

**National Advertising Review Council and Council of BBB's  
National Advertising Division Annual Conference  
"What's New in Comparative Advertising, Claim Support and Self-Regulation"**

**Keynote Speech of FTC Commissioner Julie Brill**

**October 4, 2010**

**Introduction**

Good afternoon. I'm so pleased to be here with you today. As most of you probably know, advertising issues are near and dear to my heart, and this conference is addressing so many interesting topics. I am delighted to be a part of the dialogue and to offer my thoughts on some of the important efforts underway at the FTC in the advertising arena.

I'd like to talk first a bit about the Commission's review of the Guides for the Use of Environmental Marketing Claims – otherwise known as the Green Guides. On Wednesday, October 6<sup>th</sup>, the FTC will be announcing its proposed revisions to the Green Guides. I'll talk today about why we've undertaken this important project, and offer my view of some of the highlights of the proposed revisions.

Next, I will turn to an issue of particular interest to many of you, I'm sure: the Commission's new order provisions in advertising substantiation cases, contained in recent consent orders in the *Nestle BOOST Kid Essentials* and *Iovate* matters. It might perhaps be a bit of an understatement to say that these provisions have generated a bit of buzz. I'd like to spend a few minutes discussing what they represent, what they don't represent, and why we're using them.

Finally, I will touch briefly on the recent revisions to the Commission's Endorsement and Testimonial Guides, and the FTC's much discussed recent enforcement action in this area.

**Proposed Revisions to the "Green Guides"**

First: the Green Guides. The Commission issued its first Guides for the Use of Environmental Marketing Claims in 1992, to advise marketers about how to make truthful and substantiated claims in promoting the "green" attributes of their products and services.<sup>1</sup> I think we can all agree that environmental marketing claims are useful sources of information for consumers – but only when those claims are true. Ensuring that the claims are truthful is particularly important in this area, because these claims are essentially "credence claims."<sup>2</sup> Consumers often cannot determine for themselves

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<sup>1</sup> 16 C.F.R. Part 260.

<sup>2</sup> On the topic of "credence goods and claims," see Muris, The Interface of Competition and Consumer Protection, Fordham Corporate Law Institute's 29<sup>th</sup> Annual Conf. on International Antitrust Law and Policy

whether a product, package, or service is recyclable, “made with renewable energy,” or possesses another environmental attribute that is being promoted. The Green Guides therefore play an important role in ensuring that consumers can make well-informed decisions about their choices, and that sellers fulfill their promises about the products they offer.

The Guides perform this important function by outlining general principles applicable to all environmental marketing claims, and also by providing specific guidance regarding particular green claims. We advise marketers about how reasonable consumers are likely to interpret certain claims, how marketers can substantiate these claims, and how marketers can qualify them to avoid consumer deception.

The Commission last revised the Green Guides in 1998. Twelve years later, you can’t watch television or go to the grocery store without seeing advertising claims for products that are “eco-friendly” or “green.” The sheer number of these claims is staggering, and we find them across a very broad array of products. No doubt this is a result of a heightened awareness of environmental concerns among consumers, many of whom place an increased importance on buying products and services that will cause less harm to the environment. As such, the Guides are probably more relevant to today’s advertising landscape than ever before, and that’s why the Commission’s current review is so important – and such a substantial undertaking. And here, I want to congratulate and commend the staff who did such an extraordinary job on this project: Jim Kohm, of course, and his team, including Laura Koss and Laura DeMartino.

Responding to the veritable explosion of “green” claims in the marketplace, as well as evolving consumer perceptions about those claims, the Commission began its current review of the Guides a year earlier than originally planned. We conducted three public workshops to explore emerging environmental marketing claims. These workshops brought together more than 450 people representing industry, government, consumer groups, the academic community, and non-profit environmental organizations. We also asked for public comments, and received 200 in total throughout the review process.

In addition, as Jim described this morning, we commissioned an extensive consumer perception study to provide us with additional information on how consumers interpret various types of environmental claims. The consumer perception study tested general environmental claims such as “green” and “eco-friendly,” as well as claims about specific attributes such as:

- “degradable”
- “made with renewable materials”
- “made with renewable energy,” and
- “made with recycled materials.”

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(2002), *citing* Darby & Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J. LAW & ECON. 67 (1973).

The study also explored consumer understanding of “carbon offset” and “carbon neutral” claims.

The workshops, public comments, and consumer perception study generated a substantial amount of evidence that was very instructive. What we have learned is that the Green Guides have benefitted consumers and businesses, but they should be updated to better reflect the types of claims being made, the science behind such claims, and consumers’ understanding of the claims.

The proposed revisions to the Green Guides that will be announced on Wednesday will strengthen, add specificity to, or improve the utility of the current guidance. We will also propose adding new guidance on emerging claims that are not addressed in the current Guides.

This morning you all heard Jim Kohm preview some of the areas where we propose revisions. I’d like to highlight a few areas of particular interest to me and I think to consumers, businesses and advertisers.

One notable revision stems from evidence in our consumer perception study regarding consumers’ understanding of unqualified general environmental benefit claims, such as “environmentally friendly” or “eco-friendly.” The study demonstrates that such claims are likely to convey specific and far-reaching environmental benefits – for example, that an “eco-friendly” product is:

- made from recycled materials,
- recyclable itself,
- biodegradable, and
- non-toxic, among other things.

But very few products – if any – have all of the attributes that consumers perceive from these general, unqualified claims, and so the unqualified claims are virtually impossible to substantiate. Based on this evidence, the Commission will propose to strengthen the current guidance to caution marketers not to make unqualified general environmental benefit claims.

However, we also learned that advertisers may be able to effectively qualify their general claims to focus consumers on the specific environmental benefits that marketers *can* substantiate. Therefore, the proposed, revised Guides will provide more prominent guidance on how to adequately qualify claims about general environmental benefits.

The proposed new Guides will also have a new section that addresses the use of certifications and “seals of approval.” I am probably stating the obvious when I point out that the use of certificates and seals of approval in environmental advertising has become pervasive, and that such symbols can be intended to convey any number of meanings to consumers. For example, they can symbolize a certification issued by some third-party, or merely represent that the product meets some standard developed by the marketer

itself. They can refer to a specific environmental attribute of a product, or a number of attributes. There is plenty of room for consumer confusion in this area.

So what marketers need to remember – and what this proposed new section will emphasize – is that these certifications and seals are considered endorsements and should therefore meet the criteria for endorsements set forth in the FTC’s Endorsement Guides.<sup>3</sup> Advertisers will be reminded, for example, that it is deceptive to represent that a product or service has been endorsed or certified by an independent third-party organization when that is not the case.

Advertisers will also be reminded that the use of a certification or seal may, *by itself*, imply a general environmental benefit claim – and, because such general claims are so difficult to substantiate, we will advise marketers not to use unqualified seals or certifications. Instead, marketers should accompany seals or certifications with clear and prominent language limiting the general environmental benefit claim to the particular attributes that can be substantiated.

The proposed revisions to the Green Guides will also address claims that are newer to the marketplace – such as “made with renewable materials” and “made with renewable energy.” These proposals are driven by consumer perception evidence that indicates confusion and a potential for deception with respect to “made with renewable materials” and “made with renewable energy” claims. We will recommend that advertisers *qualify* these claims, by providing context such as specific information about the materials and energy used, to make clear the precise contours of the environmental benefits being touted and reduce potential consumer misperceptions.

Our goal for the Green Guides revisions is to provide better, *evidence-based* guidance to help advertisers navigate these tricky waters.

So, what’s next? Now, we’d like to hear from you. We invite you to comment on all of the issues raised in the revised Guides to be released on Wednesday. We will also pose a number of specific questions about which we are particularly eager to hear your views. And we are particularly eager to hear about any relevant consumer perception data you may have. We really mean that. It will be most useful to us in considering your comments if they are linked to data we can evaluate.

We want our proposed revisions to the Green Guides to provide useful, updated guidance to marketers. There are limits, of course, to what we know – and what we can test – about consumer understanding of the vast array of environmental benefit claims in the marketplace. But we have endeavored to make our best judgments, based on the information available to us, and we look forward to your review and input.

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<sup>3</sup> 16 C.F.R. Part 255.

## **New Advertising Substantiation Order Provisions**

Now I'd like to turn to another hot topic – the Commission's new order provisions in advertising substantiation cases. I'm sure many of you have heard about them. They appear in our recent settlements in the *Nestlé BOOST Kid Essentials* and *Iovate* cases.<sup>4</sup>

The substantiation requirements are designed to provide greater clarity to the companies and individuals that need to comply with the orders, and to improve the enforceability of the orders. Briefly stated, these orders require the companies to comply with more specific and tailored substantiation requirements for certain types of health claims going forward.

Now, some folks have said that the language in these orders represents a shift toward a stricter and more rigid substantiation standard. They contend it is a departure from existing policy as articulated in the FTC's Substantiation Policy Statement<sup>5</sup> and from settled law – namely, the *Pfizer* case.<sup>6</sup>

But that is simply not the case. The Commission has *not* changed its fundamental approach to determining whether advertising claims are substantiated by competent and reliable scientific evidence in the first instance. That's right, I'm here to tell you that reports of *Pfizer's* demise are greatly exaggerated. In fact, *Pfizer* is alive and well.

Let me give you an example. In the *Nestlé* matter, the Commission investigated claims that the company made for its "BOOST Kid Essentials" product, including that the product will reduce children's sick-day absences from school. Under the *Nestlé* order, the company may not claim that its BOOST Kid Essentials product will reduce children's sick-day absences, unless the claim is true and substantiated by at least two well-designed human clinical studies. This provision is based on expert opinion about the level of substantiation needed to support this particular claim for this particular product. The order provision does not represent a departure from *Pfizer* but is in fact an application of *Pfizer* to the claim at issue. And what this provision really does is provide more transparency to the company as to what "competent and reliable scientific evidence" means for this claim, for this product, going forward. We think that is a good thing for everyone.

With respect to the provisions requiring FDA approval of certain claims, this requirement is being applied only as fencing-in, in the context of specific orders where the FTC has determined that respondents have already made unfounded disease treatment or prevention claims – for example, that *Iovate's* dietary supplements treat or prevent colds or flu. Of course, if the companies made such claims in labeling, the product would

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<sup>4</sup> See *Nestlé HealthCare Nutrition, Inc.*, FTC File No. 092-3087 (consent order accepted for public comment); *FTC v. Iovate Health Sciences USA, Inc.*, No. 10-CV-587 (W.D.N.Y.) (2010) (Stipulated Final Order).

<sup>5</sup> FTC Policy Statement on Advertising Substantiation, *appended to Thompson Medical Co.*, 104 F.T.C. 648, 839 (1984).

<sup>6</sup> *In the Matter of Pfizer, Inc.*, 81 F.T.C. 23, 64 (1972).

be misbranded and unlawful in interstate commerce under the Food Drug and Cosmetic Act – so, extending that principle to other forms of advertising is not really much of a stretch and should not impose any additional substantiation burden on the companies under order.

I also want to emphasize that the requirement in the *Nestlé* and *Iovate* orders that certain disease and other health claims be approved by FDA is, in fact, quite consistent with long-standing Commission policy as articulated in our 1994 Food Advertising Policy Statement. Our 1994 Policy Statement made clear that the FTC generally expects unqualified health claims for foods and dietary supplements to be backed by the FDA’s standard for a “significant scientific agreement” level of support. Specifically, the Policy Statement says that the Commission regards “the ‘significant scientific agreement’ standard, as set forth in the Nutrition Labeling and Education Act and the FDA’s regulations, to be the principal guide to what experts in the field of diet-disease relationships would consider reasonable substantiation for an unqualified claim.”<sup>7</sup> And the Commission imposed the requirement that, for particular claims, clinical trials would be needed as part of the requisite substantiation as far back as the 1980s and 1990s.<sup>8</sup>

Finally, I want to be clear that, even for a marketer that is required by order to have FDA pre-approval for certain claims going forward, there is still some room for making *qualified* claims that would not be subject to that requirement. For example, the marketer could try to craft an advertising claim that characterizes limited scientific evidence supporting a relationship between a covered product and a particular disease. If the marketer can show – through reliable empirical testing – that the ad’s net impression does not also convey the *unqualified* disease claim, then FDA approval would not be required. Now, I must admit, I believe that it is very difficult to adequately qualify a disease claim in this way, but if the marketer can show that consumers take away only the qualified claim, then the claim would be allowed, subject, of course, to other provisions in the order.

Consumers are increasingly health conscious – which is a very good thing – and would like to find foods and dietary supplements that can provide additional health benefits. Companies are appropriately responding to this consumer demand by making large investments in research to develop products that have a beneficial health impact.

As a result, it will be useful to businesses as well as consumers to have a clear understanding of how the Commission will use these new order provisions. We will use these new provisions on a case-by-case basis, depending on the nature of the challenged

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<sup>7</sup> See FTC Enforcement Policy Statement on Food Advertising, Section IV.A. See also, Dietary Supplements: An Advertising Guide for Industry (FTC 2001), Section II.B., available at <http://www.ftc.gov/bcp/edu/pubs/business/adv/bus09.shtm> (“Where there is an existing standard for substantiation developed by a government agency or other authoritative body, the FTC accords great deference to that standard.”).

<sup>8</sup> E.g., *Thompson Medical Co.*, 104 F.T.C. 648 (1984); *In the Matter of Novartis, Corp.*, FTC Docket No. 9279 (1999).

claims and what our experts tell us is appropriate substantiation for the claims at issue. We believe that these provisions will facilitate order compliance by providing clearer guidance to companies about the precise level of substantiation required going forward, depending on the type of health claim and the type of product at issue.

### **Endorsement Guides & Reverb Settlement**

Finally, I'd like to return briefly to the world of "Guides" – but this time, to the Commission's Guides on Endorsements and Testimonials in Advertising.<sup>9</sup> It was, coincidentally, just about one year ago that the FTC announced its final revisions to the Endorsement Guides. This was the first update since 1980 and, needless to say, the world of advertising has changed a lot in the past 30 years. As we saw earlier today, there has been an explosion in online advertising. We are seeing endorsements and testimonials in new contexts – particularly on social networks and in blogs – that consumers have not previously thought of as "advertising." It was time to update the Guides to make clear how our traditional rules of the road apply in these new online spaces.

You may recall that some of the revisions set Madison Ave and the blogosphere buzzing. It's true that the revised Endorsement Guides contain some new ideas; they also extend settled advertising principles to newer forms of marketing. Many of these important revisions respond to changes in technology and advertising. Some revisions also respond to research on consumer perception of advertising containing testimonials.

I'd like to highlight four key revisions in the Endorsement and Testimonial Guides that I think all advertisers should know about.

First, payments by advertisers to bloggers and other endorsers in new social media must be disclosed. Now, it has always been the law that a material connection between the endorser and the marketer must be disclosed. Such a connection exists when an endorser has been paid or given something of value to tout the marketer's product, or an ad features an endorser who is a relative or employee of the marketer. This connection must be disclosed if consumers would not reasonably expect such a connection.

The reason for this requirement is, I hope, obvious – a material connection between the endorser and advertiser is important information for consumers who are trying to evaluate the endorsement.

Let's say you are planning a vacation. You do some online research and find a glowing review on someone's blog – a certain resort is the most luxurious place the blogger has ever stayed and she highly recommends it. Now, if you knew that the hotel had *paid* that blogger to say great things – or that the blogger had stayed there for a week for free – it naturally could affect the weight you give her endorsement. So, the Endorsement Guides now make clear that material connections must be disclosed, regardless of the marketing medium. Of course, not all situations will be as clear cut as

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<sup>9</sup> 16 C.F.R. Part 255.

the example I just gave, and the Commission will carefully evaluate the relevant facts in each case.

Second, payments for celebrity endorsements must be disclosed if the payments aren't reasonably expected by consumers. The revised Endorsement Guides contain new examples of situations in which consumers might not be aware of a connection between a celebrity endorser and an advertiser, and where disclosure is therefore appropriate – for example, a celebrity discussing a product in a promotional way during a talk show interview or on Twitter. In short, if the celebrity is being paid to speak publicly about the product, and consumers would not otherwise be aware of her connection to the advertiser, she should disclose it.

Third, the revised Guides now clarify that both advertisers and endorsers may be liable for failing to disclose material connections, and for false or unsubstantiated claims made through endorsements. These principles apply in the context of traditional advertising as well as in newer contexts such as talk show interviews or social media. And the revised Guides encourage advertisers to take a proactive approach with respect to endorsements – by implementing policies and practices to inform their endorsers of their rules, monitoring their endorsers, and taking steps to correct any deceptive claims or undisclosed material connections. Of course, liability will always be determined on a case-by-case basis, considering all the relevant facts and circumstances.

Finally, the Guides now provide that advertisements that feature a consumer endorser – and that convey a message that the consumer's experience with the advertised product or service is "typical" – must clearly and conspicuously disclose what *other* consumers can generally expect to experience, if that is different from the featured consumer's experience. And, the Guides make clear that disclaimers such as "Results not typical" are not sufficient to cure potential consumer deception and therefore no longer provide a safe harbor. The Commission made this modification after analyzing relevant consumer research, including two studies commissioned by the FTC that examined whether ads with consumer testimonials conveyed to consumers that they would achieve similar results to those portrayed, and whether certain disclosures affected the messages conveyed. In short, advertisers now have two options: they can either have adequate proof to back up the claim that the results depicted in an ad are typical, *or* they can disclose, clearly and conspicuously, the generally expected performance of the product or service under the circumstances depicted in the advertising.

Although our revisions initially seemed to cause some agita in some quarters, I think it's safe to say that the concerns expressed have not been borne out. The Commission's first enforcement action after the revisions was the *Reverb* settlement, announced at the end of August. *Reverb* is a public relations agency that was hired to promote video games. In exchange for its services, the company often received a percentage of the sales of each game. One promotional strategy the company used was having its employees pose as ordinary consumers and post positive reviews of the games at the online iTunes store – without disclosing that the reviews came from paid employees working on behalf of the game developers. We alleged that this information



would have been material to consumers reviewing the iTunes posts in deciding whether or not to buy the games.

The *Reverb* settlement confirmed what we said when we announced the revised Guides – that our well-settled truth-in-advertising principles apply to new forms of online marketing. We expect – and the law demands – the same transparency in online marketing as in offline marketing. In either context, it is deceptive for an advertiser to pass itself off as an ordinary consumer promoting a product, and it is deceptive for an endorser to conceal the fact that he or she has a material financial connection to the product seller.

I think the revisions to the Commission’s Endorsement Guides provide important new and expanded guidance to advertisers across the vast array of marketing media, including new media like social networks and blogs. I am confident that industry will put the new Guides into practice.

Thanks so much for your attention this afternoon. I’m happy to answer any questions you might have.