

Senate Subcommittee Holds Hearing on Advertising Trends and Consumer Protection

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On July 22, 2009, the Senate Commerce, Science, and Transportation Committee's Subcommittee on Consumer Protection, Product Safety, and Insurance held a hearing on advertising trends and consumer protection. David Vladeck, Director of the Federal Trade Commission's ("FTC") Bureau of Consumer Protection testified before the Subcommittee, as well as various industry and consumer advocacy representatives.

The hearing focused primarily on Vladeck's testimony, in which he outlined the FTC's proposed revisions to its guidelines for testimonials, endorsements, and green marketing. Those speaking on behalf of consumer advocate groups applauded the FTC's plans to strengthen its advertising guidelines, while industry representatives raised concerns about the burdens imposed by the revisions, specifically those related to the safe harbor provision for atypical result testimonials. Subcommittee members generally agreed with the FTC and consumer advocacy representatives that consumers need more protection from deceptive marketing practices, but they have not reached a consensus on the extent to which the FTC should regulate advertisers. More details on each of these issues are provided below.

Testimonial Guidelines

In his testimony, Vladeck told the Subcommittee that he intends to eliminate the safe harbor provision for atypical result testimonials because it constitutes an "open invitation" for advertisers to conflate their products' benefits, particularly the benefits of products promoting health and wellness. Vladeck argued that such advertisements are deceptive, even when they include general disclaimers like "results may vary," and cited various studies that demonstrate that consumers often believe they will be among "the lucky few" to experience the benefits of a product despite a disclaimer stating otherwise. The proposed revisions would require advertisers to disclose test results showing the "average" benefits generated by a product if an advertiser suggests that a testimonial represents a "typical result." Advertisers would still be able to use atypical result testimonials provided that the disclaimers are conspicuous enough that they would not deceive a reasonable person. Vladeck ensured advertisers that removing the safe harbor provision would represent a change in the FTC's guidelines, but not its enforcement policy, which would still require a finding of falsity or deception before the FTC could find a violation by an advertiser. The FTC intends to finish reviewing comments on the proposed revisions and finalize changes "by the year's end."

Vladeck's testimony raised questions for many industry representatives, such as Jon Congdon, President of Product Partners, a company that markets dietary supplements and weight-loss programs, who asked how the FTC intended to verify companies' "average results" findings to

ensure that companies were not using flawed data or loading their tests with favorable data. In addition, Greg Renker, co-chairman of the advertising company Guthy-Renker, asked how the FTC intended to define what constitutes “average” for different types of products, claiming that it is “impossible to determine averages” for some products because they have varying effects on consumers based upon their different ages, genders, and cultural backgrounds. Congdon agreed, adding that, in a weight-loss context, exercise is a “personal matter” and resists an average benchmark. Representatives from consumer advocacy groups were quick to declare that, with the revenue that such products generate, companies should be obligated to tell consumers about the likelihood that their product works.

Endorsement Guidelines

In response to Sen. Amy Klobuchar’s (D-Minn.) questions about consumer protection and advertisers’ increased use of new media, Vladeck said that revisions to the FTC’s endorsement guidelines would make it easier for consumers to learn what connections exist between online promoters of products and the companies that sell the products, as the revisions would require bloggers to disclose if they are receiving compensation from sponsors.

Industry representatives did not offer much criticism for this proposal but did question how the Commission would define blogger “compensation.”

Green Marketing Guidelines

Responding to questions from Sen. Klobuchar regarding the FTC’s efforts to revise the green marketing guidelines, Vladeck said that the FTC will continue to have a difficult time enforcing green marketing standards until the agency understands consumer perception of green marketing claims. The FTC has received clearance from the Office of Management and Budget to begin a consumer survey of green marketing, which will begin later this summer and finish by mid-fall. The FTC’s proposed changes to the green marketing guidelines, which it expects to release by the end of the year, will reflect the findings from the survey. Vladeck did not hesitate to tout the enforcement actions that the FTC has pursued against companies that claim their products – disposable plates, wipes, and towels – are “bio-degradable.”

Conclusion

The panelists and Subcommittee members voiced several concerns during the hearing about how the FTC intends to revise its advertising guidelines, particularly the proposal to remove the safe harbor provision for atypical result testimonials. If the FTC acts on schedule, businesses can expect significant changes to the FTC’s testimonial, advertising, and green marketing guidelines as early next year.

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The attorneys in Kelley Drye & Warren's [Advertising Law practice group](#) have broad experience at the FTC, the offices of state attorneys general, the National Advertising Division (NAD), and the networks; substantive expertise in the areas of advertising, promotion marketing and privacy law, as well as consumer class action defense; and a national reputation for excellence in advertising litigation and NAD proceedings. We are available to assist clients with developing strategies to address issues contained in this Advisory.

For more information about this Client Advisory, please contact:

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