



# Federal Trade Commission

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## National Advertising Division 2018 Annual Conference

**Remarks of Andrew Smith<sup>1</sup>**  
**Director, Bureau of Consumer Protection, FTC**

**New York, NY**  
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### **I. Introduction**

I want to thank the NAD and Lee Peeler for inviting me to speak today about the Federal Trade Commission's national advertising priorities now that almost all our Commissioners are in place – with our final Commissioner set to join us tomorrow. This morning gives me the opportunity to say hello as the Bureau of Consumer Protection's new Director, look back on another active year in national advertising, and share what I expect we can see as the Commission moves forward to ensure that advertising is truthful and non-deceptive, injured consumers are made whole, and companies are deterred from violating the law.

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<sup>1</sup> The views expressed here are my own and do not necessarily represent the views of the Federal Trade Commission or any Commissioner. Thanks to Devin Domond for assisting in the preparation of these remarks.

One thing that remains the same regardless of who is at the Commission, is the FTC's support of self-regulation in advertising and the high regard given to the Council of Better Business Bureaus' programs, like the NAD, as national advertising enforcement models. We thank you for your hard work and continued partnership in protecting consumers.

## **II. FTC Enforcement Priorities and Self-Regulation Support**

I am sure you are interested in hearing about the present Commission's enforcement priorities in regard to national advertising, so I will begin there. First, you may be surprised to know that our priority enforcement areas have not changed with the changing of the guard. What may be an even bigger surprise is the recently announced priorities of the Chairman and some Commissioners to vigorously enforce consumer protection laws and broaden available remedies to address FTC Act violations. I will talk a bit about all of these priorities.

### **a. Disease, Weight Loss, and Other Health Claims**

A big part of the FTC's advertising program has – and continues to be – a focus on deceptive health and safety claims. Policing these claims remain a top priority for the Commission. This includes claims that products improve diseases (such as cancer) or treat particular medical conditions (such as opioid addiction), claims that target older Americans (such as treating Alzheimer's and arthritis), or miraculous weight loss claims.

- **Opioid Addiction Treatment**

You may have seen the announcement regarding the warning letters that the FTC sent with the FDA this year to 11 marketers and distributors of opioid cessation products.<sup>2</sup> Our joint letters warned the targeted companies that they were marketing their products illegally with unauthorized drug claims, including unproven claims that the products would help in the treatment of opioid addiction and withdrawal.

With the growing opioid crisis, you can expect this to be an area in which the Commission will continue to be active.

- **Products Targeting Seniors**

We also will remain active in fighting deceptive advertising that targets seniors – our baby boomers – searching for treatments for serious diseases or other health conditions. As the market continues to overflow with dietary supplements, devices, or other products deceptively represented to combat aging or related diseases and ailments, the FTC will continue mop up the mess.

For example, in May, the FTC settled with the marketers of MSA 30X, a sound amplifier deceptively marketed as being “independently tested to help [consumers] hear up to 30 times better.” In addition to requiring adequate science to back up future claims

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<sup>2</sup> The Federal Trade Commission and the U.S. Food and Drug Administration Opioid Warning Letters (Jan. 24, 2018 and Jun. 12, 2018), <https://www.ftc.gov/ftc-fda-opioid-warning-letters>.

about any device, the settlement order imposed a \$47 million judgment against the defendants, including \$500,000 that the defendants paid for consumer redress.<sup>3</sup>

Earlier this year, the FTC settled with the marketers of purported “anti-aging” products – a pill called TA-65MD and a topical cream called TA-65 for Skin – that were advertised as reversing the effects of aging, including increasing bone density and reversing aging of the skin and eyes. The FTC’s final order prohibited the company from making similar claims in the future without scientific support and required the company to notify consumers who purchased the products within the past year and licensees who marketed the products to consumers about the FTC’s action.<sup>4</sup>

- **Weight Loss & Disease Claims**

Another top enforcement area that – like waistlines, unfortunately – does not seem to be receding is fighting deceptive weight loss claims. Last year, with the State of Maine, the FTC settled charges against Health Research Labs – a company that deceived consumers that their products could treat a variety of diseases and ailments targeting seniors – including arthritis, memory loss, and joint and back pain – and cause significant weight loss. The order banned the company from making “gut check” weight-loss claims that the

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<sup>3</sup> *FTC v. Global Concepts Limited, Inc.*, No. 0:18-cv-60990 (S.D. Fl. complaint filed May 2, 2018), <https://www.ftc.gov/enforcement/cases-proceedings/162-3225/msa-30x-sound-amplifier>.

<sup>4</sup> *Telomerase Activation Sciences, Inc.*, FTC File No. C-4644 (final order entered April 18, 2018), <https://www.ftc.gov/enforcement/cases-proceedings/142-3103/telomerase-activation-sciences-inc-noel-thomas-patton-matter>.

FTC has publicly advised are always false with respect to any dietary supplement, over-the-counter drug, or skin product.<sup>5</sup>

Also, last year, the FTC settled charges that dietary supplements promoted by three Florida-based companies could prevent or treat everything from HIV to high blood pressure and cause miraculous weight loss, including a loss of 2 pounds of weight a day or 100 pounds in 6 months. The companies in this case also were prohibited from making “gut check” weight loss claims in the future.<sup>6</sup>

#### **b. Endorsements**

Another Commission enforcement priority is challenging deceptive advertising tactics using paid endorsements or testimonials without disclosing material connections or fake endorsements or testimonials.

I do not want to talk too much about cases, because I know Lesley Fair will be discussing in more detail some of this year’s activities, but I would be remiss if I did not at least highlight some of the FTC’s allegations concerning inadequate disclosures for endorsements in a couple of the cases I just mentioned.

The FTC’s action involving the TA-65 anti-aging products also alleged that the company misrepresented that a segment it paid for on *The Suzanne Show* – hosted by none other than Suzanne Somers – was independent, educational programming instead of

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<sup>5</sup> *FTC v. Health Research Laboratories, LLC*, No. 2:17-cv-00467-JDL (D. Me. complaint filed Nov. 30, 2017), <https://www.ftc.gov/enforcement/cases-proceedings/152-3021/health-research-laboratories-llc>.

<sup>6</sup> *FTC v. NextGen Nutritionals, LLC, Anna McLean, and Robert McLean*, No. 8:17-cv-2807-T-36AEP (M.D. FL. complaint filed Jan. 9, 2018), <https://www.ftc.gov/enforcement/cases-proceedings/162-3176/nextgen-nutritionals-llc-anna-mclean-robert-mclean>

advertising. We also challenged the company for deceptively representing that consumer endorsers who received free products for their endorsements were independent users, expressing impartial opinions of the product.<sup>7</sup>

The FTC complaint I mentioned we filed with Maine against Health Research Labs challenged the company's egregious practice of styling their direct mail advertising as scientific journals featuring fictitious medical doctors and consumer testimonials. It should not surprise you that the Commission alleged that fake expert endorsements and fake consumer testimonials were deceptive.

### **c. Self-Regulation Support**

Another important national advertising priority of the Commission that I want to mention today is the Commission's efforts to support advertising industry self-regulation by programs like the NAD and other Council of Better Business Bureaus programs. I understand Mary Engle will discuss in more detail the Commission's role of backing up NAD's efforts by thoroughly reviewing matters the NAD refers to us, but I want to stress that the Commission continues to believe that effective self-regulation is a benefit to everyone. It helps remove deceptive claims that may injure consumers from the marketplace more quickly than may be possible through government enforcement or legislation and gives industry a forum to respond to marketplace changes.

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<sup>7</sup> *Telomerase Activation Sciences, Inc.*, FTC File No. C-4644 (final order entered April 18, 2018), <https://www.ftc.gov/enforcement/cases-proceedings/142-3103/telomerase-activation-sciences-inc-noel-thomas-patton-matter>.

We appreciate the NAD's referrals and are grateful for the industry's role in offering a voluntary forum to address national advertising practices, and we are disappointed when companies fail to participate. Companies should take heed that Commission staff is committed to reviewing NAD referrals and recommending enforcement actions where appropriate.

### **III. Other Priorities – Rethinking Remedies**

Now to a topic that I know is on some of your minds – the announcement that the FTC is rethinking the remedies it employs when companies have violated the FTC Act. I am sure you are wondering what new or little used remedies you might expect the Commission to start seeking.

I am sure many of you have read or heard about the Commissioner statements released in connection with three recent Made in USA settlements – specifically, a statement by Chairman Simons with Commissioner Slaughter and another by Commissioner Chopra. As background, the cases involved deceptive country-of-origin claims by a hockey puck seller by the name of Patriot Puck,<sup>8</sup> a sporting goods business,<sup>9</sup> and an online mattress company<sup>10</sup> who boldly claimed certain of their products were Made in the USA when they were not. The final order and the two proposed settlement

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8 *Underground Sports Inc.*, FTC File No. 1823113 (consent agreement accepted for public comment Sept. 12, 2018), <https://www.ftc.gov/enforcement/cases-proceedings/182-3113/underground-sports-inc-doing-business-patriot-puck-et-al>.

9 *Sandpiper of California, Inc.*, FTC File No. 1823095 (consent agreement accepted for public comment Sept. 12, 2018), <https://www.ftc.gov/enforcement/cases-proceedings/182-3095/sandpiper-california-inc-et-al-matter>.

10 *Nectar Brand LLC*, FTC No. C-4656 (final order entered Aug. 28, 2018), <https://www.ftc.gov/enforcement/cases-proceedings/182-3038/nectar-brand-llc>.

orders in these cases would prohibit the companies from making unqualified U.S.-origin claims for their products, unless they can show that all or virtually all of the products' ingredients or components are from the U.S. and their final assembly or processing takes place in the U.S. Order violations could result in civil penalties of over \$40,000 per violation.

Although Chairman Simons and Commissioner Slaughter agreed with the resolution of these cases and that the injunctive relief and civil penalty risk were powerful deterrents, they wrote a separate concurrence to suggest the possibility that the Commission consider broadening the remedies it seeks in future cases involving FTC Act violations such as deceptive Made in U.S.A. claims. They mentioned, for example, that considering monetary relief or notice to consumers may be warranted in some circumstances, with the benefit being that notified consumers might be able to avoid injury by seeking refunds or stopping their use of the product.<sup>11</sup>

Commissioner Chopra wrote that there should be a presumption against merely seeking cease-and-desist orders in undisputed Made-in-USA fraud cases, and that the Commission should consider broadening sought remedies to include full redress, notice to consumers, corrective advertising, disgorgement of ill-gotten gains, opt-in return

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<sup>11</sup> Concurring Statement of Comm'r Slaughter, in which Chairman Simons Joins, regarding the matters of *Nectar Brand LLC*, FTC No. C-4656 (final order entered Aug. 28, 2018), *Sandpiper of California, Inc.*, FTC File No. 1823095 (consent agreement accepted for public comment Sept. 12, 2018), *Underground Sports Inc.*, FTC File No. 1823113 (consent agreement accepted for public comment Sept. 12, 2018), (Sept. 12, 2018), <https://www.ftc.gov/public-statements/2018/09/concurring-statement-commissioner-slaughter-which-chairman-simons-joins>.



programs, or admissions of wrongdoing. Commissioner Chopra wrote that admissions of wrongdoing could give consumers or competitors tools to remedy harm beyond FTC remedies, for example, in Lanham Act cases involving the same conduct.<sup>12</sup>

Earlier this month, Commissioners Chopra and Slaughter wrote a separate statement in connection with a settlement involving operators of copycat websites *army.com* and *navyenlist.com* that were falsely claiming affiliations with the military to generate sales leads for post-secondary schools. In that statement, the Commissioners suggested other nontraditional remedies – specifically, requiring the website operators to disclose their full list of lead purchasers to discourage other lead buyers who may be turning a blind eye to the deceptive tactics employed by lead generators.<sup>13</sup>

The Chairman’s and Commissioner Slaughter’s concurrence in the Made in USA cases announced “[t]he Commission has already begun a broad review of whether we are using every available remedy as effectively as possible to fairly and efficiently pursue vigorous enforcement of our consumer protection and competition laws.” It went on to note “[i]f we find that there are new or infrequently applied remedies that we should be seeking more often, the Commission will act accordingly.”<sup>14</sup>

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12 Statement of Comm’r Chopra, in the matters of *Nectar Brand LLC*, FTC No. C-4656 (final order entered Aug. 28, 2018), *Sandpiper of California, Inc.*, FTC File No. 1823095 (consent agreement accepted for public comment Sept. 12, 2018), *Underground Sports Inc.*, FTC File No. 1823113 (consent agreement accepted for public comment Sept. 12, 2018), (Sept. 12, 2018), <https://www.ftc.gov/public-statements/2018/09/statement-commissioner-chopra>.

13 Statement of Comm’r Chopra, Joined by Comm’r Slaughter, in the matter of *FTC v. Sunkey Publishing, Inc.*, No. 3:18-cv-01444-HNJ (N.D. Ala. complaint filed Sept. 6, 2018), (Sept. 6, 2018) <https://www.ftc.gov/public-statements/2018/09/statement-commissioner-chopra-joined-commissioner-slaughter>.

14 Concurring Statement of Comm’r Slaughter, in which Chairman Simons Joins, regarding the matters of *Nectar Brand LLC*, FTC No. C-4656 (final order entered Aug. 28, 2018),

You may be asking yourselves, what does this mean for your clients? First, I think it reiterates the importance that marketers make sure they do not cross the line and disseminate truthful and non-misleading advertisements. They should make sure claims are substantiated and necessary disclosures are clear and conspicuous. Complying with recommendations provided by industry self-regulation programs like the NAD also would serve useful – it would help them avoid being the subject of an action referred to the FTC. I cannot speak for the Commissioners, but I think it is clear that our Chairman and this Commission prioritizes enforcing the law, securing as much money as possible to redress consumers, and considering other available remedies to deter wrongdoers and make consumers whole – such as consumer notice – where the law has been violated.

If you are looking for guidance on the types of remedies that the Commission will be seeking, the remedies sought in recent and future cases in addition to the Made in USA Commissioner statements may serve as helpful guideposts. For example, as I mentioned, with regard to the TA-65 case I discussed earlier, our final order required the company to send a notice to consumers and to the licensees who marketed the products. Although this order was voted out before our current Commissioners were in place, we may see similar consumer notification remedies in other deceptive advertising cases.

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*Sandpiper of California, Inc.*, FTC File No. 1823095 (consent agreement accepted for public comment Sept. 12, 2018), *Underground Sports Inc.*, FTC File No. 1823113 (consent agreement accepted for public comment Sept. 12, 2018), (Sept. 12, 2018), <https://www.ftc.gov/public-statements/2018/09/concurring-statement-commissioner-slaughter-which-chairman-simons-joins>.

#### **IV. Conclusion**

I hope this provided a helpful outlook on the Commission's current enforcement priorities regarding national advertising. Thank you for your time and attention.