

**ADVERTISING TRENDS
AND CONSUMER PROTECTION**

HEARING

BEFORE THE

SUBCOMMITTEE ON CONSUMER PROTECTION,
PRODUCT SAFETY, AND INSURANCE

OF THE

COMMITTEE ON COMMERCE,
SCIENCE, AND TRANSPORTATION

UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

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JULY 22, 2009
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Printed for the use of the Committee on Commerce, Science, and Transportation



U.S. GOVERNMENT PRINTING OFFICE

55-980 PDF

WASHINGTON : 2010

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ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

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ADVERTISING TRENDS AND CONSUMER PROTECTION

WEDNESDAY, JULY 22, 2009

U.S. SENATE
SUBCOMMITTEE ON CONSUMER PROTECTION, PRODUCT
SAFETY, AND INSURANCE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:04 a.m. in room SR-253, Russell Senate Office Building, Hon. Mark Pryor, Chairman of the Subcommittee, presiding.

OPENING STATEMENT OF HON. MARK L. PRYOR, U.S. SENATOR FROM ARIZONA

Senator PRYOR. I'll go ahead and call our meeting to order, here.

Thank you all for being here in our Subcommittee today. And I just want to say, I appreciate the prepared testimony and the efforts all of you made to get here, and also members of the audience for being here and paying attention to these important issues.

Today, we're talking about advertising trends and consumer protection, in our Subcommittee. And we will have a few Senators who will be coming in and out, due to activities on the floor, and various other committees that are meeting right now. We're going to have a group of Senators that are coming and going, and it looks like we're going to have a little bit of that as we go.

What I'd like to say is, we have assembled a very strong panel of witnesses today representing the Federal Trade Commission, the consumer advocacy community, and the advertising community. And I think we all look forward to their testimony.

And during last week's hearing on frauds and scams tied to the economic downturn, we focused on the FTC's enforcement actions and statutory authority. Today, we'll examine current trends in deceptive advertising and the Federal Government's effort to protect consumers.

Over and over again, consumers purchase products from companies that claim to make us a little trimmer, stronger, or healthier. If these advertising claims were just about eliminating pimples or fat, it would be one thing. However, many of the deceptive practices employed today are increasingly putting safety at risk.

I particularly want to commend the FTC and the FDA's sweep, last year, that brought down several companies advertising a fake cancer cure. These companies preyed on vulnerable patients, and sometimes desperate patients, to put these individuals' lives on the

line just to make a quick buck. Today, companies are even more desperate for sales, as families cling a little tighter to their dollars.

Today, we'll explore the negative impact deceptive advertising can have on customers in the marketplace. We'll hear about new trends in advertising, including bait-and-switch techniques, advertisements portrayed as news articles, bloggers paid by advertisers to publish positive reviews, false or "testimonial" advertising, free-product advertising, and false or deceptive advertising of "green" products.

I hope that, through testimony and questioning, we can determine the extent that consumers are harmed by deceptive advertising, whether the connections between the advertisers and endorsers are transparent enough for consumers, how to improve the coordination between Federal and State governments, and, finally, what Congress can do to strengthen the FTC's ability to protect consumers all across the Nation.

We cannot allow the customer in the marketplace to be in confusion. If dishonest companies insist on bogus claims about their products, the Federal Government must step up and ensure information on our airwaves or the Internet is accurate and truthful. This allows individuals to make informed decisions, and it preserves the overall integrity of our marketplace.

Again, I want to thank our panel. I want to introduce our panel, here, in just a few moments, but first I'd like to ask Senator Wicker to make his opening statement.

**STATEMENT OF HON. ROGER F. WICKER,
U.S. SENATOR FROM MISSISSIPPI**

Senator WICKER. Thank you, Mr. Chairman, and thank you all.

The Federal Trade Commission has protected American consumers for almost a century. In 1914, Congress created the Commission by passing the Federal Trade Commission Act, and tasked the new entity with authority over anticompetitive practices. Later, Congress expanded the authority of the Commission to include the issue most Americans associate with the Federal Trade Commission: the authority to prohibit unfair and deceptive acts or practices. Today's hearing will focus on trends in the advertisement industry, and steps the Commission has taken over the years related to these advertisement practices.

Americans have seen an explosion in the available advertising venues over the past two decades. The Internet helped create a number of different options for advertising, including ad placement on websites, product-related websites, YouTube, and blogs. Additionally, the advertisement industry has expanded its use of certain types of ads, based on parameters established by the FTC.

While the increased opportunity for marketing is a win for industry, this development has raised concerns related to the practices used to sell products to American consumers. The FTC plays a vital role in this area by actively pursuing bad actors. If an advertisement is deceptive or misleading, the Commission has broad authority to stop these activities.

Additionally, the industry must also answer to the National Advertising Review Council's Electronic Retailing Self-Regulation Program. This program, which has significant coverage over the adver-

tising and marketing industries, provides oversight, and brings enforcement action against those who violate the program's requirements. I understand the FTC regularly cites this self-regulatory program as an effective and efficient model for industry self-regulation.

While updating of FTC guidelines and self-regulatory principles are important, a balance must remain between good government and personal responsibility. On the other hand, we must not limit the consumers' ability to judge products and advertisements for themselves, and apply commonsense principles to their purchasing decisions. If true fraud or attempts to deceive consumers occur, then the FTC and the self-regulatory program must act quickly to address the problem.

I look forward to hearing from Mr. Renker and Mr. Congdon on how the FTC's proposed changes would impact the industry, as well as possible solutions that might further protect consumers without limiting an effective advertisement tool. I'm also eager to hear how their business practices conform to the FTC's related guidelines, and what disclosures they include in their advertisements.

Additionally, we've seen an increase in advertisements related to green and environmentally friendly products, as the Chairman just stated. The Commission is currently reviewing established guides on green advertising. I look forward to hearing more about this progress today.

So, Mr. Chairman, thank you for assembling this outstanding panel, and I look forward to hearing their testimony.

Senator PRYOR. Thank you, Senator Wicker, and I appreciate your attention to this issue.

Before I introduce the panel, let me just say one last thing that I should've said during my opening statement, and that is, when it comes to the area of advertising, you know, the vast majority of advertisers are the good guys. And I think what we are most interested in is, How do you find that balance in going after the bad guys, but also not punishing all the good guys for doing what they do?

So, we really appreciate this group of witnesses coming here today. We're going to hear different perspectives on that, and we're going to talk about some of the challenges that are going on in the marketplace, and some of the things that the Federal Trade Commission either can do, or can't do, and talk about what we can do to help and make this a better marketplace.

So, let me just run through the panel real quickly, and then I'll just call on each of you for a 5-minute opening statement. I really hope that you all can keep it to 5 minutes, because we're going to have questions, and we'll try to keep our questions brief, as well.

First we have Mr. David Vladeck. He's the Director of the Consumer Protection Bureau, Federal Trade Commission. Next, we have Ms. Sally Greenberg. She's the Executive Director of the National Consumers League. Next, we have Dr. Urvashi Rangan, Director of Technical Policy, Consumers Union. Next, we have Mr. C. Lee Peeler, President and CEO of the National Advertising Review Council. Next, we have Mr. Greg Renker, Co-Chairman, Guthy-

Renker. And last, and certainly not least, we have Mr. Jon Congdon, President of Product Partners, LLC.

Mr. Vladeck, would you lead off for us, please?

STATEMENT OF DAVID VLADECK, DIRECTOR, BUREAU OF CONSUMER PROTECTION, FEDERAL TRADE COMMISSION

Mr. VLADECK. Good morning, Chairman Pryor, Ranking Member Wicker. I am David Vladeck. I'm the Director of the Bureau of Consumer Protection at the Federal Trade Commission. I'm pleased to be here this morning, again this week. I'm glad to make a repeat appearance so quickly.

The written statement submitted by the Commission reflects the views of the Commission. My oral statement today, and responses to questions, reflect my own.

The Commission statement shows a—the broad array of advertising matters the agency has handled over the past year or so—deceptive ads for products making health and safety claims, bogus environmental and green claims, and, these days, advertising that preys on those suffering because of the economic downturn. Today, I will focus principally on the FTC work to protect consumers from false and deceptive ads relating to products that claim to improve the consumers' health, but do not do so.

The Internet makes it much easier for marketers of dietary supplements and other health-related products to sell their wares. At the same time, these sellers have been emboldened to make claims not approved by the Dietary Supplement Health and Education Act, DSHEA, or by the Food and Drug and Cosmetic Act; make claims that their products actually can prevent, treat, or cure diseases. These are the so-called “drug” claims. These claims place consumers at great risk, putting their faith in unproven remedies in lieu of getting established therapies. As our recent enforcement actions show, the diseases for which such claims are being made range from the common cold to cancer.

In a major law enforcement initiative last year, the Commission brought 11 actions against marketers of products such as laetrile, black salve, coral calcium, shark cartilage, in various herbal mixtures, for deceptively claiming that their products would cure cancer. These cases were the result of an Internet surf conducted by the FTC, the Food and Drug Administration, and the Competition Bureau of Canada.

An important adjunct to our law enforcement actions are consumer education, and we, at the same time, launched a campaign called “Cure-ious? Ask.” to warn consumers about bogus cancer-cure claims. The Commissioner's partners in this endeavor include the American Society of Clinical Oncology, the Cleveland Clinic, and the National Association of Free Clinics, all of whom distribute the FTC's information to both patients and medical-care practitioners.

I'd like, with your permission, to take a minute to show you a short video from that campaign.

[Video presentation.]

Mr. VLADECK. Thank you. This video shows the importance we place on consumer education. Those who succeed in selling products based on fear or unsubstantiated claims that they will treat

or cure serious diseases prey on the fear and desperation of the sick, the elderly, or those without the means to afford conventional medical care. Law enforcement cases can only take us part of the way. Consumer education is really vital, here.

Let me quickly discuss some of the other actions that we're taking. Other enforcement efforts target supplement sellers' advertising remedy to purport—purported to treat, prevent, or reduce the risk of diabetes, HIV/AIDS, Alzheimer's disease, heart disease, and others. Sometimes these products are marketed through so-called "infomercials" or force—false—fake news broadcasts. And we are quite alert to those kinds of scams.

It is not often clear to viewers that what they are watching is a very long sales pitch and not an independent television program about an amazing breakthrough new technology. In those cases, we try to obtain redress that not only takes the—not only takes the product off the market, but also takes these false advertisements off the air.

Given the skyrocketing rates of obesity and diabetes, we are also expending considerable resources to get the weight-loss industry to shed its excess pounds of false or grossly exaggerated weight-loss claims. Over the last 10 years, we've brought 77 cases involving weight-loss products. The heavily promoted weight-loss ingredient du jour changes with regularity, which complicates enforcement. Each time we bring a series of cases targeting claims for one kind of purported remedy, a new one is suddenly discovered. We've sought help from the media with some media screening ads to eliminate what we call our "red-flag claims"; that is, claims that are always false, such as a statement that a product will cause weight loss, no matter how much a person eats, without diet and without exercise.

Many deceptive weight-loss claims are made through consumer testimonials. For example, a trim and attractive individual proclaiming, "I lost 50 pounds in 6 months." As demonstrated in the video we've just shown, patient testimonials are often used to promote cancer cures.

The Commission's guides concerning the use of endorsement and testimonials in advertising, last modified in 1980, made clear that endorsement should not be used to make ad claims that could not be substantiated if made directly by the advertiser. In addition, the guides advise that the consumer testimonial on a key product attribute is, in fact, a representation that the endorser's experience is typical of what consumers would generally achieve. The guides say that if the advertiser cannot substantiate the typicality claim, the ad can disclose what the general expected performance of the product would be, or, alternatively, the limited applicability of the endorser experience.

We've seen that many advertisers take advantage of this "safe harbor" by using small-print footnotes or fleeting superscripts on TV that simply state "results may vary," or that "results are not typical." But, the Commission's own research and law enforcement efforts have made clear that so-called disclaimers of typicality are not effective in preventing consumer deception. Consumers generally believe that they, too, will be able to achieve the dramatic, but atypical, results depicted.

The Commission is now reviewing the guides, as the Chairman noted. It has sought public comment twice, and has proposed certain provisions, one of which—and this is the controversial one—would remove the guides’ safe-harbor provision for disclaimers of typicality.

Now, let me be clear, the proposed revision would not bar their use, it would, instead, make the advertiser responsible for ensuring that consumers are not misled by the ad, considered in its entirety. In other words, the proposed revision would restore the same substantiation standard that is applied to all advertisers making similar claims without the use of testimonial. Simply level the playing field. But, as might be expected, this proposal has triggered a fair amount of controversy.

Another proposed revision involves the application of the guides to consumer-generated media, such as consumer blogs. Based on the well-established principle that consumers have a right to know when they are the target of a sales pitch, proposed new examples in the guide would make it clear that a connection, such as compensation, between a consumer promoting the product and the company that sells the product should be disclosed. This, too, has generated controversy. We will give consideration—careful consideration to all of the comments before issuing final guides, hopefully by the end this year.

Let me close by saying this. The FTC’s task of monitoring and pursuing false and deceptive advertising claims has grown more daunting and more complex over the past few decades. It will only grow more complicated as new technologies give marketers more tools, and more sophisticated tools, to sell their products. But, the Commission’s resources are not keeping pace. Increased resources would provide more effective consumer protection, especially in this critical area.

Thank you for your time and indulgence. I appreciate it.
[The prepared statement of Mr. Vladeck follows:]

PREPARED STATEMENT OF DAVID VLADECK, DIRECTOR,
BUREAU OF CONSUMER PROTECTION, FEDERAL TRADE COMMISSION

I. Introduction

Chairman Pryor, Ranking Member Wicker, and Members of the Subcommittee, I am David Vladeck, Director of the Bureau of Consumer Protection at the Federal Trade Commission (“FTC” or “Commission”).¹ I appreciate the opportunity to appear before you today to discuss the Commission’s efforts to combat fraudulent and deceptive advertising.

Deceptive advertising cases have always been at the core of the Commission’s consumer protection law enforcement agenda. In 1972, however, the FTC revolutionized advertising law when it held that an advertiser violates the FTC Act by making an affirmative product claim without having a reasonable basis of support for that claim.² In the 37 years since that groundbreaking decision, advertising substantiation has been a key focus of the Commission’s consumer protection mission—and never more so than at the present time. Developments in science and technology, as well as in marketing strategies, have led to a proliferation of products and services and a parallel burgeoning of advertising claims about how these products will make us thinner, better looking, and healthier; improve the quality of our lives; make us richer; and even improve our environment. The substantiation of adver-

¹The written statement presents the views of the Federal Trade Commission. My oral testimony and responses to questions reflect my views, and do not necessarily reflect the views of the Commission or any individual Commissioner.

²*Pfizer, Inc.*, 81 F.T.C. 23, 62 (1972).

tising claims has itself become a business opportunity, with a variety of labs and testing facilities—some legitimate and others less so—offering this service. For the FTC, assessing the adequacy of support for a claim also has grown more complex, sometimes requiring analysis by multiple experts.

Likewise, the venues for advertising messages have multiplied. In the 1970s, FTC staff looked at ads printed in newspapers and magazines, pasted on billboards, and broadcast by radio and television stations. Today, we also have cable television, the Internet, cell phones, and other hand-held electronic devices, with growing opportunities for techniques like viral and word-of-mouth marketing. It seems that we are continually learning about new and creative methods to get promotional messages out to consumers. Consequently, the work of monitoring advertising for compliance with the law has greatly expanded.

Today, this testimony will focus on a few areas that are of particular importance to the Commission's current advertising enforcement agenda: health and safety claims, issues raised by the use of endorsements and testimonials, environmental marketing or "green" claims, and advertising that preys on victims of the economic downturn, including offers of "free" products. Of course, these are not the only areas of focus in the Commission's advertising program. Other important FTC priorities, such as advertising to children and behavioral targeting, are not addressed in this testimony.

II. Health and Safety Claims

Americans have become far more health conscious over the past two decades. Not surprisingly, the marketplace has seen a steady stream of new or reformulated products purporting to help consumers get and stay healthy. Just within the past year, the FTC has challenged advertising claims for weight loss, cold prevention, improved concentration, and even the cure of very serious diseases, such as diabetes and cancer.

In a major law enforcement initiative targeting bogus cancer cures, the FTC announced 11 actions charging that a number of companies and individuals made false or unsubstantiated claims that their products—including laetrile, black salve, essiac tea and other herbal mixtures, coral calcium, and shark cartilage—cure or treat cancer, and, in some cases, that clinical or scientific evidence proves the products work.³ One seller also was charged with deceptive use of a consumer testimonial about the product's efficacy because the ad failed to disclose the connection between the endorser and the company: the "consumer" endorser was, in fact, the owner of the company.⁴ Most of these actions have been resolved through settlements that bar future false or unsubstantiated claims and require notification to purchasers that little or no scientific evidence exists to demonstrate product effectiveness and urging them to consult with their doctors. Four of the settlements also required a monetary payment. Two cases remain in litigation before an administrative law judge.⁵ The cancer cure cases were the result of an Internet surf coordinated among the FTC, the U.S. Food and Drug Administration (FDA), and the Competition Bureau Canada.

As an important adjunct to the law enforcement initiative, the Commission launched *Cure-ious? Ask*, a consumer education campaign to raise awareness about bogus cancer treatment claims. The Commission's partners in this effort are the American Society of Clinical Oncology, the Cleveland Clinic, and the National Association of Free Clinics, all of whom are disseminating campaign information to both patients and medical care practitioners. In addition, the campaign is mentioned in numerous blogs related to health or cancer.

As demonstrated by the Internet research that resulted in the cancer cure sweep, marketers of dietary supplements and other products have become very bold in the medical-benefit claims they are making to sell their goods. Many are going far beyond the basic structure/function claims that are permitted under the Dietary Supplement Health and Education Act.⁶ Last year, for example, the Commission settled actions against two companies marketing supplements purported to prevent and

³ See Press release, FTC Sweep Stops Peddlers of Bogus Cancer Cures (Sept. 18, 2008), available at <http://www.ftc.gov/opa/2008/09/boguscures.shtm>.

⁴ *Holly A. Bacon d/b/a Cleansing Time Pro.*, Docket No. C-4238 (Oct. 22, 2008).

⁵ A default judgment was entered in another matter, and one case was dismissed without prejudice because the individual lives in Mexico and cannot be served.

⁶ Dietary Supplement Health and Education Act of 1994, Pub. L. No. 103-417, 108 Stat. 4325. "Structure/function" claims are representations about a dietary supplement's effect on the structure or function of the body for maintenance of good health and nutrition. These claims are not subject to pre-authorization by the Food and Drug Administration.

treat diabetes.⁷ Earlier this year it accepted a settlement that included \$3 million in consumer redress to resolve charges of false and deceptive claims that an infrared sauna could treat cancer and that various nutritional supplements could treat, reduce the risk of, or prevent diseases including cancer, HIV/AIDS, diabetes, Alzheimer's disease, Parkinson's disease, heart attacks, and strokes.⁸ The products were sold on the Internet and through print media, but the primary marketing vehicle was a live, hour-long radio call-in program called "The Truth About Nutrition." In another case, filed in 2004, the Commission charged marketers of two supplements with falsely claiming that their products can prevent or cure cancer, heart disease, diabetes, and arthritis.⁹ In addition, the defendants were charged with failing to disclose that the infomercial promoting one of these products was a paid commercial advertisement, not an independent television program.

Supplements to prevent or treat the common cold have been another recent target of FTC enforcement activity. The Commission settled charges that Airborne Health, Inc. disseminated false and unsubstantiated claims that Airborne effervescent tablets prevent or treat colds, protect against exposure to germs in crowded environments, and offer a clinically proven cold remedy.¹⁰ The settlement required the defendants to add funds to a consumer redress program already established to resolve a private class action lawsuit, bringing the total amount available for consumers to \$30 million. The Commission then turned its attention to Airborne copycat products. The agency is in litigation against the supplier of a copycat formula widely marketed under various retailer private label brand names, and last week announced a settlement with Rite Aid resolving charges that it made unsubstantiated claims for its Germ Defense products.¹¹ A consumer redress program will coincide with the onset of the cold and flu season this fall.

In another area important to the health of Americans, the Commission has expended substantial resources to get the weight-loss industry to shed its excess pounds of false or grossly exaggerated weight loss claims. In fact, over the past 10 years, the Commission has brought 77 cases dealing with weight-loss claims alleged to be untrue and/or not substantiated.

The heavily promoted weight-loss ingredient *du jour* changes with regularity. Each time the Commission brings a series of cases targeting claims for one kind of purported remedy, a new one emerges. *Hoodia* is one of the current weight-loss remedy favorites, and recently the Commission charged a supplement seller with falsely claiming its product was FDA-approved and would suppress appetite sufficiently to cause a user to cut calorie intake in half, from 2,000 to 1,000 calories per day. In addition, the complaint alleges that the product itself, supposedly derived from a rare South African plant, is not what it is purported to be.¹²

Earlier this year, a Federal district court judge, who had previously granted an FTC motion for summary judgment, ordered a payment of more than \$15.8 million and issued a permanent injunction against sellers of three supplements. Two of the substances were promoted as the equivalent of prescription weight-loss products and touted as causing a 19 percent loss in total body weight, while a third product was extolled as a remedy for erectile dysfunction.¹³ In addition, the court ordered the defendants' medical expert to pay \$15,454 for his deceptive endorsement of one of the weight-loss products.

In an order enforcement action brought by the Department of Justice on behalf of the FTC, home shopping channel QVC agreed to pay \$6 million for consumer redress, with an additional \$1.5 million in civil penalties, to settle allegations that it

⁷ See Press release, Marketers of Dietary Supplements Ordered to Halt False Claims About Diabetes Prevention and Treatment (Nov. 6, 2008), available at <http://www.ftc.gov/opa/2008/11/glucorell.shtm>.

⁸ See Press release, Marketers of Dietary Supplements and Devices Agree to Pay \$3 Million to Settle FTC Charges of Deceptive Advertising (Mar. 6, 2009), available at <http://www.ftc.gov/opa/2009/03/roex.shtm>.

⁹ See Press release, Marketers of "Supreme Greens" and "Coral Calcium Daily" Come Under Fire from the FTC (June 3, 2004), available at <http://www.ftc.gov/opa/2004/06/dma.shtm>.

¹⁰ See Press release, Makers of Airborne Settle FTC Charges of Deceptive Advertising; Agreement Brings Total Settlement Funds to \$30 Million (Aug. 14, 2008), available at www.ftc.gov/opa/2008/08/airborne.shtm.

¹¹ See Press release, Rite Aid to Pay \$500,000 in Consumer Refunds to Settle FTC Charges of False and Deceptive Advertising (July 13, 2009), available at <http://www.ftc.gov/opa/2009/07/riteaide.shtm>.

¹² See Press release, FTC Charges Marketers of 'Hoodia' Weight Loss Supplements With Deceptive Advertising (Apr. 27, 2009), available at <http://www.ftc.gov/opa/2009/04/nutra.ceuticals.shtm>. The case currently is in litigation.

¹³ See Press release, Court Rules in Favor of FTC in National Urological Group Case; Orders Marketers of Thermalean, Lipodreme, and Spontane-ES to Pay More Than \$15 Million (Jan. 15, 2009), available at www.ftc.gov/opa/2009/01/nug.shtm. The case is currently on appeal.

violated a prior FTC order.¹⁴ QVC was charged with making false and unsubstantiated claims, on 200 of its programs, for weight-loss pills, food bars, and shakes, as well as energy claims for its Bee-Alive supplement concocted from a substance secreted by bees.

The Commission considers its work in the dietary supplement and weight-loss area to be a high priority. Obesity is epidemic in the United States, causing a dramatic increase in related diseases, such as diabetes. False claims engender false hopes of an easy solution and may deter consumers from making necessary serious efforts to get their weight under control. Marketers using such claims simply prey on the hardships people face when they need to lose weight.

Health claims are becoming more prevalent in food marketing, and therefore, the FTC is giving increased scrutiny to food advertising. In April, Kellogg Company agreed to settle charges that its advertising—appearing in print and on TV, the Internet, and packages—falsely claimed that a breakfast of Frosted Mini-Wheats was shown clinically to improve children’s attentiveness by nearly 20 percent when compared to children who ate no breakfast.¹⁵ The case provides a lesson to advertisers on the importance of careful and accurate portrayal of research findings when they are transformed into advertising claims.

Finally, a notable case in the health and safety area was announced in June. A major U.S. alcohol supplier agreed to settle FTC charges that it deceptively claimed a caffeinated alcohol drink would enable users to remain alert when consuming alcohol.¹⁶ The unsubstantiated claims—which appeared in print ads, Web videos, and other Internet advertising—fueled the common but erroneous perception that mixing alcohol and caffeine helps people stay alert when drinking. Obviously, this kind of deceptive claim is of concern given the many ways people can and do injure themselves and others if they misjudge their alcohol intake.

III. Endorsements and Testimonials in Advertising

Based on the prevalent—and sometimes deceptive—use of third-party endorsements in advertising, and after receiving extensive public comment on the issues, the Commission, in 1980, adopted Guides to assist advertisers in using endorsements in a lawful and non-misleading way.¹⁷ Broadly defined, endorsements and testimonials encompass any advertising messages that consumers are likely to believe reflects the honest opinion, beliefs, findings, or experience of a party other than the sponsoring advertiser. Endorsements should not contain express or implied representations that would be deceptive, or could not be substantiated, if made directly by the advertiser. In addition, the 1980 Guides advised that a consumer testimonial on a key product attribute would be interpreted as representing that the endorser’s experience is typical of what consumers generally will achieve. If the advertiser did not have substantiation to support this claim of typicality, the advertisement should disclose either what the generally expected performance of the product would be in the depicted circumstances or the limited applicability of the endorser’s experience to what consumers can expect to achieve. With respect to endorsements by experts, the Guides advised that the expert must in fact have the qualifications he or she is represented to possess, and the endorsement must be supported by the appropriate exercise of that expertise. In addition, connections between endorsers and product sellers should be disclosed if they would not reasonably be expected by the audience and might affect the credibility of the endorsement.

As part of its ongoing process of reviewing all of its rules and guides, the FTC initiated review of the Endorsement Guides in 2007.¹⁸ Based on comments received in response to that first Federal Register notice, as well as its own independent research, the Commission proposed revisions to the Guides in late 2008.¹⁹ The staff is analyzing comments received in response to those proposed changes and formu-

¹⁴ See Press release, QVC to Pay \$7.5 Million to Settle Charges that It Aired Deceptive Claims (Mar. 19, 2009), available at <http://www.ftc.gov/opa/2009/03/infomercials.shtm>.

¹⁵ See Press release, Kellogg Settles FTC Charges That Ads for Frosted Mini-Wheats Were False (Apr. 20, 2009), available at <http://www.ftc.gov/opa/2009/04/kellogg.shtm>.

¹⁶ See Press release, Constellation Brands Settles FTC Charges That Ads for ‘Wide Eye’ Caffeinated Alcohol Beverage Were Deceptive (June 10, 2009), available at <http://www.ftc.gov/opa/2009/06/consbrands.shtm>.

¹⁷ Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. Part 255. Guides are not rules; rather they are advisory in nature—informing businesses and others how the Commission would seek to apply Section 5 of the FTC Act, 15 U.S.C. § 45, to specific representations and conduct. As such, they provide the basis for voluntary compliance with the law by advertisers.

¹⁸ 72 Fed. Reg. 2214 (Jan. 18, 2007).

¹⁹ 73 Fed. Reg. 72,374 (Nov. 28, 2008).

lating final recommendations to the Commission. The process has elicited some strongly held views from those who submitted comments.

The 1980 Guides were adopted in a world that was quite different from the one in which advertisers and marketers promote their goods and services today. The Guides were created to cover endorsements and testimonials in print media and 30- or 60-second radio or television commercials. Although the basic principles of the Guides remain valid, the specific applications and examples were not developed, obviously, within a context of program-length infomercials, Internet advertising, word-of-mouth or viral marketing, and consumer blogs. In 1980, the advertiser always disseminated the advertisement. With the advent of advertiser-promoted consumer blogging, the advertiser is not always disseminating the endorsement, although it certainly expects to profit from the message.

Moreover, the Commission's enforcement history with false or deceptive advertising using consumer endorsements, as well as its own research, have made it increasingly clear that in one key aspect—disclaimers of typicality—the Guides are not working as intended to prevent consumer deception. The misuse of testimonials and endorsements has been particularly prevalent in the promotion of weight-loss products, as described in the FTC staff's 2002 report, *Weight-Loss Advertising: An Analysis of Current Trends*.²⁰ A review of 300 weight-loss ads revealed that two-thirds used consumer testimonials, and those testimonials rarely described realistic achievements, instead proclaiming extraordinary weight loss. Of the ads featuring testimonials, 30 percent reported weight losses exceeding 70 pounds, while 20 percent reported losses of more than 100 pounds. In many instances, the testimonials reported results that, in all likelihood, are not achievable—*e.g.*, weight loss of nearly one pound daily for two or more weeks. With few exceptions, advertisers did not disclose the actual weight loss consumers could expect to achieve with the product.²¹ Furthermore, the usual disclaimers—*e.g.*, “results may not be typical” or “your results may vary”—did not adequately inform consumers that the reported weight losses were, at best, outliers or extreme cases.

The Commission has also conducted consumer research regarding the messages conveyed to consumers through consumer endorsements and the effect of disclaimers of typicality. These reports were placed on the public record in connection with the request for comments on the Endorsement Guides. In general, the research showed that even with prominent disclaimers of typicality—in fact more prominent than is usually the case in actual ads—significant numbers of consumers believed that at least half of product users would achieve results similar to those stated in the ads. By contrast, disclosure of actual expected results with the product significantly altered consumer expectations that the endorser's experience was representative of what others could achieve.

When it promulgated the Endorsement Guides, the Commission clearly intended that advertisers usually would accompany atypical result testimonials with disclosure of the generally expected results.²² However, as documented by the 2002 report, this has not been the practice. The testimonial of a slim individual in a bathing suit that “I lost 50 pounds in 6 months with X's weight loss pills” likely conveys to the consumer that other users of the product will achieve similar results. If the advertiser cannot substantiate that claim, a fine print or fleeting superscript disclosure of atypicality is unlikely to cure the deception—as demonstrated by the Commission's research. For this reason, the Commission has proposed removing the “safe harbor” for disclaimers of typicality. However, the proposal does not bar the use of these disclaimers—as some comments have suggested—but merely makes the advertiser responsible for ensuring that consumers are not misled by the ad in its entirety. In other words, advertisers who use such disclaimers would be subject to the same standards, under Section 5 of the FTC Act, as advertisers making similar

²⁰ The Report is available at <http://www.ftc.gov/bcp/reports/weightloss.pdf>.

²¹ The current Endorsement Guides provide that if an advertiser does not have substantiation that the experience described by an endorser is representative of what consumers generally will achieve, the advertiser can either clearly and conspicuously disclose: (1) what the generally expected performance would be in the depicted circumstances, or (2) the limited applicability of the endorser's experience to what consumers can generally expect to achieve, *i.e.*, that the depicted results are not typical. With regard to the latter option—disclosing that the depicted results are not typical—the FTC report found that only 36 percent of the testimonial ads contained any disclosure regarding the atypicality of the advertised results, and only 25 percent of those disclaimers were conspicuous or proximate to the testimonials. Often the disclaimer was buried in a fine-print footnote or flashed as a video superscript too quickly to be read.

²² 45 Fed. Reg. 3870, 3871 (Jan. 18, 1980). Generally, a disclaimer of typicality alone probably will not be considered sufficient to dispel the representation that the experience is typical.

claims without use of testimonials. As might be expected, this was one of the most controversial of the proposed revisions.

Another controversial proposed revision involves the application of the Guides to consumer-generated media. The proposed revisions include several new examples using such media. These examples are based on the general principle, applicable to other advertising, that consumers have a right to know when they are being subjected to a sales pitch. A material connection between a consumer promoting a product and the company that makes the product might affect the weight or credibility of the consumer endorsement, and therefore should be disclosed. Admittedly, the issues are difficult and complex, and the Commission will give careful consideration to all of the comments received before it issues revised Endorsement Guides some time later this year.

IV. Environmental Marketing Claims

In the past few years, there has been a proliferation of environmental marketing. Businesses in various industry sectors are proclaiming the “green” attributes of their products and services, and several major retailers have launched their own green product lines. Consumers have become increasingly concerned about the environmental impact of the products they use. Green claims can help them make better choices—but only when those claims are true and adequately substantiated. Therefore, the FTC has launched its own green initiative, including review of its Green Guides²³ and law enforcement actions targeting false or deceptive green claims.

The Commission’s Green Guides are the centerpiece of the agency’s environmental marketing program.²⁴ The Guides help marketers avoid making green claims that are “unfair or deceptive” in violation of the FTC Act.²⁵ The Guides also describe how to substantiate certain green claims and explain how consumers understand commonly used environmental claims, such as “recyclable” and “biodegradable.” In response to the explosion of green marketing in recent years, the agency initiated a review of its Green Guides to ensure that they are responsive to today’s marketplace.²⁶

To develop a robust record upon which to base its guidance, the Commission also held a series of public workshops on emerging green marketing issues, bringing together representatives from industry, government, consumer groups, environmental organizations, and the academic community to explore the marketing of carbon offsets and renewable energy, green packaging claims, and claims for green building and textiles.²⁷ The Commission sought additional public comment in connection with each workshop²⁸ and solicited consumer perception data on consumer understanding of green claims. Because little consumer perception data was submitted, the Commission plans to conduct its own research.²⁹ This study will focus on consumers’ understanding of particular green marketing claims, such as “eco-friendly,” “sustainable,” and “carbon neutral.”³⁰

The Commission is actively prosecuting companies making deceptive green claims. The latest enforcement actions charged three companies with disseminating false and unsubstantiated claims that their products, such as disposable plates, wipes, and towels, were “biodegradable.”³¹ According to the complaints, the companies could not substantiate that their “biodegradable” products would decompose into elements found in nature within a reasonably short period of time after customary dis-

²³ Guides for the Use of Environmental Marketing Claims, 16 C.F.R. Part 260.

²⁴ The Commission issued the Guides in 1992 to address confusion surrounding the meaning and proper use of proliferating green claims. 57 Fed. Reg. 36363 (Aug. 13, 1992). The Commission revised the Guides in 1996 and in 1998. 61 Fed. Reg. 53311 (Oct. 11, 1996); 63 Fed. Reg. 24240 (May 1, 1998).

²⁵ 15 U.S.C. § 45(a).

²⁶ 72 Fed. Reg. 66091 (Nov. 27, 2007).

²⁷ Information about the review, including the workshop transcripts and written comments, is available online at www.ftc.gov/green.

²⁸ 72 Fed. Reg. 66094 (Nov. 27, 2007); 73 Fed. Reg. 11371 (Mar. 3, 2008); 73 Fed. Reg. 32662 (June 10, 2008). The comments are available at <http://www.ftc.gov/os/comments/greenguides/regreview/index.shtm>.

²⁹ See 74 Fed. Reg. 22396 (May 12, 2009) (requesting comment on the FTC’s consumer perception study, as required by the Paperwork Reduction Act).

³⁰ Because many currently used green claims, such as “sustainable” and “carbon neutral,” were not common when the Commission last revised the Guides, FTC staff also is reviewing the state of green marketing claims by conducting an Internet surf to analyze the nature and incidence of particular claims. FTC staff plans to issue its findings in the near future.

³¹ See Press release, FTC Announces Actions Against Kmart, Tender and Dyna-E Alleging Deceptive ‘Biodegradable’ Claims (June 9, 2009), available at <http://www.ftc.gov/opa/2009/06/kmart.shtm>.

posal,³² because the substantial majority of solid waste is disposed in landfills, incinerators, and recycling facilities—disposal methods that do not afford the conditions to allow decomposition. Two of the cases have settled, with orders that bar deceptive “degradable” product claims, as well as other environmental claims not supported by competent and reliable scientific evidence. A third case is in administrative litigation.

In addition, the Commission has brought two Federal court actions against marketers of “miracle” devices advertised to dramatically increase gas mileage in ordinary cars. Earlier this year, the FTC filed a case alleging that the defendant falsely advertised in major magazines that its Hydro-Assist Fuel Cell could boost automobile gas mileage by at least 50 percent and “turn any vehicle into a hybrid.”³³ Last year, the FTC won a contempt action against another defendant for falsely advertising that its NanoDetonator would allow ordinary passenger cars to harness the power of nuclear fusion, thereby eliminating the need for gasoline.³⁴ In both cases, the Commission charged that the claims for the devices violate basic scientific principles. Through litigation, the Commission is seeking to halt unsubstantiated gas savings claims and reimburse consumers who have purchased the devices.

V. Economic Assistance Claims

Offers that are too good to be true, such as help obtaining government grants, get-rich-quick plans, promises of new jobs or business opportunities, and free gifts attract a great deal of consumer interest, but may also serve as traps for the most vulnerable and unwary consumers—especially during challenging economic times. As part of a collaborative law enforcement sweep with other agencies, dubbed Operation Short Change, the Commission recently filed multiple lawsuits targeting businesses that preyed on financially vulnerable consumers.³⁵

In one action, the defendants were charged with bilking hundreds of thousands of consumers into paying \$300 million for get-rich-quick systems, marketed through nationwide infomercials and websites with promises that substantial amounts of money could be earned through real estate transactions and Internet businesses.³⁶ According to the complaint, a system, called “John Beck’s Free & Clear Real Estate System,” consisting of CDs, DVDs and written materials that sold for nearly \$40, was advertised as enabling consumers to earn thousands of dollars by purchasing homes at local government tax sales “free and clear” for just “pennies on the dollar” and re-selling them at large profits. One featured consumer endorser claimed she made a profit of more than \$50,000 in 3 months. Purchasers were automatically enrolled in a 30-day free-trial membership program, supposedly affording them access to seminars and advisors. Unknown to many consumers, however, the “free trial” was actually a continuity program, and they were subject to recurring automatic and unauthorized charges every month. Consumers also found the financial promises of the program to be empty ones.

The FTC also filed a lawsuit against related business entities that allegedly pretended to be affiliated with Google, using trade names such as Google Money Tree and Google Pro, and peddled low-cost home business opportunity kits.³⁷ The defendants’ websites advertised that the kits would enable consumers to earn over \$100,000 in 6 months by simply filling out forms and running Internet searches on Google and Yahoo. The complaint alleged that the defendants tricked consumers into divulging debit or credit card information, for supposedly nominal shipping and handling charges, but then used the account information to charge them a recurring monthly fee for a membership program. The court granted the FTC’s request for a temporary restraining order to halt the defendants’ practices.

In addition, the FTC has cracked down on companies making bogus claims that they can assist consumers in obtaining grants from the government and other sources.³⁸ For example, the Commission obtained a temporary restraining order against a company that launched robocalls telling consumers they were qualified to receive grants to help them overcome their financial problems. Consumers were di-

³² See 16 C.F.R. § 260.7(b).

³³ *FTC v. Dutchman Enterprises, LLC, et al.*, No. 2:09-cv-00141-FSH (D.N.J. Jan. 14, 2009) (granting stipulated injunction order).

³⁴ *FTC v. Five Star Auto Club, Inc. et al.*, No. 99-CV-1693 (S.D.N.Y. Feb. 23, 2009) (order granting temporary restraining order to be converted to a preliminary injunction).

³⁵ The Operation Short Change law enforcement sweep included 15 FTC cases, 44 law enforcement actions by the Department of Justice, and actions by approximately 13 states and the District of Columbia.

³⁶ Economic Downturn (July 1, 2009), avail Down at n Scammers Trying to Take Advantage of the <http://www.ftc.gov/opa/2009/07/shortchange.shtm>.

³⁷ *Id.*

³⁸ *Id.*

rected to visit particular websites, which referred them to yet another website that charged a fee.

Finally, “free gift” offers are always enticing, but often are not what they appear to be. In late 2007 and early 2008, the FTC settled actions against three companies charged with promising consumers free gifts, including iPods, flat screen televisions, and store gift cards, but failing to live up to these promises.³⁹ Online advertising and spam e-mail misled consumers into believing they had won a contest, earned a gift for correctly answering a trivia question, or were otherwise eligible for a valuable “free” prize. Consumers who took the bait by visiting the websites to which they were directed quickly learned that their “free” gift was available only if they participated in a series of sponsor offers. These offers were tiered so that inexpensive ones appeared first, giving consumers the impression that the desired gift could be obtained for a minimal expenditure. By the time consumers arrived at the last tier of offers, they discovered that only by purchasing hundreds of dollars worth of goods, or by committing to a car or home loan, could they actually obtain their so-called “gift.” The FTC settlements required the companies to post clear and conspicuous disclosures of the true costs of the “gifts,” and also required the payment of \$3.75 million in combined civil penalties for violations of the CAN-SPAM Act.⁴⁰

VI. The FTC Advertising Enforcement Program

Thirty years ago, the Commission’s ad monitoring program primarily involved perusing major publications and viewing story boards for advertisements on the television networks. Today, of course, the Commission staff has additional marketing venues to track, as well as far more sophisticated means at its disposal to identify false and deceptive advertising. The Internet has caused a vast increase in the amount of advertising, but it has also facilitated the task of monitoring ads to detect issues and problems. Internet surfs—where staff members search for particular kinds of product claims—are conducted on a regular basis. In addition, the FTC’s Consumer Response Center was established in 1997 to handle and respond to complaints and inquiries. The CRC staff receive, respond to, and collect information from the thousands of consumer and business complaints or inquiries received each week. The complaints are made available to FTC staff and other law enforcement agencies in the U.S. and abroad through the Consumer Sentinel Network, a secure online database that includes complaints received not only by the FTC, but also by other selected government agencies and non-governmental entities. The Network is accessible only to law enforcement agencies, and about 1,700 such organizations in the U.S., Canada, and Australia are members. The Network has enabled the Commission to join forces with its law enforcement partners to bring multiple actions at one time to address a particular problem.

At one time, most advertising cases were brought as administrative proceedings. Violators of administrative orders could be subject to civil penalties through Federal district court enforcement actions brought by the Department of Justice on the FTC’s behalf. With the development of the Commission’s fraud program during the 1980s, however, the agency relied increasingly on its authority pursuant to Section 13(b) of the FTC Act⁴¹ to initiate its own actions in Federal district court seeking preliminary and permanent injunctions, as well as consumer redress or disgorgement of ill-gotten gains. The Federal court option is not limited to cases of blatant fraud, but is being used increasingly for advertising substantiation actions.

VII. Conclusion

The areas of focus described above—health and safety claims, endorsements and testimonials, environmental benefit claims, and economic assistance claims—are current and future priorities for the Commission’s advertising program. As noted at the outset, the task of monitoring and pursuing false and deceptive advertising claims has grown larger and more complex over the past few decades. Significantly, however, the Commission’s resources to tackle deceptive advertising, as well as the other important consumer issues addressed by the agency’s Bureau of Consumer Protection, have not increased enough. The FTC has a highly competent and dedi-

³⁹ See Press releases, ValueClick to Pay \$2.9 Million to Settle FTC Charges (Mar. 17, 2008), available at <http://www.ftc.gov/opa/2008/03/vc.shtm>; Online Advertiser Settles FTC Charges. “Free” Products Weren’t Free; Settlement Calls for \$200,000 Civil Penalty (Jan. 30, 2008), available at <http://www.ftc.gov/opa/2008/01/media.shtm>; Major Online Advertiser Settles FTC Charges. “Free” Gifts Weren’t Free; Settlement Calls for \$650,000 Civil Penalty (Nov. 28, 2007), available at <http://www.ftc.gov/opa/2007/11/free.shtm>.

⁴⁰ The CAN-SPAM Act of 2003, 15 U.S.C. §§ 7701–7713, prohibits deceptive sender and subject lines in commercial e-mail and provides consumers the right to opt out of future commercial e-mail campaigns.

⁴¹ 15 U.S.C. § 53(b).

cated staff that is used to being asked to do more with less. However, increased resources would provide more effective consumer protection.

Self-regulatory programs, such as those initiated and ably administered by the National Advertising Division/National Advertising Review Council of the Council of Better Business Bureaus are a welcome adjunct to the FTC's advertising enforcement program, and clearly their work has served to lighten the load for the Commission. With respect to deceptive weight-loss claims, the FTC has enlisted the help of the media to screen advertising. It published a guide describing seven weight-loss product claims that should raise "red flags" because they are always false (*e.g.*, a claim that one can lose weight without diet or exercise).⁴² Former Chairman Muris and former Commissioner Leary met with media members and asked them to refuse to run ads making the "red flag" claims. While there was initial resistance to the suggestion, some media members have responded to the challenge, and there was a significant decline in those particular claims.⁴³ The "red flags" initiative was a step in the right direction, although obviously it has not solved the problem of deceptive weight loss advertising. Much more needs to be done by both the industry and the media.

Thank you for providing the Commission the opportunity to appear before the Subcommittee to describe the agency's advertising enforcement program.

Senator PRYOR. Thank you.
Ms. Greenberg?

**STATEMENT OF SALLY GREENBERG, EXECUTIVE DIRECTOR,
NATIONAL CONSUMERS LEAGUE**

Ms. GREENBERG. Yes, good morning, Mr. Chairman and Senator Wicker, Members of the Subcommittee, who we hope to see in a few moments.

My name is Sally Greenberg. I'm Executive Director of the National Consumers League. And we greatly appreciate the opportunity to be here with you this morning to talk about consumer protections against deceptive advertising.

Over more than—over our more than 100-year history, the National Consumers League has been a fierce critic of misleading advertisement, deceptive labeling, and other anti-consumer marketing practices. And, in fact, going back so far as the 1904 St. Louis World's Fair, volunteers from our organization demonstrated to fairgoers that canned green beans, touted by food processors as labor-saving home improvements, were adulterated with green dye.

Our testimony today will focus on proposed revisions to the Federal Trade Commission's guides concerning use of endorsements and testimonials in advertising, which are currently under final review.

TV-watchers turning on their sets at nearly any time of the day or night have grown accustomed to advertisements claiming that, by taking a pill or eating a certain type of submarine sandwich, they can expect to shed pounds and achieve a desired weight. Other advertisements trumpet that, with a minimal investment and only part-time work from home, consumers can achieve financial wealth in as little as 6 months. These advertisements are typically accompanied by small print quickly flashed at the bottom of the screen, indicating that, quote, "results are not typical," end quote, or that "your results may vary."

⁴² FTC, *Deception in Weight-Loss Advertising Workshop: Seizing Opportunities and Building Partnerships to Stop Weight-Loss Fraud* (2003), available at <http://www.ftc.gov/os/2003/12/031209weightlossrpt.pdf>.

⁴³ FTC Staff Report, *Weight-Loss Advertising Survey* (2005), available at <http://www.ftc.gov/os/2005/04/050411weightlosssurvey04.pdf>.

Advertisers rely on these techniques for one simple reason: they work. For example, in 2005, when Subway, the sandwich empire, briefly ceased using everyman Jared Fogel in its advertising, same-store sales decreased 10 percent until Fogel was reinstated. This is not an isolated incident. An FTC study found that 65 percent of weight-loss advertisements used consumer testimonials, and 42 percent contained before-and-after pictures.

Expert testimonies are similarly effective at swaying consumer opinion. Many weight-loss ads attempt to bolster their credibility by depicting doctors or scientists using phrases like “clinically tested” or “studies confirm.” A July 2006 Temple University study examined how teenage girls interpret weight-loss advertisements, and found that most of these girls viewed with trust the image of a white-coated doctor.

The National Consumers League supports the proposed FTC guides and the changes to those guides—improvements, in our view—regarding consumer and expert endorsements. We believe that the overuse of consumer testimonials and expert endorsement has crossed the line from aggressive marketing to outright deception.

The Commission has also proposed changes to the guides that would require bloggers compensated by advertisers to disclose their relationship. In addition, bloggers—and the advertisers who pay them—would be explicitly held liable for false or misleading representations made through an endorsement on a blog or other platform.

We acknowledge that protecting consumers online presents special challenges for regulators. However, we fear that injecting advertiser dollars into consumer-to-consumer blog—into the consumer-to-consumer blogosphere, without proper guidelines, could give rise to rampant consumer deception. We believe that consumers have a right to know if a product endorsement is paid for by a company. Therefore, we support the FTC rules requiring disclosure when a blogger is compensated for voicing his or her opinions on a particular product or service.

Finally, we believe that consumer trust has been endangered by the misuse of video news releases, or VNRs. VNRs are corporate-, government-, or nonprofit-produced videos made to resemble news segments, but, in reality, are advertisements designed to promote a product, service, public image, or point of view of the entity that funded them. The typical newsroom may have 10—may be sent 10 to 15 VNRs every single day. We find the rampant lack of disclosure by broadcasters that they are being paid to air VNRs extremely troubling. We support vigorous FCC enforcement of relevant regulations in this area. And we would further argue that the FTC should continue investigating whether the producers of VNRs, themselves, should be subject to terms of the FTC guides on endorsement and testimonial advertising.

In conclusion, the proliferation of advertising has made pitches for products and services an inescapable fact of modern life. The FTC has rightfully sought to ensure that advertisements are accurate and not deceptive.

Finally, we should be assured that a free and independent media is not passing off advertisements as hard news. NCL fully supports

the FTC's review of, and proposed changes to, the guides, and we further urge the Commission to undertake an investigation of the applicability of the guides to the use of video news releases.

Thank you, Mr. Chairman, Senator Wicker, for giving the National Consumers League this opportunity to comment on the impact of advertising trends on consumer protection. We applaud you for your proconsumer leadership in this area, and look forward to answering any questions you may have.

[The prepared statement of Ms. Greenberg follows:]

PREPARED STATEMENT OF SALLY GREENBERG, EXECUTIVE DIRECTOR,
NATIONAL CONSUMERS LEAGUE

Introduction

Good morning, Mr. Chairman, Mr. Ranking Member and members of the Subcommittee. My name is Sally Greenberg and I am the Executive Director of the National Consumers League (NCL).¹ I appreciate this opportunity to appear before the Subcommittee on Consumer Protection, Product Safety, and Insurance of the Senate Commerce, Science, and Transportation Committee to discuss the issue of consumer protections against deceptive advertising.

Over its more than one hundred years of existence, NCL has been a fierce critic of misleading advertising, deceptive labeling, and other anti-consumer marketing practices. At the 1904 St. Louis World's Fair, NCL volunteers demonstrated to fairgoers that canned green beans touted by food processors as a labor-saving home product were adulterated with green dye. More recently, NCL's advocacy prompted the FDA in 2001 to investigate misleading claims by tomato juice manufacturers that their products were "fresh."² In 2008, we supported legislation introduced by Senator Bill Nelson of Florida aimed at curbing the use of deceptive advertising practices in the prepaid calling card industry.³ Earlier this year, in response to an NCL letter to the agency, the Food and Drug Administration (FDA) warned General Mills to stop printing misleading health claims on box of their Cheerios cereal.⁴

NCL believes that knowledgeable consumers can participate more fully and effectively in the marketplace. The more consumers know about their rights and responsibilities with regards to the goods and services they buy, the better they are able to protect themselves and make sound purchasing decisions. For this reason, it is imperative that the advertising consumers receive is accurate and transparent.

In 2008 alone, more than \$141 billion was spent on advertising in the United States, despite reduced corporate advertising budgets dragged down by the souring economy.⁵ Omnicom Group Inc., one of the largest advertising agencies in the world, last year made nearly \$1.7 billion in profits on more than \$13.3 billion in revenues.⁶ The advertising business is a large industry in its own right and its vitality affects virtually every other sector of the economy. NCL believes that the advertising industry plays a special role in both informing and persuading consumers to buy products and services. The reliability and transparency of advertising therefore requires special scrutiny by policymakers to ensure that the industry meets its obligations to the public.

Our testimony today will focus on proposed revisions to the Federal Trade Commission's (FTC) *Guides Concerning Use of Endorsements and Testimonials in Adver-*

¹The National Consumers League, founded in 1899, is America's pioneer consumer organization. Our non-profit mission is to protect and promote social and economic justice for consumers and workers in the United States and abroad. For more information, visit www.nclnet.org.

²National Consumers League. "National Consumers League Asks FDA to Crack Down on Companies that Violate Labeling Laws," Press Release. October 11, 2001. Online: <http://www.nclnet.org/freshpr1001.htm>.

³National Consumers League. "Testimony of Sally Greenberg, Executive Director, National Consumers League on S. 2998, the 'Prepaid Calling Card Consumer Protection Act of 2008' Before the U.S. Senate Commerce, Science and Transportation Committee." September 10, 2008. Online: http://www.nclnet.org/news/2008/prepaid_testimony_09102008.htm.

⁴National Consumers League. "National Consumers League Applauds FDA for Warning General Mills for Misbranding Cheerios," Press Release. May 13, 2009. Online: http://www.nclnet.org/news/2009/fda_cheerios_05132009.htm.

⁵TNS Media Intelligence. "TNS Media Intelligence Reports U.S. Advertising Expenditures Declined 4.1 Percent in 2008," Press Release. May 4, 2009. Online: <http://www.tns-mi.com/news/05042009.htm>.

⁶Omnicom Group Inc. 2008 Annual Report. Online: <http://files.omnicomgroup.com/ReportManagement/UploadedFiles/128836875883178750.pdf>.

tising (“the Guides”),⁷ proposed by the Commission in November 2008 and currently under final review.⁸ In addition, we will discuss the issue of video news releases (VNRs), and whether the use of such advertising should fall under the jurisdiction of the *Guides*.

Deceptive Testimonial Ads and Bogus “Expert” Endorsements Distort the Market

Consumers turning on their televisions at nearly any time of the day or night have grown accustomed to advertisements claiming that simply by taking a pill or eating a certain type of submarine sandwich they can expect to shed pounds and achieve a desired weight. Other advertisements trumpet that with a minimal investment and only part-time work from home, consumers can achieve financial wealth “in as little as 6 months!”⁹ These advertisements are typically accompanied by small print, quickly flashed at the bottom of the screen indicating that “results are not typical,” or that “your results may vary.” Such advertisements frequently feature a “noted expert” on the topic of the advertisement, often clothed in a trust-inducing white medical coat.¹⁰ It does not take a Ph.D. to realize that through the use of such examples of success—which tend to be outliers if they exist at all—and the reputations of supposed “experts,” advertisers are attempting to persuade consumers that they can easily and quickly get rich or resemble the attractive person on the screen. The advertising industry does not generally release data on the effectiveness of testimonial advertisements. However, the impact of one of the most famous testimonial advertising pitchmen, Subway’s Jared Fogle, is illustrative. When Subway briefly ceased using Fogle in its advertising in 2005, same store sales decreased by 10 percent until Fogle was reinstated.¹¹ Clearly, Jared’s crediting of his substantial weight loss to Subway’s sandwiches in the company’s advertisements had a large impact on consumers’ preference for Subway.

We believe that the proliferation of such ads¹² clearly highlights three factors pertaining to deceptive advertising. First, the present ubiquity of the use of such testimonials indicates that the spirit of the FTC’s *Guides*—last revised in 1980—has been thoroughly circumvented by advertisers. Second, such advertising practices are proving to be very successful for advertisers and their clients. Were this not the case, advertisers would be unlikely to invest in the broadcast of such ads. Third, consumers are being harmed by these ads. Indeed, the two FTC staff reports^{13 14} examining this issue concluded that current efficacy and typicality disclosure practices (the “results not typical” and “your results may vary,” disclaimers) were insuf-

⁷ Available online at <http://www.ftc.gov/bcp/guides/endorse.htm>.

⁸ Federal Trade Commission. “16 C.F.R. Part 255: Guides Concerning the Use of Endorsements and Testimonials in Advertising: Notice of Proposed Changes to the Guides, and Request For Public Comments,” November 21, 2008. Online: <http://www.ftc.gov/os/2008/11/P034520endorsementguides.pdf>.

⁹ Federal Trade Commission. “FTC Cracks Down on Scammers Trying to Take Advantage of the Economic Downturn,” Press Release. July 1, 2009. Online: <http://www.ftc.gov/opa/2009/07/shortchange.shtm>.

¹⁰ See: Hobbs, Renee *et al.* “How adolescent girls interpret weight-loss advertising,” Health Education Research. Pg. 723. July 2006. Online: <http://her.oxfordjournals.org/cgi/reprint/21/5/719>: “By contrast, only 17 percent of participants in our study recognized the persuasive technique of claiming that products are ‘doctor-endorsed and scientifically proven’. Many weight-loss ads attempt to bolster their own credibility by depicting ‘doctors’ or ‘scientists’ using phrases like ‘clinically tested’ or ‘studies confirm. . . .’ This strategy is particularly manipulative considering that most consumers rarely question the advice of their doctors. Most girls in this study viewed with trust the image of the white-coated doctor, seeing it as a sign of credibility. For example, one participant said, ‘If I had a weight problem, then I’d probably be more confident in that product because the specialist was in it.’”

¹¹ York, Emily Bryson. “Subway Can’t Stop Jonesing for Jared,” *Advertising Age*. Pg.1. February 18, 2008.

¹² According to Cleland, Richard *et al.* [*Weight-loss advertising: An Analysis of Current Trends*. Federal Trade Commission. September 2002.], weight-loss advertisements in magazines more than doubled between 1992 and 2001. Among the magazines sampled, 65 percent of weight-loss advertisements utilized consumer testimonials and 42 percent contained before-and-after pictures.

¹³ Hastak, Manoj and Mazis, Michael. “The Effect of Consumer Testimonials and Disclosures on Ad Communication for a Dietary Supplement,” Report submitted to the Federal Trade Commission. September 30, 2003. Online: <http://www.ftc.gov/reports/endorsements/study1/report.pdf>.

¹⁴ Hastak, Manoj and Mazis, Michael. “Effects of Consumer Testimonials in Weight Loss, Dietary Supplement and Business Opportunity Advertisements,” Report submitted to the Federal Trade Commission. September 22, 2004. Online: <http://www.ftc.gov/reports/endorsements/study2/report.pdf>.

ficient in adequately warning consumers that they were not likely to enjoy the same results highlighted by these testimonials.

To address this issue, the Commission has proposed several revisions to Sections 255.2 (“Consumer Endorsements”) and 255.3 (“Expert Endorsements”) of the *Guides*.

First, the proposed revisions to Section 255.2 would require that advertisers who use consumer testimonials be able to substantiate claims made by the endorsement. The revision would prohibit the use of consumer testimonials as a replacement for clear scientific evidence when quantifiable claims are made in the advertisement. The proposed revisions would also make the use of the “results not typical,” “your results may vary,” and similar disclaimers insufficient to meet disclosure requirements. Instead, the proposed guideline would require “clear and conspicuous” notification of the results that consumers can generally expect to see from the use of the advertised product or service. Second, the Commission’s proposed changes to Section 255.3 would clarify two important requirements—(i) that the experts endorsing a particular product or service must be qualified and have exercised their expertise in their decision to endorse and (ii) that endorsements made by experts “certified” by advertiser-connected institutions are inherently deceptive.

NCL applauds these proposed changes. The threat of consumer deception is high when an advertisement promises extraordinary results and such claims are reinforced by “experts” or “people just like you.” Given the troubling increase in the use of such tactics in advertisements, we support action by the FTC to clamp down on these practices via the proposed revisions to the *Guides*. We believe that approval of the revisions to Sections 255.2 and 255.3 of the *Guides* would encourage advertisers to be more truthful in their advertising, help ensure that consumers get more accurate information from advertisements, and ultimately increase consumer confidence in the marketplace.

Enhanced Blogger Disclosure Requirements Strengthen Consumer Confidence

The Commission has proposed significant revisions to section 255.1 (“General Consideration”) and 255.5 (“Disclosure of Material Connection”) of the *Guides* to address the growing problem of bloggers and other users of social media platforms failing to disclose compensatory relationships in product and service reviews and endorsements.¹⁵ The proposed changes to the *Guides* would require bloggers compensated (either monetarily or in the form of free samples or gifts) for their roles in advertising campaigns to disclose the relationship. In addition, bloggers and the advertisers who pay them would explicitly be held liable for false or misleading representations made through an endorsement on a blog or other online platform.

Blogging, by its nature, is a communications medium open to any consumer with access to the Internet. This openness has encouraged an unprecedented explosion in consumer discourse about practically every category of consumer product available. The inherently open qualities of the blogosphere suggest that the inclusion of bloggers as parties subject to the revised guidelines could present unique challenges for regulators.

There are those who argue that the blogosphere is and should remain a place where consumer-bloggers are free to say what they wish without fear of government regulators or of law enforcement holding them liable for their statements. Another argument against the change is that the blogosphere is inherently self-regulating and thus not in need of government oversight. Those making such arguments frequently cite cases where the credibility of blogs reviewing products was reduced when it was discovered that the bloggers had not disclosed a financial benefit given in return for a review. A third argument against the revisions maintains that given the dynamic nature of the social Web—where anyone can voice an opinion on a blog or via Twitter, Facebook, or other platform—it will be practically impossible for the FTC to effectively administer the proposed rule.

We reject all these arguments in the name of consumer protection. As with any emerging means of communication, “rules of the road” must govern to protect against deceptive advertising. With regard to the first critique of the proposed changes, we believe that the need for consumer confidence online outweighs any potential “chilling effect” that FTC review might produce. Indeed, reasonable disclosure requirements could provide much needed guidance to bloggers unfamiliar with the ethics guidelines commonly adhered to by professional journalists in product reviews produced for “traditional” media outlets.

¹⁵This practice is commonly known as “blogola,” a variation on the term “payola,” an illegal business practice in which record companies compensate radio stations in return for airplay of the company’s artists.

Second, consumer groups generally do not believe that self-regulation works in highly competitive, financially lucrative marketing environments. The effectiveness of the blogosphere and other social media platforms as consumer empowerment tools is built on trust. Without trust, such tools lose their value to consumers. The increasing frequency of revelations that bloggers did not disclose that they were compensated for their endorsements suggests that the self-regulatory model is breaking down in the face of relentless monetary inducements from the advertising industry.¹⁶ Marketers all-too-frequently fabricate “spontaneous” Internet “buzz” around products and services by paying for endorsements by influential bloggers and other “e-celebrities.” With each new news story of such incidents, the trust that has made the blogosphere such a powerful consumer tool is eroded. Given that the blogosphere is growing more sophisticated and influential by the day, and that advertisers are investing significant resources in trying to tap that influence, we believe that FTC guidelines and oversight in this area are appropriate and needed.

Third, we acknowledge that there are practical difficulties in policing the ever-changing social Web. Any consumer with an Internet connection can quickly and easily create a blog, Facebook Page, and/or Twitter account dedicated to reviewing products and services. We believe that the practical difficulties of policing blogs and other social media platforms can be addressed by focusing enforcement on the most egregious violators of the proposed guidelines and the advertisers that provide them with compensation. The FTC has similarly voiced an intention to narrowly target its enforcement efforts at repeat offenders of the proposed guidelines.¹⁷

Over time, consumers have developed a healthy skepticism of traditional print, radio, and television advertising. Properly enforced disclosure requirements in Federal statutes and regulations help build consumer confidence in the marketplace, enabling them to make informed decisions about the products and services they purchase for themselves and their families. NCL supports FTC rules requiring disclosure when a blogger is compensated for voicing his or her opinions on a particular product or service. Consumers have a right to know if a product endorsement is paid for by the company. We do not want to see the viral spread of word-of-mouth recommendations enabled by social media technologies give rise to rampant consumer deception.

Video News Releases Damage Consumer Trust in the Fourth Estate

We believe that the same consumer trust that has helped consumer-oriented blogs flourish has been endangered by the use of video news releases (VNRs) that purport to be news but are really paid advertising.

VNRs are corporate, government, or non-profit-produced video made to resemble “news” segments but which in reality are advertisements designed to promote a product, service, public image, and/or point of view of the client(s) who funded them.¹⁸ While exact figures on the scope of VNR use are difficult to obtain, one of the largest VNR production agencies, Medialink Worldwide, reported that it produced approximately 1,000 VNRs per year.¹⁹ The typical newsroom may have ten to fifteen VNRs available per day.²⁰

It is easy to see why VNRs are so popular with advertisers and news organizations. First, newsrooms are under increasing pressure to provide expanded news coverage but lack additional staff resources to make that happen. The use of VNRs is a time and cost-saving way to address this pressure. In addition, news agencies are under enormous financial strain due to the proliferation of news outlets competing for advertising dollars. VNRs bring in additional revenue beyond ads sold to fill the time between news segments. Production and airtime costs typically range from \$25,000 to \$75,000 for a VNR, making them significantly cheaper than traditional advertisements. The cost for a traditional 30-second advertisement can easily

¹⁶For example, in 2006, Microsoft sent laptop computers preloaded with its Vista operating system to bloggers on highly-trafficked blogs, asking them to review the then-new operating system. The company only vaguely encouraged the bloggers to disclose that they had received the laptop computer as a gift. See: Solis, Brian. “This is Not a Sponsored Post: Paid Conversations, Credibility & the FTC,” TechCrunch.com. May 24, 2009. Online: <http://www.techcrunch.com/2009/05/24/this-is-not-a-sponsored-post-paid-conversations-credibility-the-ftc/>.

¹⁷Yao, Deborah. “FTC plans to monitor blogs for claims, payments,” Associated Press. June 21, 2009. Online: http://tech.yahoo.com/news/ap/20090621/ap_on_hi_te/us_tec_bloggers_freebie_disclosures.

¹⁸Center for Media and Democracy. “Fake TV News: Frequently Asked Questions.” Online: <http://www.prwatch.org/fakenews/faq>.

¹⁹Barstow, David and Stein, Robert. “Under Bush, a New Age of Prepackaged TV News,” *The New York Times*. March 13, 2005. Online: http://www.nytimes.com/2005/03/13/politics/13covert.html?_r=1&pagewanted=print&position=

²⁰Center for Media and Democracy. “Fake TV News: Frequently Asked Questions.” Online: <http://www.prwatch.org/fakenews/faq>.

run into the tens of millions of dollars.²¹ VNRs also benefit from the implicit trust that consumers place in news programs. The average viewer places a healthy dose of skepticism on claims made in traditional ads. In contrast, media stories are expected to be free of conflicts of interest. The lack of disclosure of the source and payments involved in the airing of VNRs preys on that trust and deceives consumers.

Regulation of VNRs has traditionally been the purview of the Federal Communications Commission (FCC). The FCC exercised this authority in 2007 when it fined Comcast repeatedly for failing to disclose VNRs that aired on its CN8 channel promoting products from companies like General Mills, Allstate, and Trend Micro.²²

As a consumer organization, NCL finds the rampant lack of disclosure by broadcasters that they are being paid to air VNRs extremely troubling. We support vigorous FCC enforcement of relevant regulations in this area. We would further argue that the FTC should consider investigating whether the use of VNRs should be subject to the terms of the FTC's *Guides*. In particular, we believe that when a VNR airs on a media program without sufficient disclosure, it could constitute a *de facto* endorsement of the product or service advertised by the news organization, thus invoking Section 255.4 requirements. In addition, we would urge the Commission to investigate whether a news organization's failure to disclose their compensatory arrangement with the providers of VNRs should invoke sanctions under Section 255.5 of the *Guides*.

Conclusion

The proliferation of advertising has made pitches for products and services an inescapable fact of modern life. Recognizing the singular power of the advertising industry to affect consumer attitudes and behavior, the FTC has rightfully sought to ensure that advertisements are accurate and not deceptive. When the *Guides* were last revised in 1980, the means for disseminating advertisements were largely limited to traditional print, radio, and television outlets. Cable television was in its infancy and the World Wide Web was virtually unknown. In the nearly three decades since, cable television has exploded in variety and viewership and Internet advertising has reached dizzyingly complex heights of sophistication. Both trends were fueled by an increasing abundance of advertising dollars. Given these facts, NCL fully supports the FTC's review of and proposed changes to the *Guides*. In addition, we would urge the Commission to undertake an investigation of the applicability of the *Guides*' rules to the use of video news releases.

Now more than ever, consumers need to be assured that products and services advertised to them deliver on what they promise. Where extreme results are promoted, typical results should be clearly disclosed. When an "expert" unequivocally stakes her or his reputation on an endorsement of a product, consumers should be informed whether that person is qualified to make the statement. Readers of a product review on a blog or Facebook page deserve to know if the reviewer's opinion may have been swayed by a free gift or a hefty check. Finally, citizens of a democratic society should have confidence that the media is not passing off advertisements as hard news.

Thank you, Mr. Chairman, for giving the National Consumers League this opportunity to comment on the impact of advertising trends on consumer protection. We applaud you for your leadership in this area and look forward to answering any questions you or other members of the Subcommittee may have.

Senator PRYOR. Thank you. You timed that perfectly, by the way. Thank you.

[Laughter.]

Senator PRYOR. We love that about you.

[Laughter.]

Senator PRYOR. Dr. Rangan?

²¹Mandese, Joe. "The Art of Manufactured News," *Broadcasting & Cable*. March 27, 2005. Online: http://www.broadcastingcable.com/article/156596-The_Art_of_Manufactured_News.php.

²²The FCC's 2007 *Notice of Apparent Liability for Forfeiture* in this case is available online at http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-07-4075A1.pdf

**URVASHI RANGAN, Ph.D., DIRECTOR OF TECHNICAL POLICY,
CONSUMERS UNION OF U.S. INC.**

Dr. RANGAN. Good morning Chairman Pryor, Ranking Member Wicker, and Members of the Subcommittee. We thank you for providing us the opportunity to come before you today to share our perspective on deceptive marketing in advertising of green products.

My name is Urvashi Rangan. I am the Technical Director of—I am the Director of Technical Policy for Consumers Union. We're the nonprofit publisher of *Consumer Reports* magazine. I'm an environmental-health scientist, and I provide technical support to our research and testing, and help develop advice and policy recommendations on advocacy issues, on a wide array of environmental and public health issues.

We believe there are both broad and specific challenges in defining a fair green marketing practice, and we believe that the government, including the Federal Trade Commission, has a very important role to play in guiding and protecting this marketplace.

Consumers are faced with a dizzying array of labels, some of which are very specific and discrete, like “no phthalates,” to those that are vague and not well defined, like “natural” and “green.” This marketplace is incredibly confusing for consumers, and filled with a lot of noise that can be misleading and, at times, deceptive. Too often, consumers are presented with claims that sound better than they are, like “carbon-negative,” or have minimal standards, like “natural,” on virtually every product, and—as well as claims that have no standards, like “nontoxic.” And yet, consumers misinterpret those claims to have much more meaning than they actually do.

Consumers can also choose products with meaningful labels. And there are many certified label programs out there. The administration of the certification can vary by model. There are public, private, nonprofit, for-profit models. That information is of interest to some consumers, and it is not of interest to other consumers. But, a consumer cannot tell, by just looking at a product, whether a claim is certified or not, whether it is verified or not; and therefore, it is impossible for them to make accurate assessments of “green” claims in the marketplace at the point of purchase.

The Federal Trade Commission's role in reducing deceptive marketing practices, we feel, is necessary, and should be broadened, and, at the same time, a baseline for good marketing practices and minimum standards for common claims, we believe, should be established.

Consumers Union has been rating the meaning of “green” labels for consumers for the last 10 years. We measure the value of green claims over conventional production practices in order to help consumers make the most informed decisions.

We look at six main criteria. And there are more details in the written testimony, but they are: Is the label meaningful? Is it verified? Is it consistent in meaning from product to product? Are the standards transparent? And are—is information about the labeling organization and verification organization transparent? Is there an opportunity for stakeholder input? And finally, is the label

independent? That is, were the decisions made, for both the standards and the verification, free from conflict of interest?

Conflicts of interest do not automatically render an advertising or marketing claim false or misleading; however, when conflicts of interest are not fully disclosed, transparency is compromised, in a way that can undermine even the most truthful claims. And that applies to testimonial advertisements, marketing, as well as label claims on products.

Based on our experience of rating and monitoring label claims in the green marketplace, we have identified a few trends. Comprehension and accessibility are challenges for all green claims. Whether specific or broad, the maintenance and evolution of those standards over time also need to be addressed.

We have several recommendations that we would like to see made, both at the government and the Federal Trade Commission level. We think that eliminating or better defining meaningless claims in the marketplace is necessary, so that claims like “natural,” “carbon-negative,” “nontoxic,” “free-range,” which have little or—little definition and no verification, really should either be banned, or specifics should be required to back those claims up.

The type of verification, or lack thereof, should also be disclosed on a product, so that, if it is, indeed, a voluntary claim, not a certified claim, that consumers are able to distinguish between those types of claims on a particular product.

We also think that baseline practices should be set for all green marketing claims. We think that there does need to be a floor established, in terms of transparency. And we think that, in order to reduce confusion between claims, like “natural” and “organic,” for example, the more information consumers have at the point of purchase, the better they will be able to make those distinctions. At the current time, consumers are not able to adequately differentiate between those two claims. And yet, there is a large discrepancy in the meaning between them.

We think that there should be mandatory ingredient labeling. The cleaning product industry is currently not required to disclose ingredients. Green claims that are made on those products cannot be verified, either by the consumer or by a group like Consumer Reports, without basic product information on the package. We do not believe green claims should be used on top of that.

We also think that, where there are green government labeling programs, that the FTC has a role to play in ensuring the high meaning, and consistency of that meaning, across product categories. So, for example, where certain phthalates have been banned by the Consumer Product Safety Improvement Act, perhaps those phthalates, under similar exposure scenarios, should also be banned for children’s personal-care products like baby wipes. So, we would like to see more consistency brought into the application of those particular standards across the board.

And finally, we do think that it is important for the FTC to have a role in supervising the variety of different claims coming out of the various different agencies. So, whether it’s “FDA” and “natural,” whether it’s “USDA” and “free-range,” we believe that the Federal Trade Commission has a larger role to play in ensuring

that there is a baseline, and a consistent application and meaning, behind the claims that are overseen by the government itself.

Thank you.

[The prepared statement of Dr. Rangan follows:]

PREPARED STATEMENT OF URVASHI RANGAN, PH.D., DIRECTOR OF TECHNICAL POLICY,
CONSUMERS UNION OF U.S. INC.

Good morning Chairman Pryor, Ranking Member Wicker, and distinguished members of the Committee. Thank you for providing me the opportunity to come before you today to share our perspective on deceptive marketing and advertising of green products. I am Urvashi Rangan, Ph.D. and Director of Technical Policy for Consumers Union, non-profit publisher of *Consumer Reports*TM. I am an Environmental Health Scientist and provide technical support to our research and testing and help develop advice, policy recommendations and advocacy initiatives on a wide array of environmental and public health issues. I also direct *Consumer Reports' Greenerchoices.org*, a free, public-service website, which disseminates wide ranging reports on the green marketplace, including an eco-labels data base, that gives consumers our evaluation and ratings of more than 150 environmental claims including those found on food, personal care products and cleaners. We also advocate for stronger labeling standards across a wide range of products.

There are both broad and specific challenges in defining fair green marketing practices, and we believe that the government, including the Federal Trade Commission, has a very important role to play in guiding and protecting this marketplace. Consumers are faced with a dizzying array of labels—some which are very specific and discreet, like “no phthalates” to those that are vague and not well defined, like “natural” and “green.” This marketplace is incredibly confusing for consumers and filled with a lot of noise that can be misleading and, at times, deceptive. Too often, consumers are presented with claims that sound better than they are (e.g. “carbon negative”), have minimal standards (e.g. “natural”) or no standards (e.g. “non-toxic”).

In contrast, consumers can also choose products with meaningful, certified labels. Of the certified label programs, the administration of the certification can vary, including by public, private, non-profit or for-profit organizations. Some claims have comprehensive standards behind them with robust verification (certified labels) while many do not (general claims). But it is difficult to impossible for consumers to make accurate assessments of green claims in the marketplace on their own. The Federal Trade Commission's role in reducing deceptive marketing practices therefore is necessary and should be broadened. At the same time, the baseline for good marketing practices and minimum standards for common claims should be established.

Consumers are currently faced with a huge learning task that better guidance and regulation could reduce. Requirements for transparency in standards and product information, such as ingredient lists, should be standard for all products being sold with green claims. Government regulation and guidance would be helpful in maintaining universal requirements for credible green marketing practices.

Consumers Union has been rating the meaning of green labels for consumers for the last 10 years. We measure the value of green claims over conventional production practices in order to help consumers make the most informed purchasing decisions, especially where the may be an associated premium. The following is list of criteria and typical questions or issues we consider, with the first two (meaning and verification) as the most important:

1. *Meaning*: How meaningful is the label (with ratings of highly, somewhat, or not)
 - are the standards credible?
 - have the standards progressed over time?
 - does the claim accurately represent the standards behind it?
2. *Verification*: Is the label verified (rating: yes/no)
 - many general claims are on the market which are not verified but impossible for consumers to know
 - types of verification can range from none to onsite inspection
3. *Consistency*: In meaning across products (rating: yes/no)
 - does the claim mean the same thing across products that it is found?
4. *Transparency*: Are the standards and labeling organization information publicly available? (rating: yes/no)

—is enough product information disclosed so claims can be analyzed effectively?

5. *Stakeholder input*: Were the standards developed with broad public and industry input? (rating: yes/no)

6. *Independence*: Were the decisionmaking bodies within both the standard-setting and verification arms free from conflict of interest? (rating: yes/no)

Conflicts of interest do not automatically render an advertising or marketing claim false or misleading. However, when conflicts of interest are not fully disclosed, transparency is compromised in a way that can undermine even the most truthful claims.

In evaluating claims, we provide consumers with comparative rating snapshots. Examples of these comparisons can be seen in a recent presentation made to the American National Standards Institute on sustainable product standard setting.¹

Based on our experience of rating and monitoring label claims in the green marketplace, we have identified a few trends. Comprehension and accessibility are challenges for all green claims. Whether specific or broad, the maintenance and evolution of standards over time must be addressed. Consistency in the meaning of standards across different product categories can also be a challenge. And the ability to respond and incorporate emerging marketplace issues, especially around health and/or safety (*e.g.*, bisphenol-A (“BPA”), phthalates, mad cow) is another hurdle for label standards and programs. All of these challenges increase with the complexity of a label.

Yet, the green-ness or sustainability of a product is a complex subject. There are often many attributes to a product’s sustainability like the social, environmental, and health aspects from production through to disposal. Green marketing claims can be very specific or very broad (with the latter being much more difficult and challenging), requiring more consumer education to launch and more maintenance (standards development and evolution) to keep current over time—which then requires additional consumer education. For these reasons, consumers tend to better understand labels that are discreet and can better decipher the meaning of a group of discreet labels compared to a single large multi-attribute label. When a set of sustainability practices has become defined and well understood, then combining labels or standards can be accomplished more coherently. For example, there are labels that address well-understood and defined practices, like energy or water usage, and newer, innovative labels that may need to compete in the marketplace until well understood or defined practices evolve, like the elimination of toxic materials within a given production system or manufacturing that allows for the easiest recycling.

Consumers Union believes that the government could help provide guidance for green marketing in five main areas including:

1. *Eliminating or better defining meaningless label claims in the marketplace.*

Voluntary, general claims like “natural,” “carbon negative,” “non-toxic,” or “free range,” have little to no definition and no verification. There should be minimum meaningful requirements that these claims should have to meet (and perhaps disclosures about what the claims do not represent). The type of verification or lack thereof should also be disclosed on the product. In some cases, like “natural,” the term is so vague and difficult to establish standard meaning that prohibiting the use of certain label claims may also be necessary toward reducing green noise in the marketplace.

2. *Setting baseline practices for all green marketing claims.*

We believe that the best labels meet all of our criteria for good labeling. However, there should be a floor established that ensures full transparency in the marketing and advertising of green products regarding both who is making the claim and how the product achieves the claim. In order to reduce confusion between claims like “natural” and “organic,” consumers should be able to differentiate between voluntary claims made by the manufacturer from claims that require independent certification. The Federal Trade Commission’s Green Marketing Guide should be updated to discourage or ban the new wave of vague, unsubstantiated claims in the marketplace, including those that are loosely addressed by other agencies, like “natural.” Other considerations for baseline practices could include verification requirements, accreditations (oversight of programs), and meeting minimum claim definitions.

3. *Mandate disclosure of basic product information.*

¹ Rangan, Urvashi. A purchaser’s/consumer’s perspective on setting product standards for sustainability. American National Standards Institute meeting, April 8, 2009.

Without basic information on products, it is impossible for consumers to make informed purchasing decisions, especially where additional green marketing claims are being made. We believe that all product categories, like cleaners, should be required to disclose ingredient information. There currently is no requirement for cleaning labels to disclose all ingredients. Despite this fact, the green cleaning marketplace is filled with claims. We also believe that plastic recycling numbers should be required to be listed so consumers can recycle effectively and better differentiate among plastics offered, including consumers who wish to avoid BPA from polycarbonate plastic (*e.g.*, #7 PC should be required).

4. *Hold government labeling programs to high standards with regard to practice and standard setting and ensure independence of standards and verification.*

Government-based green labeling programs should be independent, and represent input from a broad range of stakeholders. They should also have rigorous standards that evolve over time. Where a premium is associated, for example with Energy Star or Design for the Environment, standards required should have to go beyond the minimum requirements set by law and only a certain small percentage of a product market should be awarded premium labels. As more of a production market can meet a particular claim, it should signal an indication that standards need to improve. Marketing claim programs should have appropriate accreditations, oversight and adequate verification. There should be full transparency of information including how individual products are certified, whether all product ingredients are disclosed to allow consumers to make the most informed purchasing decisions, especially where they are paying a premium. This is not currently the case for EPA's Design for the Environment label. The label should have consistency in meaning across product types, which may require multiple agency coordinated efforts when product label claims straddle fall under multiple agency jurisdictions.

5. *Provide consistency in label meaning across jurisdictions.*

Where policies lead to laws or regulations in one product area—like the removal of certain phthalates from children's products under the jurisdiction of the U.S. Consumer Product Safety Commission—Congress should take steps to ensure that other products, especially those with similar exposure profiles, also are required to meet similar standards. For example, in the case of certain phthalates, children's personal care products, such as lotion and baby wipes, should not be allowed to contain those specific phthalates. These steps would impart consistency to laws based upon important health and safety policy recommendations. In addition, it also will help to level the playing field for the use of green claims.

We appreciate the work of this Subcommittee to identify and address problems and challenges in green marketing. Consumers Union believes that the Federal Trade Commission has an important role in maintaining fairness in this market and that decisions made in one sector could benefit claims made in another.

I thank the Chairman, Ranking Member Wicker, and the Committee for the opportunity to testify, and I look forward to any questions you may have.

Senator PRYOR. Thank you.
Mr. Peeler?

**STATEMENT OF C. LEE PEELER, PRESIDENT AND CEO,
NATIONAL ADVERTISING REVIEW COUNCIL AND EXECUTIVE
VICE PRESIDENT, ADVERTISING SELF-REGULATION COUNCIL
OF BETTER BUSINESS BUREAUS**

Mr. PEELER. Chairman Pryor and Senator Wicker, on behalf of the National Advertising Review Council and the Council of Better Business Bureaus, I want to thank you for inviting me to appear before you today to discuss the ongoing work of the industry's system of self-regulation.

Advertising self-regulation plays a critical role as part of a comprehensive system of preventing misleading advertising. That system includes enforcement at the Federal level by the Federal Trade

Commission, enforcement at the State level by State attorneys general, private litigation under the Lanham Act, active prescreening of ads by broadcast networks, and local advertising review by many of the 125 bureaus that compose the National Better Business Bureau system.

There are three main self-regulatory investigative bodies in the self-regulatory process. Each of these investigative units monitors advertising, hand-reviews complaints from consumers and competitors to identify potentially misleading advertising. If challenged, the advertising claims are—determined to be misleading or unsubstantiated, advertisers are required to halt such claims in future advertising and correct all material, including packaging and labeling.

And I would particularly commend the staff for the seating today. The—our position, right between the consumer groups and the government and the industry, is exactly the place where self-regulation falls on that spectrum.

[Laughter.]

Mr. PEELER. And, in fact, the significant number of our cases do come from companies that question the truth and accuracy of a competitor's advertising claims. Competitors are in a unique position to monitor the marketplace and their competitors' claims. Competitive challenges are a very healthy sign of self-policing in the marketplace. It's good for the consumers, it's good for competitors, and it's good for the integrity of advertising.

In other instances, discrete industries have come forward to support broader scrutiny of advertising. For example, the Council of Responsible Nutrition has initiated a special program for the monitoring of dietary supplement advertising, which has increased the number of cases the self-regulation body is able to bring. And, as you will hear more about today, the Electronic Retailing Association has funded a special program devoted to examining claims made in electronic retailing ads.

Although compliance with self-regulatory decisions is voluntary, the program has a voluntary compliance rate of well over 90 percent. This is a remarkable record and a strong indication of the industry's support for self-regulation. Advertisers that refuse to participate in the process, or refuse to comply with the recommendations to modify or discontinue their ads, are referred to the appropriate government agency, usually the Federal Trade Commission.

The advertising self-regulatory system receives strong support from the FTC. The referral of advertising to the FTC often prompts the advertiser to either discontinue the claim or return to the system; in other cases, referrals to the FTC have resulted in FTC lawsuits, often resulting in the payment of significant monetary penalties.

There are a number of trends that we see in our competitive advertising challenges and monitoring cases. One growing area, as referred to by the previous witness, has been green marketing cases. Here, building on the FTC's green guides, the self-regulatory system is building a body of precedent that can help advertisers avoid misleading or unsubstantiated advertising claims.

In the current economy, we are also seeing a growing number of savings claims and value claims coming through the system. Here

again, our decisions give guidance on appropriate substantiation for these claims. And reflecting the Nation's aging population, we see a steady number of health and appearance claims often targeted to the Boomer Market, and we are active in separating truthful claims from nontruthful claims.

Our Electronic Retailing Self-Regulation Program, which monitors direct-response advertising, all electronic media, including the Internet, reports seeing a growth in questionable weight-loss claims and in efficacy claims for health products and dietary supplements. And of particular concern here is the prevalence of what we call "affiliate marketing," where you'll see the same exact type of claim being made on what—on seemingly a host of unrelated Websites. And our recent alert to consumers about acai berry claims is an example of that.

Also, our BBB system reports a proliferation of claims—of complaints about free trial-type programs, negative-option plans, where you're offered a free product, but then are subject to repetitive billing.

All of our self-regulatory programs are working to examine advertising in the new media context, including claims on the Internet, YouTube, and in virtual-reality worlds. In addition, we continue to see example of paid advertising presented in formats that can be confused as editorial content. And the most recent iteration of that is the posting—is the paid-for posting of reviews on websites for the products without disclosing that the reviewer is actually an employee of the company.

In conclusion, the advertising industry has a strong, long-standing commitment to self-regulation as a tool to foster high standards of truth and accuracy in advertising. Each year hundreds of advertisers participate in our system. Hundreds more scrutinize our decisions. Despite this high level of support and commitment, there is still significant work to be done to prevent misleading advertising. And self-regulation has a very important role in that effort.

Thank you for your time.

[The prepared statement of Mr. Peeler follows:]

PREPARED STATEMENT OF C. LEE PEELER, PRESIDENT AND CEO, NATIONAL ADVERTISING REVIEW COUNCIL AND EXECUTIVE VICE PRESIDENT, ADVERTISING SELF-REGULATION COUNCIL OF BETTER BUSINESS BUREAUS

Thank you for inviting me to appear before you today.

I appreciate the opportunity to describe for the Subcommittee the ongoing work of the advertising industry's system of self-regulation.

Advertising self-regulation, as described below, monitors and reviews national advertising in all media to foster high standards of truth and accuracy. In addition to programs requiring all advertising to be truthful and accurate, the self-regulatory system maintains special programs to address claims made in electronic direct-response advertising and in the advertising of dietary supplements; has a unit that focuses exclusively on children's advertising, and supports a new program that addresses concerns about food advertising and childhood obesity.

For almost 40 years, and with the support of the advertising industry, these programs have provided expert, impartial, transparent and accountable oversight of national advertising. The process is independent and expert, relying on skilled professional staff to examine advertising claims and substantiation; expeditious, with decisions normally made in 60 to 90 business days; and efficient, resolving cases at a fraction of the time and cost of private litigation or government investigations.

The decisions reached by the investigative units of the self-regulatory system provide a comprehensive body of guidance that advertisers regularly consult in con-

structing advertising claims. Despite the fact that decisions often require that advertisers modify or discontinue claims, well over 90 percent of participants voluntarily comply with our decisions.

In short, the system is a highly effective means of fostering truth and accuracy in advertising. It has frequently been cited by the Federal Trade Commission as a model of effective industry self-regulation and the principles underlying the system's success can be looked to in deploying self-regulatory efforts in other areas. We are, for example, using this model to build an accountability program for the behavioral advertising self-regulatory principles announced earlier this month.¹

National Advertising Review Council

The advertising industry's self-regulatory system was created in 1971 when three leading advertising trade organizations—the American Advertising Federation (AAF), American Association of Advertising Agencies (AAAA) and Association of National Advertisers (ANA)—together with the Council of Better Business Bureaus (CBBB), announced a new alliance to promote truthful and accurate advertising. That alliance, the National Advertising Review Council (NARC), sets policies and procedures for advertising industry self-regulation.

In addition to the founding partners, the NARC Board now includes the chief executives of the Direct Marketing Association, Electronic Retailing Association and Interactive Advertising Bureau, giving NARC significant reach throughout the advertising and marketing community.

Administration by the Council of Better Business Bureaus

To ensure the impartiality and independence of the self-regulatory process, the system is administered by the CBBB. The CBBB is the network hub of the 125-member Better Business Bureau system in the United States and Canada, which works to promote trust in the marketplace.

NARC Self-Regulation Programs

The self-regulatory system includes three investigative units, the National Advertising Division of the Council of Better Business Bureaus (NAD), the CBBB's Children's Advertising Review Unit (CARU), and the Electronic Retailing Self-Regulation Program (ERSP). It also maintains the National Advertising Review Board, the appellate unit. In addition, the CBBB provides ongoing oversight and compliance reporting for the NARC-endorsed Children's Food and Beverage Advertising Initiative (CFBAI). As exemplified by these programs, NARC has, throughout its history, adapted its programs to respond to new public and policy concerns.

National Advertising Division

The National Advertising Division of the Council of Better Business Bureaus (NAD) was chartered in 1971 in response to concerns about truth and accuracy in advertising. NAD examines advertising that is national in scope to assure that it is truthful and that claims are fully substantiated. NAD opens cases as result of its own monitoring, and in response to consumer complaints and to challenges filed by companies that question the truth and accuracy of a competitor's advertising claims.

Through its decisions, NAD has provided invaluable guidance on appropriate advertising and advertising claims substantiation in all forms of national media.² NAD attorneys have examined advertising for products as diverse as infant formula, over-the-counter medications, nuclear energy, weight-loss supplements, tires, plastics, consumer electronics, building supplies and products that claim a "green" or environmental benefit.

In 2008, NAD closed 134 cases, including 98 challenges filed by companies to their competitors' advertising claims.

Overall, NAD has produced well over 5,000 decisions on the truthfulness and accuracy of advertising claims, perhaps the Nation's largest body of advertising decisions.

The Children's Advertising Review Unit

The CBBB's Children's Advertising Review Unit was created in 1974. CARU sets high standards to assure that advertising directed to children under 12 is not deceptive, unfair or inappropriate for its intended audience. The standards take into account the special vulnerabilities of children, including their inexperience, immatu-

¹ Principles on Collection and Use of Behavioral Advertising Data Released

<http://www.bbb.org/us/behavioral-advertising-principles/>

² NAD/CARU/NARB Procedures <http://www.narcpartners.org/about/procedures.aspx>.

riety, susceptibility to being misled or unduly influenced, and their lack of cognitive skills needed to evaluate the credibility of advertising.³

CARU's standards are embodied in principles and guidelines that were adopted in 1975 and have been periodically updated to address changes in the marketing and media landscape. In 1996, for example, CARU added a new section of the guidelines to address concerns about online data collection practices, and, in 2006, the guidelines were comprehensively updated and new provisions were added addressing food advertising, blurring of advertising and editorial content and unfair advertising practices.⁴

In 2008, CARU handled 84 cases. About one-third of these cases focused on provisions of the CARU guidelines governing the collection of personal information on child-directed websites.

The Electronic Retailing Self-Regulation Program

The Electronic Retailing Self-Regulation Program was developed in 2004 at the request and with the support of the Electronic Retailing Association—which represents retailers selling goods and services online, on television and on radio—to monitor advertising claims made in electronic direct-response marketing, including infomercials, home-shopping channels, Website advertising and e-mail advertising.

Since its founding, ERSP has examined thousands of hours of infomercials and thousand of Websites, and issued more than 200 decisions on the core advertising claims made in direct-response advertising across a broad range of formats, including streaming video and in the virtual world of Second Life.

Dietary-Supplement Advertising Review Program

In 2007, the NAD, with the support of the Council for Responsible Nutrition—an association of manufacturers and suppliers of dietary supplements and their ingredients—expanded its review of advertising for dietary supplements. That program is aimed at assuring that advertising claims for dietary supplements, particularly health claims, are substantiated by scientific evidence. In the past 2 years, NAD has reviewed advertising for and issued decisions regarding more than 50 separate dietary-supplement products, including Resveratrol, Omega-3 oil, green-tea extract and glucosamine, substantially increasing NAD oversight in this important area.

National Advertising Review Board

The policies and procedures that govern advertising industry self-regulation provide advertisers with an automatic right to appeal NAD or CARU decisions to a review panel of their peers. The procedures allow challengers to request an appeal.

These appeals are heard by five-member panels of the National Advertising Review Board (NARB) which is composed of advertisers, advertising agencies and public members, including academics. NARB members are nominated for their stature and experience in their respective fields.

Children's Food and Beverage Advertising Initiative

In 2006, the CBBB worked with its NARC partners and leading food companies to develop the Children's Food and Beverage Advertising Initiative—a program that monitors food advertising to children to assure that participants abide by the terms of their commitments. The NARC-endorsed and CBBB-led initiative currently has 15 participants. Of these, four companies have elected not to engage in advertising primarily directed to children under 12. The other 11 have pledged that 100 percent of their advertisements to children under 12 in measured media (television, print, radio, and third-party Internet sites) will be better-for-you foods, as defined by nutrition standards based on government or other scientific standards.⁵

Operation of the Self-Regulatory System

Advertising self-regulation is a fast, effective, industry-supported system that acts in the interests of both consumers and the advertising industry. Through monitoring, complaints and competitor-initiated challenges, the system identifies and expeditiously examines potentially misleading or unsubstantiated advertising claims and seeks prompt voluntary correction. Advertisers are required to halt such claims in future advertising and correct all materials, including labels, that display the

³Self-Regulatory Program for Children's Advertising <http://www.caru.org/guidelines/guidelines.pdf>.

⁴New Food, Beverage Initiative to Focus Kids' Ads on Healthy Choices; Revised Guidelines Strengthen CARU's Guidance to Food Advertisers <http://www.bbb.org/us/article/672>.

⁵Changing the Landscape of Food and Beverage Advertising http://www.bbb.org/us/storage/16/documents/CFBAI/ChildrenF&BInit_Sept21.pdf.

claims at issue in the self-regulatory review. The self-regulatory system does not impose fines or penalties.

The system is fast and efficient. Our goal is to close each review within 60 business days. The system is transparent. All decisions—regardless of the findings—are publicly reported so that the public and the industry can judge the process.

NAD, CARU and ERSP each have a voluntary compliance rate of 90 percent or better. This is a remarkable record of voluntary compliance and a strong indication of the industry's respect for the self-regulatory process.

Companies that refuse to participate in the process or refuse to comply with recommendations to modify or discontinue advertising claims are publicly identified and the advertising at issue is referred to the appropriate government agency, usually the Federal Trade Commission (FTC).

FTC Support for Self-Regulation

During the nearly 40 years of its existence, the advertising self-regulatory system has received strong support from the FTC.⁶ The FTC also has consistently supported Remarks of Commissioner Jon Leibowitz at The National Advertising Division Annual Conference—September 24, 2007 self-regulation by committing to give a priority to examining referrals from the advertising self-regulatory process. Referrals to the FTC of advertisers that refused to participate in the self-regulatory process have resulted in FTC lawsuits and significant monetary penalties.⁷

The FTC's support has been critical to the success of self-regulation. The self-regulatory process has provided benefits to the FTC, in turn. Self-regulation quickly and efficiently resolves many issues that might otherwise come before the agency, thus freeing FTC resources to focus on consumer fraud and other priority issues. In the context of truth and accuracy, self-regulation acts as one important part of an comprehensive system for preventing misleading advertising. That system includes Federal enforcement by the FTC, enforcement at the state level by states' attorneys general, private litigation under the Lanham Act, and active pre-screening of advertising by broadcast networks.

Advertising Trends

As the advertising industry's principal self-regulatory body, NARC and the CBBB are positioned to identify trends both in the challenges filed and in the cases that we monitor. In addition, the 125 bureaus of the BBB system review advertising in their geographic areas and seek voluntary correction of misleading claims.

Over the past 2 years, the leading product categories for NAD's self-regulatory decisions have been food and beverages, dietary supplements, household products, cosmetics, pet products, telecommunications services, consumer electronics.

By far the most common issues that we examine are whether claims about the efficacy or performance of a product are adequately substantiated, whether the advertised product is superior to its competition and whether material information, necessary to avoid misleading consumers, is clearly and adequately communicated.

NAD has experienced an increase in cases involving green marketing claims, value claims (savings claims from using a particular product or retailer), health claims and claims for products targeted at the Nation's aging population. It is important to remember that many cases are competitive challenges. An increasing number of challenges within an industry signals that members of an industry are moving proactively to police themselves, a healthy trend.

⁶"Truth or Consequences: The FTC Approach to Advertising" Remarks of Commissioner Jon Leibowitz at The National Advertising Division Annual Conference—September 24, 2007.

"All of us at the FTC appreciate the NAD's advertising review work. It is more important today than it has ever been. . . . It really helps to have an alternative procedure that is quick, fair, and well-respected." <http://www.ftc.gov/speeches/leibowitz/070924bbbreremarks.pdf>.

The Federal Trade Commission at 100: Into Our Second Century: The Continuing Pursuit of Better Practices: A Report by Federal Trade Commission Chairman William E. Kovacic—January 2009.

"Meaningful self-regulation is an important complement to the Commission's law enforcement efforts—particularly in the area of deceptive marketing practices. For example, the program administered by the National Advertising Division/National Advertising Review Council ("NARC") arm of the Council of Better Business Bureaus ("CBBB") has worked well to obviate the need for Commission action in some instances." <http://www.ftc.gov/ftc/workshops/ftc100/docs/ftc100rpt.pdf>.

Self-Regulation in the Infomercial Industry: Deborah Platt Majoras, Chairman, Federal Trade Commission Before the Electronic Retailers Self-regulatory Program—April 2006 (Footnote No. 3, listing FTC statements in support of self-regulation since 1978.) <http://www.ftc.gov/speeches/majoras/060503eraspeech.pdf>.

⁷Court Orders Spammers to Give Up \$3.7 Million—<http://www.ftc.gov/opa/2009/07/spear.shtm>; Oregon Supplement Marketers Agree to Pay \$2.5 Million to Settle FTC Charges for False Advertising Claims—<http://www.ftc.gov/opa/2008/08/naherb.shtm>.

The ERSF program, which monitors electronic direct-response advertising in a variety of media, reports growth in weight-loss claims, efficacy claims for health products, advertising claims that state a product's benefits are "clinically proven," claims regarding "credit rescue" and work-at-home opportunities and "affiliate marketing programs" in which deceptive claims are made at multiple and seemingly unrelated websites. Marketing for acaiberry products is a recent example of this.

All of our self-regulatory programs are working to examine advertising in a new-media context. Recent cases address claims made in advertising videos and "viral" videos, posted at YouTube, advertising claims made in virtual worlds, such as Second Life, and through objective claims in product placements on television.⁸ In addition, despite longstanding prohibitions, the self-regulatory system continues to see examples of paid advertising presented in formats that can be confused as editorial content and the self-regulatory units have issued decisions addressing such "blurring" of advertising and editorial content.⁹

BBB Advertising Reviews

Many local BBBs maintain active advertising monitoring programs in their communities under the BBB Code of Advertising.¹⁰ BBBs handle thousands of advertising review cases, including pricing claims, inadequate disclosures and qualifications, superiority claims, rebates and warranty and guarantee claims.

BBBs also work to resolve complaints about business practices and are in a unique position to identify potential scams—both locally and nationally—and warn consumers about fraud. BBB scam alerts include alerts related to acaiberry weight-loss products, Twitter-based money-making schemes, "robocalls" that promise easy credit repair or rescue and scams related to swine-flu fears.¹¹

BBBs report geographic variations in the types advertising issues they see. The Better Business Bureau of Utah, for example, reports a high number of negative option complaints—low-cost trial offers that are accompanied by inadequately disclosed monthly billing commitments at a much higher price, deceptive rebate offers and questionable claims for nutritional products. The Better Business Bureau of Metropolitan New York reports a similar increase in "free trial" offers followed by surprising monthly bills, along with advance-fee mortgages and concern about misleading advertising for apartments. Recently, the New York BBB worked with the New York State Attorney General to identify and stop seven electronic retailers who allegedly advertised low prices for consumer electronics over the Internet and then would not ship products unless consumers ordered more expensive goods—classic bait and switch practices transferred to the Internet.¹²

Conclusion

The advertising industry has a strong, longstanding commitment to self-regulation as a tool to foster high standards of truth and accuracy in national advertising. These BBB-administered programs provide an expert, fast and effective mechanism to address concerns about a wide range of advertising claims, and are supplemented by the work of BBBs to promote truthful advertising in their communities.

The system represents a substantial benefit to consumers and it has earned the support of the advertising industry and the FTC.

We work every day to assure, through the quality of our decisions and clarity of our guidance, that we continue to deserve that support.

Senator PRYOR. Thank you.
Mr. Renker?

⁸NAD Case #4934, Cardo Systems www.narepartners.org; *ERSF Photoblocker Spray* www.narepartners.org; NAD Case #4611, Perfect Match www.narepartners.org.

⁹NAD Case #5038, PatentHEALTH www.narepartners.org; NAD Case #4677, Renaissance Health Publishing www.narepartners.org; CARU Case #4525, Activision www.narepartners.org.

¹⁰BBB Code of advertising <http://www.bbb.org/us/code-of-advertising>.

¹¹Weight-loss Berry Claiming Oprah Endorsement Makes Wallets Slim and Consumers Angry, Warns BBB—<http://www.bbb.org/us/BBB-Press-Releases>; BBB Warns Against Twitter Money-Making Schemes, <http://www.bbb.org/us/BBB-Press-Releases>; BBB, Schumer Warn Consumers of Robocalls Promising to Lower Their Credit Card Interest Rate—<http://www.bbb.org/us/BBB-Press-Releases>; BBB Warns Against Swine Flu Scams: Scammers are creating their own epidemic of spam e-mails—<http://www.bbb.org/us/BBB-Press-Releases>.

¹²AG Reaches Agreement with Seven Electronics Companies in NY, BBB to Administer Restitution Fund <http://www.newyork.bbb.org/article/ag-reaches-agreement-with-seven-electronics-companies-in-ny-bbbto-adminis-11186>.

**STATEMENT OF GREG RENKER, CO-CHAIR,
GUTHY-RENKER LLC**

Mr. RENKER. Thank you, Chairman Pryor, Senator Wicker, Members of the Subcommittee. My name is Greg Renker. I appreciate the opportunity to testify today. I'm one of the co-founders of Guthy-Renker. We're one of the world's largest direct-response television companies. Starting from scratch, we have built annual sales of a billion and a half dollars per year, and we spend up to \$200 million a year in advertising.

I've had the privilege and pleasure of serving as Chairman of what was the National Infomercial Marketing Association. And I am currently Chairman Emeritus of the Electronic Retailing Association, the successor to NIMA.

As Chairman of NIMA, I presided over the formation of the association's self-regulatory program, which currently works hand-in-hand with Mr. Peeler.

The Electronic Retailing Self-Regulation Program reflects my firm belief that consumers and our industry benefit from clear and fair rules enforced, initially, by self-regulatory action, and, if necessary, action by the Federal Trade Commission, to ensure that our customers have confidence in the integrity of direct-response marketers.

I testified on this topic 19 years ago, and many of the things that I'm hearing and reading are very similar. I acknowledge that it is more complex, but it's remarkable how the claims and promises made by marketers have not changed much.

The success and ongoing growth of the direct-response industry—and broader advertising industry—is due, in large part, to the effectiveness of consumer testimonials and endorsements. I've seen, firsthand over the past 20 years, that our testimonials provide hope and motivation to our consumers' lives and well-being, and we are proud of it.

As part of its periodic review of all of its guides, the Commission has proposed changes to its longstanding standards for testimonials, with the goal of limiting deception to consumers. There's no question that those intentions are laudable, and we share the goals of the Subcommittee and the Commission for a fair and healthy marketplace, and for responsible use of endorsements and testimonials.

But we have concerns that the proposed modification could have negative consequences on both advertising and consumers, and we think there are more direct and equally effective solutions to address the concerns the Commission is grappling with.

Specifically, the basis of the Commission's concern in this area is the belief that a statement made in a consumer testimonial, regarding the particular results of an individual using the product or service being advertised, may be understood by some consumers as a representation that they can expect the same result. The existing guides have always allowed the marketer of a product using a testimonial that "they may not be typical," to state "your experience will vary," or similarly disclaim the typicality of the testimonial's experience. These disclosures have obviously become vary familiar to all of us over the years.

The Commission has identified a concern with the use of these typicality disclaimers, because they apparently do not believe that consumers understand even simple and conspicuous disclaimers. To address this concern, there is a proposed modification, which would require marketers to disclose the average results of consumers that use the product or service.

This cuts to the heart of the matter, I think, of what Mr. Congdon and I hope to address today, if we have the opportunity, regarding the consumer averages, because the current disclaimer language, and “your results may vary” attempts to hide it and pop it up quickly and make it disappear as quickly as possible, we think, is inappropriate and inauthentic. And we are fully in support of clear, and unambiguous, and conspicuous, and ubiquitous disclaimers regarding products.

And I also want to just briefly touch on net impression, because I think the overall final impression that the consumer or viewer takes from these programs or commercials is ultimately what we think matters most, in terms of how they are presented, how they are disclaimed, how often these disclaimers run, et cetera.

Finally, and most importantly, I just want to say that I think we are all singing from the same hymnal here at the table, because, I know, on behalf of our industry and speaking for Mr. Congdon, we are completely in support of a strong Federal Trade Commission, strongly enforcing the guidelines that have already been in place, and we are anxious to see that beefed up even more. And we are supportive of additional resources, because we are competing against marketers who are making false and misleading claims that they cannot substantiate. They are causing our costs to rise, not only in terms of the media that we buy, but in terms of the consumers we’re trying to attract, thus, causing our credibility to diminish. And we support trying to make a move.

Thank you for giving me the opportunity to speak today.

[The prepared statement of Mr. Renker follows:]

PREPARED STATEMENT OF GREG RENKER, CO-FOUNDER, GUTHY-RENKER

Chairman Pryor, Members of the Subcommittee, my name is Greg Renker. Thank you for the opportunity to testify today. I am one of the co-founders of Guthy-Renker, one of the world’s largest direct response television companies with annual sales of approximately \$1.5 billion. We are known as the leading producer of high-quality commercials and company-owned products designed for direct response television sales. We are headquartered in California, but have offices in Europe, Asia and Australia, and market throughout the world.

I have been active in the direct response industry since the founding of Guthy-Renker in 1988. I have had the privilege and pleasure of serving as Chairman of what was the National Infomercial Marketing Association (“NIMA”), and am currently Chairman *Emeritus* of the Electronic Retailing Association, NIMA’s successor. In addition, Guthy-Renker serves on the Board of Directors of the Direct Marketing Association. As Chairman of NIMA, I presided over the formation of the Association’s self-regulatory program, which currently works hand-in-hand with the National Advertising Review Council, represented here today by Lee Peeler. The Electronic Retailing Self-Regulation Program reflects my firm belief that consumers and our industry benefit from clear and fair rules enforced initially by self-regulatory action and, if necessary, action by the Federal Trade Commission (“FTC” or “Commission”) to ensure that our customers have confidence in the integrity of direct response marketers.

According to a recent report by the DMA, the direct response industry generated \$2.058 trillion in sales in 2008 and is projected to grow 5.3 percent over the next 5 years, which is particularly impressive given the current economic climate. Direct

response marketing supports 10.9 million U.S. jobs. Advertising continues, even in these tough times, to be a leading contributor to the U.S. economy. Advertising and marketing have proven their unparalleled value in connecting consumers with products and services that they are likely to be interested in purchasing and using.

The success and ongoing growth of the direct response industry and broader advertising industry is due in large part to the effectiveness of consumer testimonials and endorsements. Testimonials by users of our products and services are a very powerful form of communication, and studies have found that consumers find statements by other consumers to be, in many cases, more credible than direct statements about products by the advertiser. That is why testimonials are so widely used, not only on television, but throughout advertising in all sorts of media. Testimonials are crucial to the success of this industry and to the success of consumer products such as our ProActiv Solution product, the largest selling non-prescription acne treatment product in the world, as well as our other well-known skin care, exercise, and entertainment products. I have seen first hand over the past twenty years that our testimonials provide hope and motivation to our consumers' lives and well-being.

With that background, I want to discuss the standards that apply to testimonials and provide my perspective with respect to one of the proposed modifications to the FTC's Guides Concerning the Use of Endorsements and Testimonials in Advertising, which are currently pending at the Commission. The current Guides have for many years set the standard for the use of endorsements and testimonials in advertising. As part of its periodic review of all of its Guides, the Commission has proposed changes to its longstanding standards for testimonials with the goal of limiting deception of consumers. There is no question that the Commission's intentions are laudable, and that the Commission has been very successful in combating the use of fraudulent and deceptive endorsements and testimonials. But I and my colleagues in the legitimate and leading segment of the direct response industry are concerned that the proposed modification would have significant negative consequences on both advertising and consumers. We believe that there are other, more direct and equally effective, solutions to address the concerns the Commission is grappling with.

The current Guidelines have been out in the advertising world since 1980, and a whole industry has grown up following these "rules of the game." The Commission's interest in the use of testimonials is appropriate considering the public's widespread acceptance of testimonials and reliance on information obtained through testimonials when making purchase decisions. To be clear, we at Guthy-Renker share the goals of the Subcommittee and the Commission for a fair and healthy marketplace and for responsible use of endorsements and testimonials.

As I understand it, the basis of the Commission's concern in this area is the belief that a statement made in a consumer testimonial regarding the particular results of an individual using the product or service being advertised may be understood by some consumers as a representation that they can expect the same result. To use a common example to illustrate the Commission's concern, if a consumer testimonial reports that by running on a treadmill he/she lost 30 pounds over a six-month period, the Commission believes that the advertiser is representing that the ordinary consumer who purchases that product will achieve the same or similar results.

In many cases, it is difficult or impossible to say what the "average" experience of a consumer using their product may be. The treadmill is a good example. We all know that regular use of a treadmill can result in weight loss, but the marketer of the treadmill does not know whether the purchaser will use it 1 day, 3 days, or 5 days a week, or how many minutes the purchaser will spend on the treadmill or how fast he/she will run. Consequently, the existing Guides have always allowed the marketer of a product using a testimonial that may not be typical to state "Your Experience Will Vary," or similarly disclaim the typicality of the testimonial's experience. These disclosures have become familiar to consumers over the years.

The Commission has identified a concern with the use of such so-called "typicality" disclaimers because they apparently do not believe that consumers understand even simple and conspicuous disclaimers. To address this concern, the Commission's proposed modification would require marketers to disclose the average results of consumers that use the product or service. In many cases, especially where we are dealing with product design specifications that apply irrespective of the use of the product, this would not be a problem. For example, the statements on light bulb packages about the average number of hours the bulb will function are generally consistent among all users.

But when it comes to products where the results obtained by consumers are variable or depend fundamentally on decisions that consumers themselves make—how

frequently to use the product and for how long, for example—the proposed modification would require that marketers disclose facts that simply cannot be determined. This is the basis for the advertising community’s concerns with the Commission’s proposal. The proposal would have the effect of limiting the use of truthful statements by individuals about their experience with the product because of an assumption that consumers will take those statements as gospel truth but ignore or fail to comprehend plain-language typicality disclaimers that accompany them.

The industry believes that there may be other more effective ways of addressing the problem identified by the Commission. While I focus more on running the business than the legal framework, I know that the Commission has strong existing enforcement authority and uses it regularly. This type of enforcement helps foster a healthy marketplace for consumers and limits fraudulent competitors.

For example, as I understand it, the Commission has highlighted as a problem area the fact that some disclaimers, in some commercials, are too small or use confusing or ambiguous language. This is a problem where the Commission could bring an enforcement action under its existing authority against those marketers, and require that they make the disclaimers larger or remain on the screen longer, or rewrite them in plain language so that consumers are not confused or deceived.

Similarly, some advertisers use extraordinary testimonials to promote products that don’t work at all. Here, the issue is not the typicality of the testimonial, but the lack of proof that the product works as claimed.

We believe the current Guides set an appropriate standard and one that is widely understood in the advertising industry. If an advertiser is using testimonials that convey a misleading “net-impression” of what the product or service is capable of doing, the Commission can and should go after the marketer under well-established existing law. The Commission’s enforcement efforts and self-regulatory programs supported by the Commission have helped clean up and maintain a robust advertising industry for consumers and businesses alike.

Given the Commission’s existing tools, and the potential negative impact on endorsements and testimonials that benefit consumers, we believe that the Commission can achieve its important goals without essentially banning the use of truthful consumer testimonials.

I thank you for the opportunity to speak with you today and for your commitment to these important issues. I am submitting for the record my prepared testimony and the comments provided by the Electronic Retailing Association and the Council for Responsible Nutrition to the Federal Trade Commission as part of its comment process.

I would be happy to take any questions you might have.

Senator PRYOR. Thank you.

And you met the “Greenberg standard,” and that is, you stayed in your time. Thank you for that.

Mr. RENKER. Thank you.

Senator PRYOR. Mr. Congdon?

**STATEMENT OF JON CONGDON, PRESIDENT AND
CO-FOUNDER, PRODUCT PARTNERS LLC/BEACHBODY**

Mr. CONGDON. Chairman Pryor, Ranking Member Wicker, and Members of the Subcommittee, it’s truly an honor to appear here before you today. My name is Jon Congdon, and I’m President and Co-Founder of Product Partners, LLC, a leading provider of health and wellness solutions under its brand name “Beachbody.”

Product Partners provides consumers with realistic and proven ways to improve their health, wellness, and lives. We offer several well-known consumer fitness programs, such as our P90X home fitness training system, as well as easy-to-follow guidelines and superior nutritional supplements.

Our dynamic online support community provides consumers with the assistance they need to help them stay focused, from the start of their program to the finish and beyond, and our products have helped millions of Americans lose weight and improve their health.

As a matter of fact, Tony Horton, who is the creator of the P90X system, was on the Hill just a couple weeks ago with members of the House, and worked out with, I believe, 14 bipartisan members of the House, and he said they were an unusually competitive group but—

[Laughter.]

Mr. CONGDON. At Product Partners, our slogan is to “Decide, Commit, and Succeed.” In our advertising, we emphasize the fact that individual effort is necessary to obtain the benefits of our products. We believe that it’s critical to be honest with our consumers so they fully accept the challenge of better health, and will not be disappointed or misled by any quick fix or it’s-so-easy promise.

Because of our commitment to consumers, we embrace industry self-regulation and we staunchly support the mission of the Federal Trade Commission. In fact, I’ve almost heard nothing that I disagree with said today. A strong Commission strengthens legitimate businesses, like ours, by ensuring that unscrupulous companies are not eroding consumer trust or competing on unfair terms.

We know, when we advertise our products, that we have to overcome a general mistrust from the public toward companies that promise to help them lose weight. As a company that goes to great lengths to earn and maintain the trust of its customers—and that deals with countless people who have been falsely duped into buying the latest fad diet or promise, only to be let down—we applaud the Commission’s efforts to protect our consumers and ensure fair advertising.

Although we share common goals with the Federal Trade Commission, we have concerns regarding the Commission’s proposed modifications to the guidelines on the use of testimonials in advertising.

In particular, the Commission proposes to require companies that use testimonials in advertising to disclose the average results experienced by consumers that use a given product or service. I’m certain that the Commission acted with the best of intentions, but I am concerned by what the implications of having to comply with that are. It may have significant unintended and negative consequences for marketers and consumers, and that’s really where our concerns come in. Our company faces such hurdles in complying.

First, the Commission’s proposal may not provide the Commission with any additional tools to protect or prevent a consumers from an unscrupulous company. Those companies are simply going to continue doing what they’re doing, creating false claims, maybe even loading their test groups or their studies so that they can claim whatever they want to claim.

The real question is, How do you enforce against companies that are going against what the consumers need to see, and what is fair?

Beyond that, though, companies that strive to comply with the Commission’s requirements, like Mr. Renker’s company and like our company, are going to be faced with an undue burden in trying to meet the demands. It’s very cost-prohibitive to create an aver-

age, and we actually don't even know what the average means, when it comes to weight loss.

It's—we have—just a few weeks ago, we brought a bunch of testimonials of ours to the Hill, and we were touring the House. And one of them was a young man named Dallas Carter, who, at the age of 25, was morbidly obese and was given a death sentence by his doctor. He was actually told that if he didn't change his lifestyle within 10 years, he would be dead, and he would not see the 10-year—10th birthday of his daughter. Still, he did nothing about it, until he finally saw one our other testimonials, Earl Broffman, who had lost 140 pounds, and saw—by seeing that story, realized that he could do it, also. There's no doubt that Earl Broffman's story was extraordinary, and not typical, but that was exactly the story that Dallas needed to see in order to change his life. He has since lost a 190 pounds and is incredibly healthy, and actually was even honored by the Governor of Hawaii.

We're very proud of that story, but we need to show extraordinary results to people who need to do something extraordinary in their life.

We also show other results, so that other people, with different goals, can also react to those stories. Testimonials generally appeal to the person who relates to them, not to everybody.

Obviously somebody who had 25 pounds to lose, who saw Dallas's story, didn't immediately think that they were going to lose 190 pounds, also. They would take the net impression of the commercial that they saw and decide whether or not that product could help them with their fitness or weight-loss goals.

That's really what we're concerned about with net impression, that the net impression of the commercial is going to create a thought in a person's mind, as to whether that product is going to help them do what they want to do with their life. If that net impression does not equal what the product is that's being offered, if the product cannot help the person achieve what the net impression is, then that is false advertising, and we believe that net impression is actually the gold standard that we need to go after bad actors with. And we fully support—we have to continue to go after bad actors.

Finally, the self-regulatory systems that we have in place, ERSP, have been incredibly helpful with getting bad actors to the FTC more quickly, and with our reviewing what's going on in our own industry, and our ability to turn in bad actors to other people. We think that that is a critical piece in our continuing effort to make sure that bad actors are not allowed to continue doing what they're doing, but, at the same time, we have to make sure that good actors are allowed to continue to sell effective products that help people with their everyday lives, and achieve the things that they want to achieve.

I think I'm out of time, so I'll close there. I want to thank you for the opportunity to present my views here today.

[The prepared statement of Mr. Congdon follows:]

PREPARED STATEMENT OF JON CONGDON, PRESIDENT AND CO-FOUNDER,
PRODUCT PARTNERS LLC/BEACHBODY

Mr. Chairman, Ranking Member, and members of the Subcommittee, it is an honor to appear before you today. My name is Jon Congdon, and I am the President and Co-Founder of Product Partners LLC, a leading provider of health and wellness solutions under its brand name Beachbody. Product Partners provides consumers with realistic and proven ways to transform their health, wellness, and lives. We offer several well-known consumer fitness programs, such as our P90X® home fitness training system, as well as easy-to-follow diet guidelines and superior nutritional supplements. Our mission is to help people lead healthy and fulfilling lives by motivating and educating consumers about long-term fitness and the benefits of maintaining a healthy body and lifestyle. Our dynamic online support community provides customers with the assistance they need to help them stay focused from the start to the finish of our programs, and beyond. I am proud to say that our products have helped millions of American consumers to lose weight and improve their health.

At Product Partners, our slogan is “Decide. Commit. Succeed.” In our advertising, we emphasize the fact that individual effort is necessary to obtain the benefits of our products. We believe that it is critical to be honest with our customers so that they fully accept the challenge of better health, and will not be disappointed or misled by any “quick fix” or “it’s so easy” promise. Because of our commitment to consumers, we embrace industry self-regulation, and we staunchly support the mission of the Federal Trade Commission. A strong Commission strengthens legitimate businesses, like ours, by ensuring that unscrupulous companies are not eroding consumer trust or competing on unfair terms. We know when we advertise our products that we have to overcome a general mistrust from the public toward companies that promise to help them lose weight. As a company that goes to great lengths to earn and maintain the trust of its customers, and that deals with countless people who have been falsely duped into buying into the latest diet fad promise only to be let down, we applaud the Commission’s efforts to protect consumers and ensure fair advertising.

Although we share common goals with the Federal Trade Commission, we have concerns regarding the Commission’s proposed modifications to its guidelines on the use of testimonials in advertising. In particular, as the Subcommittee knows, the Commission proposes to require companies that use testimonials in advertising to disclose the average result experienced by consumers that use a given product or service. I am certain that the Commission acted with the best of intentions in suggesting modifications to its longstanding guidelines. However, I fear that the Commission’s proposal will have significant unintended and negative consequences for marketers and consumers. I am glad to be able to share my perspective with the Subcommittee, because I believe that the products and services of my company provide an excellent example of the difficulties that could arise under the Commission’s proposed approach.

First, the Commission’s proposal would not provide the Commission with any additional tools to prevent an unscrupulous company from manipulating the facts and misleading consumers by simply falsifying the average result or by devising a flawed or “loaded” study that creates an average that fits the company’s advertising claims.

On the other hand, companies that strive to comply with the Commission’s requirements, as we do, will find it extremely challenging to satisfy the proposed guidelines. The cost of conducting detailed valid studies will be prohibitive, keeping many new companies out of the marketplace. The fact is that some products simply cannot be reduced to an average figure that will be meaningful to consumers. As I mentioned earlier, the Product Partners slogan emphasizes that customers must commit to improving their own health and wellness in order to benefit from our fitness tools. A customer’s experience with our product will depend on countless immeasurable factors, such as that customer’s level of effort, weight, and level of fitness before using the product. The customer’s age, gender and even genetics will also cause significant fluctuations. In addition, many of our customers use multiple fitness strategies at the same time. To illustrate these difficulties, suppose that I am selling a treadmill. I can give you the average results with respect to the durability and electrical pull of the treadmill. But if each of us takes home a treadmill and uses it as we please, how can I calculate meaningful average health effects associated with using the treadmill, given that each of us is different and used the treadmill differently? Given these complexities, how could Product Partners begin to calculate an average result for our products that everyone would agree is accurate? And even if we could collect the information to make a basic calculation, it

would tell individual consumers very little about what they might personally experience with one of our products, since the average result for a significantly overweight 48-year-old man will be drastically different than for a very fit 28-year-old female using the same fitness program even if they spend exactly the same amount of time exercising.

Some of our customers are individuals who have led unhealthy lifestyles for a long time, and we all know from personal experience how difficult it is to change old habits. A person who faces a challenge like losing 100 pounds is more likely to be inspired to change his life if he can see, through a testimonial and real-life experience, that someone else has succeeded in achieving that goal. Product Partners and companies like ours aim to inspire our customers to change their lives for the better, which is a critical decision to make, but not always an easy one. Testimonials that meet the existing standards that the Federal Trade Commission has long imposed are a meaningful way to reach out to interested consumers about products that can benefit them.

As an example, in a recent visit to Members of Congress to discuss this issue, we brought Dallas Carter, who was morbidly obese at the age of only 25, even after his doctor told him that he would likely not live to see his new daughter's tenth birthday unless he made a drastic change in his lifestyle. It wasn't until Dallas saw the true story of Earl Broffman in a P90X infomercial discussing his 140-pound weight loss and health transformation that Dallas decided to make a change—a change that has led to him losing 190 pounds, leading a healthy life, and even being an example for his community. Dallas told us, “When I saw Earl do it, I knew I could do it too.” And when Dallas told Earl this story directly, Earl replied that he himself only tried P90X after seeing another of our longtime customers, Aaron Mathis, describing his 110-pound weight loss. As you can see, as long as these testimonials are truthful and disclose that the testimonial's experience is not necessarily typical, they provide critical motivation and inspiration to others in a similar position. I believe that if we had somehow been able to determine that the average weight loss using our product was 25 pounds but had been prohibited from showing our more “extraordinary” results, it is unlikely that the customers I just mentioned would have been inspired to start their journeys to a healthy lifestyle.

We know that this country is in crisis with regard to the health of its citizens. The obesity figures are staggering, and the costs to care for overweight Americans and their related conditions are overwhelming—quite possibly the largest financial threat we may face in the coming years. Imagine if we could turn the tide and get Americans moving again and eating healthier foods. I truly believe that our company and others like it are beginning to make a difference as the customers who change their own lives also change lives of the people around them—particularly their children.

As our rates of obesity and Type 2 diabetes grow daily, I think the need to reach out and inspire others, with proven products and truthful advertising, is absolutely critical. I want to be clear, though—it takes something big to get a person who feels hopeless and has really let his health get out of control to take the step to change all that—and often the catalyst is seeing someone who was exactly where he is now, who accomplished something extraordinary. Not average—extraordinary.

Again, we share in the Commission's desire to prevent unfair and deceptive advertising. My belief, however, which is shared by others in industry, is that there are more effective ways of addressing the problem identified by the Commission that would not have the same type of negative impact on legitimate offerings. The Commission has articulated a concern that, in some cases, a group of extraordinary testimonials accompanied by disclaimers will give an impression that the product works far better than any substantiation in the possession of the marketer. In such situations, the combination of large testimonials plus disclaimers can give an impression that is misleading to consumers. I agree that if any elements of an advertisement are deceptive, there should not be any “safe harbor” or special protection, but there is another alternative that may help address this problem. The Commission has, for many years, followed a well established so-called “net impression” rule in which they look at any advertisement, determine what it means to reasonable consumers, and then require substantiation of the claims that arise naturally from a commonplace interpretation of the advertisement.

I believe this net impression rule is an appropriate standard that is widely understood in the advertising industry and already provides an effective solution to the Commission's concerns. If an advertiser is using testimonials (even with disclaimers) that give a misleading impression of what the product or service is capable of doing, the Commission can and should go after the marketer under existing law. The Commission already has the necessary legal authority and enforcement tools to address the concerns raised in the Commission's Notice.

It is important that we protect consumers from bad actors—but I strongly believe that it is equally important that legitimate companies providing effective solutions to consumers are allowed to succeed without arbitrary or unfair constraints. I am concerned that the guidelines in their current proposed format could hurt good players, and I don't think that is the Commissioners' intent. Given the Commission's existing tools, and the substantial negative impact that the Commission's proposal would have on endorsements and testimonials that benefit consumers, I believe that the Commission can and should achieve its important goals without requiring a marketer to provide information on an anticipated average result which may actually mislead consumers as to what is really average given that their individual experiences, almost by definition, will rarely be average. The comments of the Electronic Retailing Association, which are attached to my testimony, discuss these issues in detail, and I commend those comments to the Subcommittee.

In addition to the Commission's enforcement efforts, our industry is vigilantly monitoring and policing the marketplace through self-regulatory programs such as the National Advertising Review Council's Electronic Retailing Self-Regulation Program and the Direct Marketing Association's testimonials and endorsements standards provided in the *Guidelines for Ethical Business Practice*.¹ These self-regulatory programs provide the direct response industry with effective guidelines that require truthful and responsible advertising and provide the marketplace with meaningful mechanisms for evaluating accuracy of product claims that are communicated in national direct response advertising. In addition, many self-regulatory programs include enforcement mechanisms to bring about compliance and, if necessary, report violators to an appropriate government agency.

In my experience, industry self-regulation is the most effective way to address concerns that arise in an evolving marketplace, particularly for an industry that relies on emerging digital advertising channels such as the Internet, including tools such as blogs, message boards, social networks, and online video. These mediums are constantly and rapidly evolving in directions that bring new value to consumers. Industry self-regulation is effective because it is flexible and adaptable in a timely manner. Such programs can more efficiently evolve to address bad practices and target bad actors without unnecessarily restraining legitimate companies and online innovation. As with most other industries, the legitimate actors take extraordinary steps to maintain consumer confidence and their own legitimacy by constraining and eliminating the bad actors. I believe that industry self-regulation is the appropriate approach to addressing problems in the marketplace and encourage that any solution, whether formulated by this Subcommittee or the Federal Trade Commission, preserve a strong role and effective incentives for strong self-regulatory programs.

Thank you for this opportunity to present my views. I welcome your questions.

Senator PRYOR. Thank you.

I want to thank all the panelists, again, for their testimony. We appreciate it.

Mr. Vladeck, let me start with you, and just a quick clarification. You showed this video, which I thought was very helpful, but how does the FTC use that video?

Mr. VLADECK. Well, it's, of course, available on our website. We've distributed this video to clinics, and to patient groups, and—as widely as we can to try to get this message out. We can't afford to buy airtime, so we distribute these kinds of videos to sympathetic organizations that might make use of it.

Senator PRYOR. Mr. Greenberg, let me ask you—you've heard, I think, the last three witnesses talk about self-regulation, and I'd like to get your thoughts on self-regulation versus FTC action—or, maybe I should put it a different way—another scenario would be self-regulation, “and then” FTC action. Give me—if you don't mind, give me your thoughts on self-regulation and whether we need to beef up the Federal Trade Commission's abilities, or give them more resources, or whether they should do additional regs, or change their guides, or whatever.

¹See The Direct Marketing Association's *Guidelines for Ethical Business Practice*, Article 21, Testimonials and Endorsements, available at <http://www.dmaresponsibility.org/Guidelines/>.

Ms. GREENBERG. Senator, yes, I think self-regulation within an industry is extremely important, because it sets some parameters, for the honest and conscientious players within the industry, in how they communicate with consumers, and what kinds of rules of the road they set for members of the industry.

Self-regulation clearly—and I think I heard both witnesses say it's important to have an FTC there for the outliers, for those within an industry that don't comply with the standards that are set by the members. So, it's important to have both. We always recommend, if there is no industry standard—I think, when we talked about prepaid calling cards, for example—very important that there be some set of guidelines for members of the industry, but it's also important to have the FTC to look at—certain industries don't have any of those standards; they need the FTC. And the FTC needs to be there for those who don't comply with a basic set of self-regulatory standards, as well.

Senator PRYOR. Dr. Rangan, do you have anything to add to that?

Dr. RANGAN. We also agree with that. The landscape for advertising, especially green marketing, is always evolving, and it—there are always new and innovate claims being made. So, certainly, self-regulation plays an important role in that landscape. Yet, we see that there—the bottom has sort of fallen out, and that there needs to be some level, baseline, playing rules that everyone has to play with, so that we can reduce this sort of green noise, or just noise, in the advertising marketplace.

Senator PRYOR. Mr. Vladeck, do you have any comments on that?

Mr. VLADECK. Well, self-regulation serves a very important function, and we're very supportive of the process, but it's no substitute for a fully staffed, able, and capable Federal Trade Commission. Sometimes—as able as my friend Lee Peeler is, sometimes we disagree, and sometimes disputes are not submitted to NAD. So, while we think self-regulation plays an important role, it's certainly not—it's not sufficient. It's necessary, but it's not sufficient.

Senator PRYOR. And let me ask, from the FTC's perspective with the industry, do you have a cooperative relationship with the industry when it comes to self-regulation? And, is there communication back and forth that the industry comes forward with, about bad actors in the industry?

Mr. VLADECK. Oh, yes. And one of the—you know, and one role that self-regulation serves is really helping us to look at a very, very crowded playing field and identify the bad actors in it. And so, yes, that is an important role self-regulation plays.

Mr. PEELER. Senator Pryor, can I just add—

Senator PRYOR. Sure.

Mr. PEELER.—you know, the other important thing that self—two important things that self-regulation adds to this mix is, we deal with about—we issue about 200 decisions every year. And that's 200 things that the FTC doesn't have to deal with. And we have excellent communications with the FTC, so their backing is one of the reasons why our decisions are followed.

The other thing is that we deal with—often deal with claims that have a competitive impact—superiority claims and things like that—that aren't going to be very high on the FTC's enforcement

criteria, because they don't involve health or safety, or direct monetary losses, but are very, very important to maintaining the integrity of advertising and the level playing field in the advertising area. So, those are two ways that we supplement this, sort of, comprehensive system of advertising regulation that's out there.

Senator PRYOR. Thank you.

Senator WICKER?

Senator WICKER. Well, thank you very much for very thought-provoking testimony. I appreciate all six of you.

Mr. Vladeck, Mr. Congdon talks about a specific instance, here: Dallas Carter saw an advertisement with Earl Broffman in it, where he lost an enormous amount of weight. Earl Broffman was inspired to lose this amount of weight by seeing yet another ad, from Aaron Mathis, who lost 110 pounds. The advertisements were testimonials. It's been suggested that if you require these advertisements to do an average result, the company's going to have to do a great amount of background testing there.

Do you propose that the FTC look into the scientific basis for these tests? Is the FTC going to be deciding whether the test itself was loaded, whether there was a flaw in the methodology, and that sort of thing?

And what's wrong with this type of advertisement that inspired Mr. Carter and Mr. Broffman to change their life and decide not to be morbidly obese?

And what do you think about the idea in Mr. Congdon's testimony that, rather than a safe harbor, or special protection, based on the disclaimer, we sort of look at the net impression? What would a sensible person think viewing—a reasonable consumer think, based on a commonplace interpretation of these advertisement?

I'll start with Mr. Vladeck, but actually, I'll let anybody jump in.

Mr. VLADECK. OK, Senator, you've asked a simple question that deserves a simple answer, so let me start with the simple answer and then explain it. The simple answer is that—the test you've just articulated, "What would a reasonable consumer take away from the ad?" That's the test that we're proposing. But, let me explain how we get there, because this is important.

The safe-harbor provision in the guides has become an open-handed invitation to sellers to make inflated claims about a product performance that would otherwise be forbidden because they couldn't be substantiated. What we're trying to do is simply level the playing field to make it fair, both to the legitimate business guys, and take away an advantage that we've given—inadvertently—given to sellers who are willing to bend the truth or to make misleading or deceptive claims, or unsubstantiated claims.

Let me just give you an example. And I'll come to Mr. Congdon's example in a minute. But, there have been lots of ads that say, for example, "Take this product. It will lower"—and they have a person up there who's taken the product, and the claim is, it's reduced their cholesterol level by 100 points. Now, the company knows, or the company has reason to believe, that, for most consumers, the cholesterol reduction would be a small fraction of that. And the claim is then accompanied by a tiny little fleeting disclaimer, on

the bottom of the TV set, that says, “This may not be typical,” or “Results may vary.”

We’re trying to get at that claim and make sure that those claims are not run anymore, because they’re deceptive. Both our enforcement efforts and our empirical studies show that most consumers believe, or many consumers believe, rightly or wrongly, that they’re going to be one of the lucky few and get that enormous reduction.

But, what Mr. Congdon is determining—describing—is not an ad that makes a typicality claim. The claim that he’s talking about makes, essentially, a uniqueness claim, that, “Here’s someone who undertook a heroic effort and achieved a terrific result.” And if one parses our Federal Register notice—and I realize that this is a daunting task for anyone to do—but, if you look at page 72392 of the—

[Laughter.]

Mr. VLADECK.—November 28 Federal Register notice, virtually the identical ad Mr. Congdon is worried about is given, in an example—in our examples of how the guide would be applied. And we say that, when an ad is not claiming typicality, there’s no need for the kind of disclosures that were talking about. It’s ads—and these are the vast bulk of them—that make a claim—that either say overtly, or imply, that the results are typical.

Senator WICKER. So, there’s nothing wrong with the ad Mr. Congdon described, that inspired Mr. Carter?

Mr. VLADECK. In fact, that ad—yes, I agree with you, and I would say that that ad is almost identical to the example—it’s example 4 on the Federal Register page I gave you. And I’ll be glad to provide the example to staff.

[The information referred to follows:]

Federal Register / Vol. 73, No. 230/Friday, November 28, 2008 / Proposed Rules / pp. 72392–93

Example 4: An advertisement for a weight-loss product features a formerly obese woman. She says in the ad, “Every day, I drank 2 WeightAway shakes, only ate raw vegetables, and exercised vigorously for 6 hours at the gym. By the end of 6 months, I had gone from 250 pounds to 140 pounds.” The advertisement accurately describes the woman’s experience, and such a result is within the range that would be generally experienced by an extremely overweight individual who consumed WeightAway shakes, only ate raw vegetables, and exercised as the endorser did. Because the endorser clearly describes the limited and truly exceptional circumstances under which she achieved her results, the ad does not convey that consumers who weigh substantially less or use WeightAway under less extreme circumstances should generally expect to lose something in the vicinity of 110 pounds in 6 months. The advertiser must have substantiation, however, for any performance claims conveyed by the endorsement (e.g., that WeightAway is an effective weight loss product).

If, in the alternative, the advertisement simply says that the endorser lost 110 pounds in 6 months using WeightAway together with diet and exercise, the advertisement would likely convey that her results were representative of what consumers can generally expect to lose with WeightAway.

Senator WICKER. So, Mr. Congdon, are you attacking a “straw man”—doesn’t exist?

Mr. CONGDON. I hope not. My concern—

[Laughter.]

Mr. CONGDON.—is relative to—again, I love what he’s saying, because I think it is important to be able to show something extraor-

dinary, as long as people understand that it's extraordinary, that can inspire somebody to change their life. But, I also am concerned with the underlying use—or of having to say—perhaps having to say—and correct me if I'm wrong, under that—that I also need to disclose what the average weight loss is while using that product.

Mr. VLADECK. So, may I follow up?

Senator WICKER. Sure, because that's part of my question, also.

Mr. VLADECK. Yes. So, if the claim were framed in a way to suggest that the weight loss this individual achieved was somehow typical, then you'd be required to make that disclaimer. But, if you're making the claim that this was an—this—it took extraordinary effort on his part—

VOICE. Right.

Mr. VLADECK.—then we do not require that disclosure. And the bottom line is, I think, the bottom line you articulated, which is, What would a reasonable consumer take away from the ad? What we're worried about is the 99 percent of these ads that imply, or overtly state, typicality. That is the problem. Because they pick out the one outlier, the one person who had remarkable success, and depict that person as the typical consumer. And those are the ads that are subject to the safe harbor now, and those are the ads we want off the air.

Senator WICKER. Well, just one other thing, and then Senator Klobuchar probably wants to dive in here.

Are you going to be giving scientific evaluations of testing methodology if we go down this road? How far behind the average-result claim are you going to look?

Mr. VLADECK. Senator, we already look to see whether ads that make health claims are substantiated. And so, if—let me take my cholesterol-reducing example. There are lots of these claims on the market. If a product markets—is marketed that it reduces cholesterol, we want the company that's making that claim to have adequate substantiation for that claim. But, there's nothing in these enforcement guidelines that would change our substantiation standards.

And please remember, these are guides. If we bring an enforcement action, the guides have nothing to do with the case. We have to prove, as we would have to prove in any other case, that the claim was unfair or deceptive, because it was unsubstantiated.

Senator WICKER. Mr. Congdon may want to briefly respond, and then—

Mr. CONGDON. Yes.

Senator WICKER.—I intruded too much—

Mr. CONGDON. First, if I'm not mistaken, it also says that, even if it's not typical, I'm going to need to issue a 6-line—about a 6-line disclosure of everything that they ate, and how they exercised, in detail, so somebody understands what happened, which I'm not sure is going to be very carefully read, based on other findings that we've got.

Beyond that, though, it's difficult to understand when—and one of my problems with the guidelines, as written, is it's not necessarily clear when they are going to perceive that we are being typical and when they are going to perceive that we're not being typical, unless we disclose that.

So, once again, we come down to whether or not we're going to need to provide an average, which is, in my opinion—especially for weight-loss products, when people are putting in different levels of effort, and may be different ages, or a different gender—that it's going to be impossible to determine what the average is—literally impossible—even if we had endless dollars to conduct the studies.

So, I'm concerned with what typicality is going to mean, I'm concerned with whether or not we're still going to be held to an average, and I'm concerned, beyond what the FTC might perceive on this—because there are unintended consequences, which we've dealt with before, relative to the red flags on weight loss that you talked about earlier today—and that is that, sometimes, broadcasters will interpret something one way, and feel that they need to take action, so they're not liable for being a participant, or an unwitting participant, in defrauding a consumer.

The example that I've got, which actually affected my company, was a few years ago, when the red flags came out, which were based on supplements that were taken, and weight loss rules, where it was—one of the red flags was, when you see somebody claiming that somebody could lose more than 2 pounds per week, that that is a red flag. At the same time, we were advertising a program, where people were losing at least 3 pounds a week, in some cases. But, that was through diet, exercise, and taking the supplements that we were providing, but mostly through diet and exercise. We had a broadcaster who saw that we had testimonials that had lost more than 2 pounds per week, and they said, "You know what? We're not going to air your testimonials, because there's a red flag in there." They didn't understand that it was only related to supplements and—and, in my opinion, the FTC hadn't properly disclosed what the guidelines were about, and so, we were harmed in the marketplace, as a result of that.

So, I'm, again, concerned, not just with what we're talking about here, but with how others might interpret it and react in the marketplace, which could affect our ability to market our product.

Senator PRYOR. Thank you.

Senator Klobuchar?

**STATEMENT OF HON. AMY KLOBUCHAR,
U.S. SENATOR FROM MINNESOTA**

Senator KLOBUCHAR. Thank you very much to all the panelists. I'm going to stray away a little from weight loss. It's making me feel guilty.

[Laughter.]

Senator KLOBUCHAR. And I thought I'd talk a little bit about the marketing of green products. I'm a member of the Environment and Public Works Committee, and have been closely monitoring the work that the FTC is doing in this area. And I understand, Mr. Vladeck, that the FTC is currently reviewing its guides regarding environmental standards for marketing.

And in your testimony, you also reference that the FTC is conducting its own research to determine consumer perceptions of green claims. And I've always wondered what these—when things say they're "eco-friendly," "biodegradable"—and I know you're working on this, as well, Dr. Rangan—"recyclable," "ozone-safe,"

“sustainable”—and I’m just wondering—and I’ve heard from people that are just producing products, and then they get mad because someone else is claiming that their products are green, when, in fact, someone is doing the same thing as that other company, but they wouldn’t claim that they’re green.

So, could you just give me an update on what is the potential standardization of terms, what direction is this going? And I’d also like to hear from you, Dr. Rangan.

You want to start, Mr. Vladeck?

Mr. VLADECK. Well, thank you for the question. We are in the midst of updating and revising our green claims. We’re about to take a very large consumer survey. In order to do that, we needed clearance, under the Paperwork Reduction Act from OMB, which we have finally obtained. So the survey ought to begin, this summer. We ought to have the results by fall. And we’re hoping to at least put out our proposed revisions, maybe by the end of this year.

Our problem, of course, is, until we have a baseline of what it is consumers think when they hear these terms, it’s more difficult for us to bring enforcement cases. We’ve brought some—recently we brought a spate of enforcement cases on claims of biodegradability, when we could prove that the products would not, in fact, degrade. But, what we’re hoping to do is use the consumer survey to get a baseline about what is—to the extent there is any shared understanding—about what consumers understand these terms to mean, and that will inform both the way we write our green guides, and will help inform our enforcement policy.

Senator KLOBUCHAR. Doctor? Thank you.

Dr. RANGAN. Thank you, Senator.

We think that there are a host of vague and misleading claims out there. And the original green guides went a long way to highlighting some of those examples, like “environmentally friendly,” “Earth-safe.” And if you take a look at the old green marketing guides, you’ll find a number of those terms that were identified in there actually didn’t get onto the marketplace in a pervasive way, and so, those guides were useful.

The problem is that we have so much more vague and misleading terminology out there, and we need the FTC to provide guidance around those. And common claims, like “natural,” which are really muddying up the green marketplace because there is so little definition behind what that has to mean, really needs either guidance, or it should just be prohibited to be used. You can find “natural” products today that contain synthetic and petroleum-derived ingredients, you can find them with potentially harmful ingredients, you can find them with partially hydrogenated oils, high fructose corn syrup. So, you can find lots of ingredients, in those types of products that are labeled as “natural,” that no consumer would think that they’re getting in a product labeled as “natural.”

Another important aspect that we gave in our oral testimony is the fact that you need full disclosure. So, you need full ingredient disclosure on cleaners. We need to have plastic numbers be mandatory, so that consumers know what plastics they’re getting. These things are not the case, at this time; and without the kind of transparency in the marketplace, it really makes it very, very difficult for consumers to understand what it’s all about.

And just a final note, in many of the green surveys that have been done out there already, consumers who are looking to green claims are looking to them for health reasons, in the majority of cases; and so, that's an important aspect to also note.

Senator KLOBUCHAR. OK. Yes?

Mr. PEELER. Senator, I'm from the advertising industry's self-regulatory program, and I just—

Senator KLOBUCHAR. Great.

Mr. PEELER.—wanted to add a couple thoughts.

First off, you know, further definition in the guides by the FTC would be really valuable. And the way that they're going about it is exactly the right way to go about it.

In the interim, we actually are handling a number of green cases, and competitors who see claims—

Senator KLOBUCHAR. What I'm talking about.

Mr. PEELER.—that they say, "You know, my counsel won't let me make this"—there's actually a process for them to come to us, and we will adjudicate those claims, as best we can, given the information we have now, and issue a decision. And we've actually gotten very good support and coverage in *Consumer Reports* for some of the claims.

We had exactly—we've had cases with exactly the issue that you were speaking about, a claim that a product's natural, when it contains synthetic ingredients. And we actually have a body of precedent we've built up, over about 5 or 10 years, on the issue of "natural."

So, again, it's something that can be done right now, while the FTC's moving forward with its process.

Senator KLOBUCHAR. Very good. It seems like there's some agreement that we need some better guidelines here. Because I think it's really confusing, as consumers are trying to do the right thing and be part of this—you know, the new energy and—green world—that it's getting very difficult for them. So, I appreciate that.

One last question, if I could, Mr. Chairman, a brief one, just for you, Mr. Vladeck. The challenges that you see with this—the new media. I noticed, in the summaries of some of the issues, that there are issues of bloggers getting paid, and things like that—and just, the challenges you see, and how you're shifting your enforcement activities at the FTC in response to that.

Mr. VLADECK. Well, as I mentioned earlier, the proliferation of new technologies give marketers new tools to market their products. Our proposed revision to our endorsement guides do focus, in part, on social marketing techniques, and we have proposed to require bloggers who are taking some form of compensation from a sponsor to disclose that fact as part of their promotion of a product. We've got—

Senator KLOBUCHAR. I hope they do that in politics, too.

[Laughter.]

Senator KLOBUCHAR. I'm kidding.

Mr. VLADECK. I'm not going to touch that third rail—

[Laughter.]

Mr. VLADECK. But, that is—that has sparked some controversy. We believe that it's the right thing to do, and we're exploring all sorts of comments.

I would say that the one self-regulatory group that's already grown up among the blogging community very much supports our position on this.

Senator KLOBUCHAR. OK, that's excellent.

Thank you very much. Appreciate all of you.

Senator PRYOR. Thank you, Senator Klobuchar.

Senator WICKER?

Senator WICKER. Thank you, Mr. Chairman. You've been most generous.

What I want to do is let the other four panel members jump into the exchange between Mr. Congdon and Mr. Vladeck. And I'll set the stage by reading from Mr. Congdon's prepared testimony, "Companies that strive to comply with the Commission's requirements, as we do, will find it extremely challenging to satisfy the proposed guidelines. The cost of conducting detailed, valid studies will be prohibitive, keeping many new companies out of the marketplace."

With that, who'd like to jump into this discussion?

Mr. RENKER. I'd be happy to, Senator Wicker.

Senator WICKER. Mr. Renker?

Mr. RENKER. But, I'll come at it from a contrarian point of view, relative to cost. The size and scope of our company, with the amount lawyers that we have and the dozens of MBAs that we have working for us, would enable us to meet some of these average requirements on certain of our products. Yes, it would be costly; but, yes, we could do it. I think that's unfair to a small business, and I think it's unfair to innovation.

Second, this problem, relative to averages, is one that—it crosses many different kinds of product categories, not just weight loss. For example, my partner and I started our business because we shared a mutual interest in motivational tapes, and so, we created a motivational series of tapes called "Personal Power," with Anthony Robbins, 20 years ago. And those products are still on the air. It's the best-selling motivational tape series of all time. But, that product is about goal setting and trying to realize your dreams by taking action, and that may be in weight loss, that may be in relationship improvement, it may be in starting a business of your own. It's impossible to determine what the average result is of the people that have purchased that product.

We have the same circumstance with Proactiv, our acne treatment system, for which we have many resources to try to seek what the average might be. However, because acne can be genetically—excuse me—predisposed, and it may have cultural differences, it has differences based on age, gender, et cetera—that the compliance of our product changes from person to person. Acne itself can be random and, in effect, customizes per individual. And even though we have several million customers, currently—as current customers—it is nearly impossible to determine what the average result is of the use of that product.

So, the issue for us really is, as it relates to the current FTC guides, we support them and want to see them enforced. As it relates to the disclaimers, we would like to see them become more conspicuous, unambiguous, ubiquitous, larger, more important,

more prevalent, or, absent that, we fully support net impression, because that's, ideally, the business that we're in.

We can substantiate the claims that we make. We back them up. We under-promise and over-deliver. That's why we are successful marketers. And again, we support pursuing those that do not.

Senator WICKER. Anyone else?

Ms. Greenberg?

Ms. GREENBERG. Yes, certainly the story with Mr. Broffman is a compelling and a—it, you know, pulls at your heartstrings that somebody was able to—with a series of motivational relationships, was able to lose all that weight.

I guess the thing that I keep wondering is, What happened to the other customers, the many, many other customers, to whom this product was sold? Where do they fall in the average weight loss? And I—and that's the information that we don't have, I think, from Mr. Congdon. So, I'd be interested in knowing that.

The second point I'd like to make is, that it's really difficult for me to understand, as a consumer advocate, how anyone could argue against a company being required to post average results. Average results really tells the consumer what the likelihood is of their having success with this particular product. Somebody who's lost 120 pounds, I would venture to guess, with this particular product they're selling, is not their average customer. And it seems to me that if a company is selling millions of dollars worth of products to customers, the least they could do is tell their clients, their customers, what their likelihood is, pro or con, and where the average falls. I understand that there may be some costs involved, but it seems to me an incredibly sensible way to approach this issue.

Senator WICKER. Anyone else?

Mr. VLADECK. Well, I'm—

Dr. RANGAN. What—

Mr. VLADECK. Oh, sorry.

Dr. RANGAN. Sorry.

Senator WICKER. Well, Dr. Rangan, I guess we'll let you go first and then—

Dr. RANGAN. OK, thank you. I'll be brief, Senator.

In any case, even in the green sphere, it's hard for a consumer to tell what kind of impact that product has in a real reference frame, and so average numbers do give that consumer some sort of reference frame, so that they can decide how they want to do that, whether they're willing to spend more. Without that, it does become a bit of a sensational, extraordinary pitch, but there is no reference frame for the consumer to put that pitch into. And that's what averages will help them get to.

Senator WICKER. Yes, sir?

Mr. VLADECK. Could I make one quick point?

Senator WICKER. Yes.

Mr. VLADECK. Let's clear up the confusion, here. That is, for advertisers to make claims generally, they need substantiation. So, if they're claiming a product is a weight-loss product, they'd better have something, a study or other support, that shows that. And generally, that substantiation will tell you pretty much what one can reasonably expect, which is what were asking, for ads that make typicality claims.

The other point, which needs to be underscored, is, assume it is too expensive or difficult to acquire some sense of what the typical consumer is likely to achieve, in terms of their results. Our provision, our proposal, would still permit a disclaimer, provided that it was clear—I forget the language that one of my colleagues used, but provided that it was clear—easy to read, and clear about the fact that the achievement of this particular endorser or testimonial was not typical of the result.

So, I'm not sure there's that much disagreement with us. If they don't have, and cannot get, substantiation, then the key out of that dilemma is simply to make a clear, ubiquitous, unequivocal statement that the results are not standard.

Senator WICKER. Thank you.

Mr. CONGDON. If I could just elaborate for a moment.

I think that, where it's relevant—certainly nobody is saying that an average, where relevant, wouldn't be useful to a consumer. For instance, with a light bulb, if I know that your—that the average life of a light bulb is 5,000 hours, I'm certainly, as an advertiser, not going to be asking that I hold up the one light bulb that lasted 30,000 hours and not talk about the average use of a light bulb, therefore expecting that people were going to buy the light bulbs, thinking that their light bulbs are also going to last 30,000 hours.

But, when it comes to weight loss, it's in a very individual and personal thing. What might be the average—and I'll try to clarify. What it means is, because I show a woman, who's 30 years old, who lost 40 pounds, that does not necessarily mean that that is average. But, it might be average for women who had 40 pounds to lose when they started the program. That is not relevant to a 22-year-old guy who's been an athlete all his life, and, while he was in college, and because he was drinking a bunch of beer and eating pizza, happened to gain 10 pounds, and now wants to get back in shape. What's the average weight loss for that person? Well, if he uses the program effectively for a reasonable period of time, the average weight loss might be 10 pounds. But, do I have to take into account the people who buy the product and then decide not to use it? Is that—do I have to equate that into the average?

Or—for instance, our extreme workout program, P90X—when I did that program I actually gained 15 pounds. I was underweight, because I wasn't working out enough, and I packed on muscle and gained 15 pounds. In fact, many of our customers who use P90X gain weight. Do I have to average in the people who gained weight using P90X into the overall average of people who use P90X?

So, I'm not trying to skirt an issue or get around anything. It is that weight loss, or getting fit, is actually a very personal thing. With some of our programs, your body literally goes where it's supposed to go by using the program.

If I had a way that I could show an average, then I would absolutely do it, because I think the consumer would find that very useful. I'm just saying that, if I'm showing a testimonial that's extraordinary, I can inspire people who are like that to change their lives and lose a lot of weight. I also show testimonials who lose only 20 pounds, because I must appeal to somebody who has 20 pounds to lose, and get them to buy that product, as well, or at least give

them the tools that they need to decide whether or not they should buy the program.

Senator WICKER. Thank you.

Senator PRYOR. Thank you.

I have a follow-up, if I can, for Mr. Peeler, and that is—Senator Klobuchar alluded to this a few moments ago—about bloggers being paid. Are you familiar with that issue? And how deceptive is that practice?

Mr. PEELER. You know, we are familiar with that issue. And, as I said, there are a number of varieties of that, including paying employees to post reviews on websites. And there have been a couple of cases by the State AGs, just in the last 2 weeks, where they've discovered that process.

If you—you know, advertising law is pretty clear, that if you're paying somebody to promote your product, that's a material disclosure, and you need to disclose it. I think what the FTC and the blogging community are struggling with in connection with that debate is exactly what would constitute compensation in that area.

Senator PRYOR. OK.

And, Ms. Greenberg, let me ask you about—you know, we've talked a lot about averages and net impressions, et cetera. From your perspective—and if you have data on this, let me know—but, from your perspective, how effective are disclaimers? I know you get into issues about super-small type, and really fast disclaimers on television, and things like that. How effective are disclaimers? I mean, do consumers actually pick up on those, and read those, and factor that in, or not?

Ms. GREENBERG. Well, it depends on the context in which we're talking. If we're talking about a blog, the—a blog that says, "We were given samples of this product by the company, and we're testing them, and, you know, we found the following things to be positive about the product," that's a—I think, a fairly effective disclaimer.

The problem comes, of course, when you have these fleeting, tiny-print disclaimers. We've talked about this with pre-paid calling cards, where there's a tiny little disclaimer on the bottom, about—that the fees may not—or, "The minutes you're getting may not be what we promised you," for a variety of reasons. If it's—you know, if it's easy—easily read, easily seen, if it's part of a commercial, if it's part of a blog, that's a disclaimer that can be fairly effective. Mostly what we were seeing in this context, and with the work the FTC is doing, the disclaimers on a lot of these ads are not getting through to consumers. And I think the FTC's research shows that the consumers that they polled and talked to believe that they, too, could lose 110 pounds, if they need to lose 110 pounds. So, I think we're talking about—we've got to do a much better job of getting information out, much more effective information out, to consumers.

Senator PRYOR. Senator—oh, excuse me.

Senator McCaskill?

**STATEMENT OF HON. CLAIRE McCASKILL,
U.S. SENATOR FROM MISSOURI**

Senator MCCASKILL. It's OK. I'll be mistaken for Amy, any day.

[Laughter.]

Senator MCCASKILL. I'm really concerned about an area of advertising that I don't think we've talked about yet today. And when I first saw it, it just infuriated me. And that is—you know, our news folks have enough problem with credibility, right now, without fake news being aired. And this notion that we have people—and sometimes even the news anchors from the stations—being paid to pretend like it's a newscast. I mean, with the ticker running underneath, you know.

And particularly as we look at these stimulus scam ads, which—we had a huge article in the Kansas City paper this morning about a firm in Oberlin Park Kansas that was, you know, selling—you know, "We will get you \$25,000 in stimulus money." These fake newscasts are unconscionable, just unconscionable, and I don't get—I mean, I've got some numbers, here, of the numbers of them and—but, it's old data, from 2006.

And I think everyone, because of the nature of our election last year, was more attuned to the news than perhaps they have been in my adult life, just because everyone was so interested. It was a very interesting campaign. And on the heels of that kind of ratings that news channels got, to begin to use these ads, pretending like this is a newscast, I am amazed that the journalists have not kicked and screamed about this. Maybe it's because they're all worried about their jobs right now, in this downturn, and they don't think it's the thing to do.

But, I would ask—I know the FCC has taken limited action against Comcast in this area—I would like to ask the FTC, Does the current law give you enough recourse to take actions on these fake newscasts? Isn't there a way that we can say, "You can't do that. You can't pretend like you're broadcasting news, when it's a paid advertisement"? That doesn't seem unreasonable to me.

Mr. VLADECK. We can, and we do. If you look at the Commission's testimony, at page 4, we talk about a case—it's this case that we filed in 2004 against dietary supplement manufacturers that were claiming that their supplements could prevent cancer, cure arthritis, and things like that. One of the claims against the company was that they failed to disclose that they promoted these products through a paid commercial that looked like a independent television program. And, you know, we target products, based on the risks they pose to the public, in terms of public health issues and economic loss.

Where we see an infomercial like this masquerading as real news, we will add a charge. But, in our view, given our enforcement priorities, the principal actor here has to be the FTC—the FCC. We do not have the resources to go, one by one, against all of these fake newscasts. So, we look for these—

Senator MCCASKILL. Can't you, at a minimum—you know, like, I'm pretty good at yelling at people.

[Laughter.]

Senator MCCASKILL. I mean, can't you, at a minimum, every time you all see one of those ads, can't you send the production company, you know, "What you're doing could be actionable, and it could cost you a lot of"—I mean, why can't you do to them what is real, what they do to everyone else, which is fake?

Mr. VLADECK. Well—

Senator MCCASKILL. You know, they—

[Laughter.]

Senator MCCASKILL.—they pretend to the world that—you know, I mean—with all due respect—and I haven't been here for your testimony, Mr. Congdon; I assume you sell some kind of weight-loss product or—you know, with all due respect, I mean, I would—you know, in my life, I wish I had a dollar for every diet I've been on and every weight-loss attempt I've made. And I get why everybody wants to believe something that isn't going to be true. There's just really one old-fashioned way to do it; it's called "put less in your mouth and move your body more."

You know, but they—they do all this, that "It's a miracle," and, "If you do this, wonderful things will happen." Why can't we, at a minimum, send out a letter, saying, "Hey, what are you doing?" You know, "You're pretending you're a newscast, and you're not, and it could be actionable, and we could come after you"? I don't think these—the production companies have even heard a whiff of a problem. When the Comcast action was taken, it wasn't even against the production companies; it was against Comcast.

Anybody?

Mr. RENKER. Well, if I might—

Senator MCCASKILL. Consumer Union?

Mr. RENKER. If I might, Senator, speaking on behalf of the industry—and I'm—I hope Mr. Peeler has a comment—as I mentioned earlier, before you came in, I testified on this very topic 19 years ago. And what you're describing is deceptive and wrong. And if we see it on television, we try to stop it.

Senator MCCASKILL. Well, it's not hard to find it right now. It's everywhere.

Mr. RENKER. I agree. And it is harmful to our industry, it is harmful to consumers, and we are 100 percent against it.

Senator MCCASKILL. Well, I hope that you all get aggressive, because I will follow up with the FCC in—because—but, we have jurisdiction in this committee, too. It's bad enough that people are turning on the evening news and don't believe what people are saying. And all this is doing is adding to the problem.

Mr. PEELER. Senator, could I add one—

Senator MCCASKILL. We need to rely on our news.

Mr. PEELER.—could I add one complexity to this discussion?

As Mr. Renker said, 20 years ago there was a real pervasive issue with television ads that looked like they were news castings. And thanks to the support of the ERA, I think we've made a lot of progress there. We're still seeing some cases—in fact, I looked back, we've had three in the last year, of advertisements that were taking editorial format.

The specific issue, though, that I think you're raising has one additional complexity, which is, if it's basically a news release done in video form that a broadcaster decides that they're going to run, and the company that put out either the video or paper news release is not making that decision, there's actually an issue for us, as a self-regulatory body—and there certainly would be an issue for the government—as to whether or not they could go in and—they can certainly, as the FCC has done, tell the broadcaster that

they've got to disclose the connection, but I think there would be an issue about whether they could actually go and second-guess the judgment of the news program.

Assuming there's not a direct payment. If it's a direct payment to the television station for running the VNR, then that's just advertising, and that's exactly what the industry and the self-regulatory system and the FTC have been working to clean up for years.

Senator MCCASKILL. Yes, well, I'm talking about when somebody pays the station to run an ad, and pretends like it's a news with the little clip running below, with today's news on it. I mean, give me a break. I mean, it is deceptive, on its face. Give me that case in front of a jury, and I'll do it pro bono, and I'll get the result that we all know would happen if a jury looked at it. This is not complicated. It's common sense. And I hope you all take that seriously, because I think it's really a problem.

Can I ask one brief other question?

I asked the FTC, last year, to look into the Craftmatic beds. There was a unbelievable effort—sales effort. Then we added some undercover folks that went into a sales training—and how you got seniors to buy Craftmatic beds, and some egregious circumstances of seniors, where the salesman shows up at their front door, and gets in the door, and takes advantage. In fact, these people were trained how to identify seniors to take advantage of, and to make sure you close the sale before they have a chance to call anyone, and make sure they close the sale when no other family members are around really bad. And I'm just curious, has there been any follow-up done on the Craftmatic scam?

Mr. VLADECK. I assume there has been, but I can't answer that question. I'll have to get back to you. I just—I don't know the answer to that question.

Senator MCCASKILL. OK. Well—

Mr. VLADECK. We will get back to you promptly, I promise.

Senator MCCASKILL. OK. And I know that it's hard, coming to these hearings, and everything that gets covered, but—just a piece of advice, Mr. Vladeck, if you check your files for scams that Senators have written about, that are on the Committee, they're probably going to ask about them at the hearing.

[Laughter.]

Mr. VLADECK. I will make sure this doesn't happen again.

Senator MCCASKILL. OK, thank you.

Mr. VLADECK. Thank you very much, Senator.

Senator MCCASKILL. Thank you, thank you, Mr. Chairman.

Ms. GREENBERG. Senator, I just wanted to—Senator McCaskill, if I could just note that, on the VNRs, we couldn't agree with you more. It's an outrage that broadcasters would get paid to advertise something that looks like a—real news.

And what we'd like to see is a disclosure running, for the entire segment of the VNR. And I think consumers would be really shocked to see that.

Senator MCCASKILL. How about over the faces of—

[Laughter.]

Senator MCCASKILL.—the pretend newspeople who are delivering that? I think, right over their mouths.

Ms. GREENBERG. Can't argue with that.

Senator McCASKILL. Yes.

Ms. GREENBERG. Yes.

Senator McCASKILL. OK.

Ms. GREENBERG. OK, thank you.

Senator McCASKILL. Thank you, Mr. Chairman.

Senator PRYOR. Thank you.

Let me ask just a very few follow-ups. And you all have been patient, and very helpful and informative to the Subcommittee today, and we really appreciate it.

Mr. Vladeck, let me start with you. And does the Commission have research—or, do you have data that tells the Commission, and tells all of us, whether consumers can effectively distinguish between, say, testimonial advertising that is containing, truthful and substantiated information, versus that type of advertising containing, the false and unsubstantiated claims? Do you have any data showing where the line is and when the consumers buy into it or not?

Mr. VLADECK. Well, the data that we have on the testimonials shows that consumers do not understand, when there is a disclaimer about typicality, that that disclaimer means that they won't achieve what the person rendering the testimonial does. And that's part of the impetus about why we want to change our guides. That is, these disclaimers about "not typical performance" are ineffective. They may be ineffective for a variety of reasons, but they are ineffective.

With respect to whether consumers believe ads, there are—you know, there are now 40- to 50,000 dietary supplement products that are being advertised both—heavily, in both TV and through the Internet. These claims are proliferating because the market is growing. And I think that it's only fair to conclude—and there are lots of studies on this—that people, by and large, believe the ads. They believe the testimonials. They believe them when they're endorsers who are sports figures, who are athletes, who are other people that they trust—celebrities—which is why it's so important that we police the marketplace and we make sure, particularly when you're having claims of typicality, that those claims, in fact, are accurate and substantiated.

All we're trying to do is make sure the flow of information to the consumer flows cleanly, as well as freely. And that's what we're—that's why we're trying to revise these guides.

Senator PRYOR. Let—

Mr. RENKER. Senator?

Senator PRYOR. Let me follow up on that—

Mr. RENKER. Right.

Senator PRYOR.—just for one sec, and I'll get back to you in a second, Mr. Renker, but—

You're talking about revising the guides. Just for the Subcommittee's information, how many guides are there? Are they issue-specific, or is there one master guide?

Mr. VLADECK. Well, there are a lot of guides, but—

Senator PRYOR. Tell me what you're doing.

Mr. VLADECK.—but, for the advertisers, there are two main ones. There's the—there are the endorsement guides, and there's a spe-

cific guide involving environmental claims—the green guides. We’re in the midst of revising both of them; separately, because they raise different issues.

The key issues with respect to the endorsement guidelines are the typicality claims, and the social networking claims, whether bloggers who are being paid or compensated for product-touting have to disclose the relationship between themselves and their sponsors. Those are the two key issues that we’ve confronted.

Senator PRYOR. And, again, for the Subcommittee’s information, when you review and revise these guides, do you have a process which is like a public comment period, et cetera?

Mr. VLADECK. So far, we’ve had two with respect to the endorsement guides, and we will certainly have the same kind of process, open and public process. All of our data is available to everyone. So, the public can give us informed comments. And we’ve gotten lots and lots of comments from businesses, from consumers, from all stakeholders.

Senator PRYOR. OK.

Mr. Renker?

Mr. RENKER. Thank you, Senator Pryor.

Mr. Vladeck references the consumer impression of typicality disclaimer, and their belief that what they’re seeing is real. But, I just want to highlight that that is coming from print ads.

The business that we are in, that Mr. Congdon and I represent, is one of a 30-minute program, with multiple impressions throughout the program, and our products are compliant, and our claims can be substantiated. And I would suggest that that research would need to carry over into our industry in order to be valid and relevant to what we’re talking about, on averages.

Senator PRYOR. OK. Well, that’s helpful.

And one last thing, really—and Senator McCaskill may have a follow-up, too—but, really, I guess, for Mr. Peeler, since you’re in this industry and there are some self-regulation activities that you do—how hard is it for you to spot deceptive advertising?

Mr. PEELER. How hard is it to—

Senator PRYOR. How hard is it for you to spot deceptive advertising?

Mr. PEELER. You know, if—and I think that one of the real challenges of self-regulation and enforcement in the area is that, if deceptive advertising is done well, it is hard for someone on the outside to spot, which is why one of the key drivers of self-regulation has been encouraging competitors to come forward with complaints, because competitors really know what’s their—what their competitors are doing.

So, for example, if—and we handle cases like this all the time—if you’re making a claim that your toothpaste reduces cavities by 20 percent, you know, it’s hard just to look at that ad and say, you know, “Gee, I wonder if that’s true or not.” A competitor’s going to have a pretty good sense of whether or not there’s something in the area that would provide that result. So, we handle—you know, about half of our cases are competitor-complaint-driven cases.

I also want to go back, though, to what you started the hearing with, by saying that the majority of advertisers, you know, do want to tell the truth, and they are compliant. And there are two really

important points that—just to add to that. One is, you know, people like Mr. Renker and Mr. Congdon—the fact that there are deceptive ads out—advertising out there, as the Senator—Senator McCaskill suggested, really undermines the credibility of all the advertising that’s out there. So, it’s really in the—cuts against the industry, as well as consumers, to have, you know, the deceptive advertising out there.

And the other thing to say is, I—you know, I was in the government for a long time, and I—and when you’re in the government, you basically see the bad people, the people that have stepped over the line. In my present position, one of the things that is the most impressive is how mainstream that—how carefully mainstream advertisers look to both self-regulatory precedent and government precedent in following their ads. You know, a lot of our self-regulatory cases go into the nitty-gritty details of Department of Agriculture definitions, FDA definitions.

You know, literally everything that the FTC has written is scrutinized. There’s an old opinion letter that the FTC put out, 25 years ago, saying, “Here’s what we would look to for the use of the word ‘new,’” that the industry follows like it’s a bible. I don’t even think it’s in the CFR anymore. But, people really—the mainstream advertisers really pay attention to the guidance that comes from the government.

Senator PRYOR. Senator McCaskill, do you have anything else?

Senator MCCASKILL. I don’t.

Senator PRYOR. Well, I want to thank the panel. This has been a very good discussion.

What we’re going to do is leave the record open for 2 weeks. There were some Senators that, due to other committee hearings, et cetera, and action on the floor, were not able to be here today. So, we’ll leave the record open for 2 weeks. What we’d like to do is, if Senators have more questions, we would love for you all to respond to those as quickly as possible.

Senator PRYOR. And again, I want to thank you for your preparation and your time here today. It’s been very helpful for the Subcommittee.

Hearing is adjourned.

[Whereupon, at 11:47 a.m., the hearing was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF HON. JOHN D. ROCKEFELLER IV,
U.S. SENATOR FROM WEST VIRGINIA

With this hearing, the Committee continues to highlight the Federal Trade Commission's role in protecting the American people, especially at a time of unprecedented economic crisis. Last week, we explored the increasing frequency and danger of economic fraud and financial scams during tough times. Today, we will examine deceptive advertising and its power to undermine consumers' confidence.

Empowering consumers with accurate information is essential to a fair and thriving marketplace. But when that information can no longer be trusted, consumers become vulnerable to manipulation, and bad actors have the opportunity to take advantage of them.

Unfortunately, there is no limit to the tricks and ploys that deceptive advertisers may use to rope consumers into bogus opportunities and dangerous investments: elaborate "bait and switch" techniques, advertisements masquerading as news articles, advertisers paying bloggers to endorse certain products, false or deceptive testimonial advertising, "free" product advertising and false or deceptive marketing of "green" products.

With each false claim or inflated promise, consumers lose faith in the marketplace, the information they use to make decisions and the government they expect to keep these scam artists in check. The impact of deceptive advertising reaches beyond any one individual who buys into it. Fraud seriously hurts legitimate businesses trying to compete and does lasting damage to our economy.

I hope that with this hearing we can learn more about the Commission's efforts to crack down on deceptive advertisers and consider whether it has the resources and the authority it needs. And a special thanks to Subcommittee Chairman Pryor for presiding today and being such an outspoken advocate for the American consumer.

I want to thank our witnesses for sharing their perspective on these issues as we discuss the Commission's most fundamental responsibility: protecting the American consumer.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. TOM UDALL TO
SALLY GREENBERG

Question 1. What is the appropriate level of voluntary industry self-regulation?

Answer. The development of sound self-regulatory standards for consumer products and services helps ensure the physical and economic welfare of consumers. Self-regulation helps industry players know what the norm is for actions within their industry. It sets parameters that help to identify bad actors within the industry. It also encourages industry to condemn bad actors and take action to address the issue. NCL strongly supports industry self-regulatory models that include competent consumer contributions to the development of product and service standards. Such consumer input should be applied in the development of both mandatory and voluntary industry self-regulation standards.

With regards to advertising industry self-regulation, NCL believes the standards and rules set by the industry should reflect the following core principles:

- The goal of self-regulation should be to promote policies and standards that better inform consumers of product and service performance characteristics.
- There should be an endorsement and support of the role that strong and effective government regulatory and enforcement agencies play in overseeing industry.
- There should be an acknowledgment that disclosure alone is never an acceptable substitute for quality safety standards and careful design and production of the advertised product.

To the specific question of the level of voluntary industry self-regulation, we support vigorous industry-based review of all advertising, including in the new media market. Unfortunately, we find that the advertising industry too often fails to balance the competitive desires of the standards-making body's members against need for consumers to understand the true nature of a product or service advertised.

Time and again, it has been shown that when consumers are presented with all the facts about a product or service in a clear, easy-to-understand fashion, they will make an informed choice. This is no less true in "new media" advertising than in traditional advertising. Unfortunately, it is apparent to our organization that advertisers too often think first of how their advertisements can give as little substantive information as possible without running afoul of government regulators. Instead, they should focus on how to properly inform their target audience to enable them to make informed choices.

It is illuminative to note that the three goals of the National Advertising Review Council, a leading advertising industry self-regulatory body, are as follow:

- *minimize governmental involvement in the advertising business.*
- *maintain a level playing field for settling disputes among competing advertisers.*
- *foster brand loyalty by increasing public Trust in the credibility of advertising.*¹

That effectively informing consumers about the benefits, risks, and effectiveness of products advertised is not mentioned as a goal indicates to us that the self-regulatory objectives of the advertising industry may be insufficient. Further, given the opposition shown by the advertising industry to even the modest revisions proposed to the Federal Trade Commission's (FTC) *Guides Concerning Use Of Endorsements and Testimonials in Advertising*, we feel that there is a lack of ambition on the part of the industry to set such a goal in the future.

Question 2. Where do we need greater FTC authority and activity to protect consumers?

Answer. First, the proposed revisions to the FTC's *Guides Concerning Use Of Endorsements and Testimonials in Advertising* should be adopted by the Commission. These changes are long overdue and will help to stop some of the most egregiously harmful advertising industry practices, particularly with regards to weight-loss drugs, business opportunities, and other medical services such as baldness cures.

Second, replacing the FTC's current Magnusson-Moss Act-based rulemaking authority with Administrative Procedures Act (APA) rulemaking authority would do much to enhance the FTC's ability to proactively protect consumers from dishonest advertisers. For example, under its current rulemaking regime, when the FTC takes action against a dishonest advertiser, such an action requires a lengthy investigation that all too often leaves inordinate amounts of time for dishonest marketers to reap the rewards of their bogus advertisements. We believe that APA rulemaking authority would allow the FTC to much more quickly take action against dishonest marketers and thus protect more consumers, particularly in the ever-evolving new media landscape.

Finally, we would endorse more FTC activity to initiate actions against deceptive advertisers. Unfortunately, the FTC's stretched resources have in recent years forced it to only choose high-profile targets, relying on the media exposure gained from its actions to attempt to scare other bad actors out of the market. Given the proliferation of advertising we find to be manipulative at best and fraudulent at worst, especially online, we do not believe that this strategy is sufficient to control the problem. While a more vigorous rulemaking authority would give the FTC the legal tools it needs to tackle fraudulent advertisers, the agency will also require the sufficient financial and staff resources to support vigorous enforcement.

Question 3. Does the FTC need new authority to protect consumers in a new media landscape that includes Internet videos, web blogs, and Twitter accounts?

Answer. NCL supports the inclusion of new media content channels such as blogs and viral video in the *Guides Concerning Use Of Endorsements and Testimonials in Advertising*. We believe that consumers are increasingly relying on such new media outlets to inform themselves about products and services in the marketplace. The increasing resources advertisers are devoting to these advertising channels, suggests that they are of a similar mind on this issue.

Given the complexities of the new media landscape and the evolving nature of user-generated content we believe the revisions to the FTC's *Guides* are a good first step in ensuring that these new advertising channels do not become a haven for deceptive advertising. We would urge the Commission to remain vigilant and periodi-

¹National Advertising Review Council, "About the National Advertising Review Council (NARC)," Accessed August 21, 2009. Online: <http://www.narcpartners.org/about/index.aspx>.

cally review the effectiveness of its policies regarding testimonial advertising in user-generated content to determine if greater authority is needed in the future.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. TOM UDALL TO
DAVID VLADECK

Question 1. In testimonies today, witnesses express different views of the appropriate level of regulation and where industry self-policing is working—or not working—well. What is the appropriate level of voluntary industry self-regulation? Where do we need greater FTC authority and activity to protect consumers? Does the FTC need new authority to protect consumers in a new media landscape that includes Internet videos, web blogs, and Twitter accounts?

[The witness did not respond.]

Question 2. Mr. Vladeck, you note that today it is more complex and difficult to pursue false and deceptive advertising claims. With the Internet and new ways of reaching customers, we are seeing new ways for bad actors to flock unsafe products or take advantage of vulnerable consumers.

As a former state attorney general, I would appreciate your thoughts on how the FTC is working with state attorneys or U.S. attorneys to pursue these truly bad actors—those who are committing fraud and producing deceptive advertisements. How are you planning to work with and reach out to state attorneys general and U.S. attorneys? Do you have a systematic way to work with them? How often are you meeting with them and their staffs?

[The witness did not respond.]