complaint in the *CSGOLotto* case challenged two popular influencers in the online gaming community who deceptively endorsed their online gaming service without disclosing that they owned the company. CSGOLotto's owners also paid other well-known influencers thousands of dollars to promote their site in social media posts without requiring them to disclose that they were paid.[5] When announcing the Commission's complaint and proposed consent agreement, Acting Chairman Ohlhausen said the case should

[5] *CSGOLotto, Inc.*, FTC File No. 162-3184 (consent agreement accepted for public comment Sept. 7, 2017).

"send a message that such connections must be clearly disclosed so consumers can make informed purchasing decisions."[6]

The FTC is committed to helping businesses better understand how to avoid misleading consumers and clarify how already existing FTC guidance on endorsements applies to new advertising techniques, such as "influencer" marketing. Simultaneous with its CSGO Lotto announcement, the Commission issued updated endorsement guides FAQs that provide more specific advice for social media influencers and marketers.[7] The principles are not new or different – the updated FAQs simply further explain how the FTC's Endorsement Guides[8] apply to newer advertising techniques. The updated FAQs include more than 20 additional questions and answers about whether and how social media influencers should disclose material connections in their posts to avoid misleading consumers.

In areas involving new advertising techniques, like influencer marketing, the Division of Advertising Practices has also been providing guidance through educational or warning letters to marketers and businesses to make sure they understand their legal obligations under the FTC Act.

You might recall that this past April, the Division of Advertising Practices sent educational letters to more than 90 social media influencers and brands regarding their

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[6] "CSGO Lotto Owners Settle FTC's First-Ever Complaint Against Social Media Influencers," FTC Press Release, Sept. 7, 2017, https://www.ftc.gov/news-events/press-releases/2017/09/csgo-lotto-owners-settle-ftcs-first-ever-complaint-against.

[7] "The FTC's Endorsement Guides: What People are Asking," https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking.

[8] FTC Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 CFR Part 255.

Instagram posts. The letters reminded recipients that influencers should clearly and conspicuously disclose their relationships to brands when promoting or endorsing products through social media. Some of the educational letters even provided useful examples on how to (and how not to) appropriately disclose such information. For example, some letters addressed the problem with particular disclosures that are not sufficiently clear; explaining that many consumers do not understand disclosures like "hash tag (#)sp" or "Thanks" – and then the brand name – as meaning a social media post is sponsored.

Staff now has sent warning letters to 21 of the social media influencers it contacted earlier this year. In addition to citing specific social media posts of concern in the warning letters, the letters ask recipients to advise FTC staff as to whether they have material connections to the brands identified in the posts. If so, the letters ask what actions they plan to take to ensure all their posts endorsing or promoting products of brands with which they have material connections clearly and conspicuously disclose their relationships. Having previously received educational letters, these warning letters serve as further caution to marketers and influencers. They also send a strong message to the advertising industry that already existing legal obligations – like an advertiser's duty to clearly disclose material connections to the endorsers it uses– continue despite new and dynamic advertising techniques.

2. FTC Business Center Webpage and Business Blog

The FTC maintains a Business Center webpage[9] that, among other things, has an advertising and marketing page with links to FTC guidance on topics such as advertising basics,

[9] https://business.ftc.gov.

online advertising tips, marketing to children, endorsements, and health claims.[10] For example, under the topic advertising and marketing basics, businesses and other advertisers can find the FTC's Endorsement Guides[11] and FAQs to which I just was referring. Another helpful guide linked through the same advertising and marketing basics page is an advertising guide geared to small businesses, called "Advertising FAQ's: A Guide for Small Businesses." This guide provides an A to Z primer on federal truth-in-advertising standards.[12] Other frequently visited FTC guides available through the Business Center's advertising and marketing page include our "Complying with the Made in USA Standard" guide, which offers practical tips to help marketers understand how to comply with legal obligations as set forth in the FTC's Enforcement Policy Statement on U.S. Origin Claims.[13] Our guide "Advertising and Marketing on the Internet: Rules of the Road," found on the same Business Center page, gives pointers on understanding how rules that apply to other forms of advertising also apply to electronic marketing. Businesses can find FAQs on COPPA[14] on the advertising and marketing Business Center webpage, additional practical tips on making effective disclosures online in

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[10] https://www.ftc.gov/tips-advice/business-center/advertising-and-marketing.

[11] https://www.ecfr.gov/cgi-bin/text-idx?SID=70106629982253042 1fece37367c91d3&mc=true&node=pt16.1.255&rgn=div5.

[12] https://www.ftc.gov/tips-advice/business-center/guidance/advertising-faqs-guide-small-business.

[13] https://www.ftc.gov/public-statements/1997/12/enforcement-policy-statement-us-origin-claims.

[14] "Complying with COPPA: Frequently Asked Questions," revised in 2015, https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions.

our well-known "[Dot] .com Disclosures: How to Make Effective Disclosures in Digital Advertising"[15] guide, and truth-in-advertising and privacy advice for businesses developing apps.[16]

Spearheaded by the incomparable Lesley Fair, in our Division of Consumer and Business Education, who you will hear from tomorrow, the FTC also hosts a business blog that discusses recent FTC decisions and frequently posts information to guide businesses in complying with the law.[17] Companies can subscribe to blog posts through FTC business center webpage on business.ftc.gov. The FTC currently has 65 thousand daily subscribers – plus thousands more who read it directly on business.ftc.gov.

3. Other Business Outreach and Guidance

Periodically, FTC staff will provide other outreach to businesses to provide instruction on understanding their legal obligations. For example, the FTC has hosted Twitter chats to give tips after announcing certain FTC decisions. After the CSGO Lotto announcement and influencer warning letters, FTC staff held a Twitter chat to address a range of questions surrounding social media influencers and disclosures they must make if they have a material connection to a brand they post about.

Another useful tool for businesses is our Endorsements Mailbox – endorsements@ftc.gov. Consumers and businesses can email FTC staff any questions they would like staff to address

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[15] https://www.ftc.gov/tips-advice/business-center/guidance/com-disclosures-how-make-effective-disclosures-digital.

[16] "Marketing Your Mobile App: Get It Right from the Start," https://www.ftc.gov/tips-advice/business-center/guidance/marketing-your-mobile-app-get-it-right-start.

[17] https://business.ftc.gov/blog.

about endorsements and can expect a timely, meaningful response. This is especially useful for influencers and other small businesses who can't afford to hire pricey lawyers like many of you here today!

4. Future Business Guidance Activities

We anticipate updating and expanding the business guidance we provide to national advertisers and others. For example, the FTC has heard industry concerns that our Dietary Supplement Guides, now nearly 20 years old, need to be updated. We also have heard industry concerns that our Green Guides also need to be updated. We have received requests for business guidance on many other topics. Under Acting Chairman Ohlhausen, we are committed to working with industry and other stakeholders to provide guidance that will promote compliance with the law. Business guidance, especially updating and expanding comprehensive guidance documents, often is a major undertaking for the agency. We are in process of determining what documents and issues we need to make a priority so we can allocate our work to the guidance topics that will have the most impact. So, more guidance from the FTC will be coming, but it will take some time before it arrives on the many, many topics on which industry believes it would be helpful.

B. Fighting Unfair and Deceptive Advertising Targeting Critical Consumer Audiences

The final element in Acting Chairman Ohlhausen's positive consumer protection plan that I want to discuss, which is critical to the Bureau of Consumer Protection's national advertising enforcement agenda is, fighting unfair and deceptive advertising that targets critical consumer audiences – consumers who may be particularly vulnerable or may have been ignored.

1. Older Americans

Given the size of the baby boom generation, it's no surprise that we are finding more and more marketers catering to that demographic. While informing these consumers about products that may help their health may be beneficial, the Commission is concerned when advertisers do so through false, misleading, or unsubstantiated claims. The market is replete with products advertised to improve memory and ward off cognitive decline, and to relieve joint pain and arthritis symptoms.

Last month, the FTC settled with the final 3 of 9 defendants that it sued in February, with the Maine Office of the Attorney General, regarding false and unsubstantiated claims that CogniPrin and FlexiPrin dietary supplements improved memory and reduced back and joint pain, respectively. The FTC's complaint also alleged that purported medical experts featured in ads endorsed the products without exercising their supposed expertise, and one such supposed expert failed to disclose that he was paid a percentage of the products' sales. The FTC further charged the advertising agency and its owner for using deceptively formatted radio infomercials, print ads with fictitious endorsers, and other unlawful marketing tactics to advertise the supplements.[18] In addition to strong injunctive relief, some of the orders impose a $6.5 million monetary judgment, with all but $556,000 suspended due to the defendants' financial condition.[19]

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[18] *FTC v. XXL Impressions LLC,* No. 1:17-cv-00067-NT (D. Me. complaint filed Feb. 22, 2017).

[19] *Id.* (3 stipulated orders filed Mar. 10, 2017 and 2 stipulated orders filed Aug. 23, 2017).

At the beginning of this year, the FTC filed a lawsuit against the makers of Prevagen, a dietary supplement widely advertised as clinically shown to improve memory in just 90 days.[20] This follows last year's FTC settlement with the marketers of Lumosity, a computer game advertised for a variety of cognitive benefits, including staving off dementia and Alzheimer's. In addition to requiring adequate science to back up future claims, the settlement ordered Lumosity to pay $2 million in consumer refunds.[21]

One year ago this week, the FTC settled a complaint against the sellers of Supple, a liquid supplement product misrepresented as providing complete relief from chronic and severe joint pain caused by arthritis and fibromyalgia.[22] The company agreed to a court order requiring scientific evidence to support any future claims and imposing a $150 million judgment, most of which was suspended based on the defendants' inability to pay.

2. Rural Areas

Unfortunately, the nation's opiate addiction crisis has led fraudsters trying to take advantage of public health scares and sometimes ignored or forgotten consumers in rural areas. Although drug use typically is thought of as an urban issue, in reality, death and injury from nonmedical prescription opioid abuse is more commonly found in rural areas than

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[20] *FTC v. Quincy Bioscience Holding Co.,* No. 1:17-cv-00124 (S.D.N.Y. complaint filed Jan. 9, 2017).

[21] *FTC v. Lumos Labs,* No. 3:16-CV-0001-WHO (N.D. Cal. Jan. 8, 2016).

[22] *FTC v. Supple LLC,* No. 1:16-cv-1325 (E.D. Wis. Oct. 4, 2016).

cities.[23] Rural areas have a larger percentage of people abusing prescription pain relievers, but may have fewer resources available to deal with addiction.

In *Sunrise Nutraceuticals, LLC,* The FTC charged the marketers of Elimidrol – a powder containing vitamins, minerals, and herbs – for making false and misleading claims that their product alleviated opiate withdrawal symptoms and increased users likelihood of overcoming opiate addiction.[24] Our settlement order requires the company to have competent and reliable scientific evidence to back up claims for opiate-treatment products, bars deceptive claims for any health-related products, and imposed a monetary judgment of $235,000.

3. "Made in USA" Consumers

In addition to helping ensure that consumers can rely on claims involving their health or safety, the Commission is working to protect patriotic consumers who rely on claims that a product is made in the USA. As evidenced by the numerous closing letters on our website, the Commission reviews a large number of made in America claims, and most of the time when we find relatively small or inadvertent violations that are quickly corrected, we will close the matter without taking formal action.

In egregious cases, however, the agency will not hesitate to insist on an order. For example, in March, the Commission obtained an administrative settlement against a

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[23] *E.g.*, Katherine Keyes et al., "Understanding the Rural-Urban Differences in Nonmedical Prescription Opioid Use and Abuse in the United States" *American J. of Pub.Health: Promoting Public Health Research, Policy, Practice and Education*, v. 104(2), Feb. 2014, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3935688/.

[24] *FTC v. Sunrise Nutraceuticals, LLC,* No. 9:15-cv-81567 (S.D. Fla. Nov. 16, 2015).

distributor of pulley block systems who for years used imported steel plates that were stamped "Made in the USA" before entering the U.S. The order also resolved the FTC's allegations that the company misrepresented that its pulley blocks, other products, and the parts used to make them were all or virtually all made in the U.S. when, in fact, the pulley blocks and other products included significant imported parts essential to their function.[25]

Similarly, the Commission sought an order against the distributor of water filtration systems and parts claimed to be "[p]roudly built in the USA." In fact, in many instances, the products were wholly imported or made using significant amounts of imported materials.[26]

These cases reinforce our long-standing position that to make an unqualified Made in USA claim, all or virtually all of the product must have been made in America; otherwise, the claim must be qualified to indicate the amount or extent of domestic content or processing.

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[25] *Block Division, Inc.*, FTC Dkt. No. C-4613 (Apr. 12, 2017) (consent order).

[26] *iSpring Water Sys., LLC,* FTC Dkt. No. C-4611 (Apr. 6, 2017) (consent order).

III. Administrative Litigation in a Time of Fraud Fighting

At the heart of Acting Chairman Ohlhausen's positive consumer protection agenda is fighting fraud. This makes perfect sense – fraud unfortunately is prevalent, the injury to consumers is clear, and the FTC has become has extremely effective anti-fraud agency. The FTC can file actions in federal court under Section 13(b) of the FTC Act to stop or prevent any violation of laws enforced by the FTC. We use this authority to stop scammers in their tracks and obtain redress for injured consumers. Indeed, in the seven months I have been on the job, we have returned nearly $100 million to consumers. In many ways, fighting fraud is the FTC at its best.

But the FTC must continue to be much more than an agency that fights fraud in federal court if it is to fulfill its broader and intended consumer protection mission. The FTC has a critical role to play in using administrative litigation to protect consumers and competition through addressing deception that is not fraud. Many of the matters involve national advertising.

To explain this point, I think it helps to return to first principles. As many of you know, Congress empowered the FTC to enforce the prohibitions on "unfairness" and "deception" in the FTC Act while recognizing that these legal concepts were elastic. Congress intended that the Commission would develop the law as to the meaning of these legal concepts through administrative litigation before the Commission. In addition, Congress intended that the Commission would apply their expertise and experience to difficult and complicated issues of law and fact they would be better able to resolve than many district court judges.

Administrative litigation before the Commission has long performed this critical function. The FTC articulated its standards for deception in *Cliffdale,* deceptive and unfair omissions in *International Harvester*, substantiation in *Pfizer* and *Thompson Medical*, and corrective advertising in *Warner Lambert*. Even where FTC administrative decisions have not resulted in decisions developing FTC doctrine, the Commission has applied its experience and expertise to numerous difficult and complicated issues. And many of these seminal and critical FTC administrative cases have arisen in the context of national advertising.

Despite our understandable current emphasis on fighting fraud in federal court, I also believe that the FTC needs to be mindful not to neglect the pursuit of non-fraud cases in administrative litigation. Such an approach is consonant with Congress's intention that the FTC use administrative litigation to develop core consumer protection principles. It is also especially appropriate for the resolution of many of the issues that arise in national advertising. As you well know, difficult issues of claims construction often arise in national advertising cases, and these issues often are best suited for Commission resolution in administrative litigation. Similarly, many challenging issues of substantiation arise in national advertising cases and the Commission often is best suited to resolve these issues in administrative litigation, as seen most recently in *POM Wonderful*.

The relative speed of Section 13(b) actions and the availability of monetary relief in them provide powerful incentives for the FTC to choose a federal court rather than administrative litigation as a forum. Choosing federal court makes perfect sense in fraud cases. This includes cases in which the fraud arises from national advertising, such as false efficacy claims for a bogus cancer cure. But we need to resist the strong temptation to treat all

deception cases as fraud cases that are appropriate for resolution in Section 13(b) actions in federal court.

Over the course of my more than two decades working on consumer protection at the FTC, the pendulum has swung widely in how we approach consumer protection cases. When I started in the early 1990's, administrative litigation was the default and federal court litigation was the exception. Now, federal court litigation is the default and administrative litigation is the exception. This swing in the pendulum in many ways has served the public well as the FTC has become an increasingly effective fraud fighter. But in my view, the public and legitimate advertisers would be well-served if the FTC continues to consider and use administrative litigation as a vehicle to develop consumer protection law and resolve issues for which agency expertise and expertise are critical for proper resolution. In short, I think the pendulum should swing back a bit.

IV. Conclusion

Thank you again for your time and attention. I welcome any questions you may have.