Keynote Address of Chairwoman Edith Ramirez
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I want to thank the National Advertising Division for inviting me to speak today about the Federal Trade Commission's recent work in the advertising arena and our priorities going forward.

Last Friday, we celebrated the 100th anniversary of the signing of the FTC Act. Marking our centennial has reminded me that, although advertising techniques have evolved over the years, our fundamental legal principles remain the same. The priorities I will highlight for you this morning rest on these fundamentals. The central principle continues to be simple: advertising must be truthful and non-deceptive.

The first priority I would like to discuss is our effort to ensure that health claims are backed by real and rigorous evidence, especially when those claims relate to serious health conditions. The second is our work to stop certain marketing practices, like inadequate disclosures, that can lead to deceptive advertising.

I. Backing Health Claims with Sound Science

A. Clinical Testing for Claims Involving Serious Health Conditions

Let me start with health claims. We are continuing our longstanding efforts to ensure that advertisers have adequate substantiation for their health claims, especially when those claims involve the treatment or prevention of serious medical conditions. Over the past year, we have brought actions against a number of companies for making false or unsubstantiated claims involving a variety of products – ranging from devices to creams to pills. We will continue to be

active in this area, making it clear that claims about disease treatment, weight loss, and other serious health conditions must be supported by sound and sufficient science.

In a number of these cases, the widely-recognized standard in the medical and scientific community for what constitutes "competent and reliable" scientific evidence is well-controlled, randomized human clinical trials or "RCTs." And, where appropriate, our enforcement orders will incorporate this standard. In some cases, we will require a specific number of RCTs tailored to the products, conduct, and claims at issue. For instance, we have sometimes required two RCTs for particular health-related or disease claims as fencing-in relief for law violators; our recent weight-loss cases are examples of this.

The Commission's action in the recent *i-Health* matter illustrates our general approach.[1] There, the respondents marketed a dietary supplement claimed to be "clinically proven" to improve adult memory and prevent cognitive decline. We alleged these establishment claims were false and misleading. The Commission's order prohibits the respondents from making such claims unless they are backed by randomized, double-blind, placebo-controlled human clinical testing. The order does not specify the number of studies; instead it requires testing sufficient in quality and quantity and based on standards generally accepted by experts in cognitive science.

This approach has the virtue of making clear to defendants and to courts that well-controlled clinical testing is needed, while preserving flexibility on whether one or two tests will be sufficient. Ultimately, that determination will depend on what the experts say.

But in other cases, where the facts support it, our orders will specify that two RCTs are required. The principal area where we have employed this standard over the past year is in our weight-loss matters. As you know, our attention to deceptive weight-loss claims has been

[1] *In the matter of i-Health, Inc. & Martek Biosciences Corp.*, No. C-4486 (F.T.C. Aug. 21, 2014) (order), *available at* http://www.ftc.gov/enforcement/cases-proceedings/122-3067/i-health-martek-matter.

unwavering. Americans spend billions of dollars each year on weight-loss products and programs. As happens too often, fraud follows the money. So, in cases such as *Sensa*,[2] *L'Occitane*,[3] and *HCG Diet Direct*,[4] the Commission has issued consent orders requiring the defendants to have two RCTs, based on the well-established standards accepted by experts in the field of weight loss.

The central message is this: health claims must be backed by sound science.

B. Data Retention Requirements

That brings me to a second, related point: sound science must be backed by sound data. Unfortunately, in recent cases we have seen defendants relying on erroneous and even fabricated data in their studies. So we have begun to tighten the data retention requirements in our orders.

As you have probably noticed, our recent settlements compel companies to secure and preserve all underlying or supporting data relevant to assessment of their studies. We are asking companies to retain protocols, instructions, participant-specific data, statistical analyses, and their contracts with test researchers. And we plan to employ this approach regularly in future matters.

The *Sensa* and *Skechers* cases demonstrate why we are so concerned with the underlying data cited by defendents. In *Skechers,* the company purported to back its toning and weight-loss claims for its shoes with four studies. We alleged that two of those were conducted by a chiropractor who was married to a senior vice president of marketing at the company. We also alleged that one of the studies included spouses and parents of its co-authors as test subjects; and

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[2] *FTC v. Sensa Products, LLC,* No. 1:14-cv-00072 (N.D. Ill. Jan. 8, 2014) (order), *available at* http://www.ftc.gov/enforcement/cases-proceedings/112-3102/sensa-products-llc-et-al.

[3] *In the Matter of L'Occitane, Inc.*, No. C-4445 (F.T.C. Mar. 27, 2014) (order), *available at* http://www.ftc.gov/enforcement/cases-proceedings/122-3115/loccitane-inc-matter.

[4] *FTC v. HCG Diet Direct LLC,* No. 14-cv-00015-NVW (D. Ariz. Jan. 7, 2014) (order), *available at* http://www.ftc.gov/enforcement/cases-proceedings/122-3192/hcg-diet-direct-llc.

that some subjects who gained weight or increased their body fat percentage were reported as having *lost* weight or *reduced* their body fat percentage.[5]

Similarly, in *Sensa* we alleged, among other irregularities, that the defendants' purportedly randomized clinical trial was not, in fact, randomized; that it included duplicate subjects; and that, on multiple occasions, the research firm sent test subjects' supposed weights to the defendants before the subjects had actually been weighed.[6] These are the sorts of problems that have prompted us to include data retention requirements in our orders.

A recent case where we have employed this requirement is *Applied Food Sciences*, announced earlier this month. This defendant trumpeted a widely-disseminated clinical trial purporting to show that green coffee bean extract caused people to lose a substantial amount of weight and body fat. However, the study's lead investigator repeatedly altered the weights and other key measurements of the subjects; changed the length of the trial; and misstated which subjects were taking the placebo or active ingredients. When the investigator was unable to get the study published, the defendant hired other researchers to rewrite it. Despite receiving conflicting data, neither the researchers nor the defendant ever verified the authenticity of this information.[7]

Given our experience with cases like these, the data retention requirements you are seeing in our orders will be the "new normal" in our health cases going forward. And for those of you who are practitioners, do not be surprised if Commission staff requests the underlying data and

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[5] *FTC v. Skechers U.S.A., Inc.*, No. 1:12-cv-01214 (N.D. Ohio May 16, 2012) (complaint), *available at* http://www.ftc.gov/enforcement/cases-proceedings/102-3069/skechers-usa-inc-dba-skechers.

[6] *FTC v. Sensa Products, LLC,* No. 1:14-cv-00072 (N.D. Ill. Jan. 7, 2014) (complaint), *available at* http://www.ftc.gov/enforcement/cases-proceedings/112-3102/sensa-products-llc-et-al.

[7] *FTC v. Applied Food Sciences, Inc.,* No. 1:14-cv-00851-SS (W.D. Tex. Sept. 8, 2014) (complaint), *available at* http://www.ftc.gov/enforcement/cases-proceedings/142-3054/applied-food-sciences-inc.

documentation for studies the next time that you are handling an advertising matter before the agency.

C. Deceptive Cognitive Benefits Claims

I touched earlier on deceptive claims involving cognitive benefits when I discussed the *i-Health* case. I would like to spend a few more minutes on the topic because it is another priority area.

The Commission has taken action against these types of claims in the past. The FTC's case against Kellogg back in 2009 for representations that its cereal could improve children's attentiveness is one example. But products and services that deceptively promise to boost memory or cognitive abilities continue to hit the market. So this is an area we plan to devote significant attention to in the coming year.

In particular, we are concerned that demographics may spark an increase in consumers hungry for these products. Americans as a population are getting older.[8] And, according to the Pew Research Center, nearly half of adults in their 40s and 50s have a parent age 65 or older and are either raising a young child or financially supporting a grown child.[9] These consumers are often managing their children's education and their parents' health issues at the same time.

We plan to focus on claims about pills, programs, and other products offering cognitive and memory benefits for individuals at both ends of the age spectrum. The *i-Health* case involved just such a product – BrainStrong Adult. The respondents' television commercials featured a woman who forgets why she walked into a room. We are told she is there to find her

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[8] LAURA B. SHRESTHA & ELAYNE J. HEISLER, CONG. RESEARCH SERV., RL32701, THE CHANGING DEMOGRAPHIC PROFILE OF THE UNITED STATES (2011), *available at* http://fas.org/sgp/crs/misc/RL32701.pdf.

[9] PEW RESEARCH: SOCIAL & DEMOGRAPHIC TRENDS, *The Sandwich Generation: Rising Financial Burdens for Middle-Aged Americans* (Jan. 30, 2013), *available at* http://www.pewsocialtrends.org/2013/01/30/the-sandwich-generation.

sunglasses, which, it turns out, are sitting on top of her head. Another voice-over then asked, "Need a memory boost? Introducing BrainStrong. Clinically shown to improve adult memory." The ad also stated that Brainstrong could stave off cognitive decline. We alleged that the clinical study touted by the *i-Health* respondents did not substantiate their claims.[10]

In another case, the company, Your Baby Can Read, targeted parents who wanted to give their children an intellectual edge. The marketers of this $200 program advertised that it would teach babies as young as nine months old to read so quickly they would advance to books like *Charlotte's Web* by ages three or four. This summer, the Commission resolved our litigation against the defendants in the case, including the product's creator.[11] The settlement bars them from misrepresenting that their products will teach children or babies to read or enhance their cognitive ability or school performance. What's more, the order also bans the defendants from using the phrase "Your Baby Can Read" as part of any product name or logo.

We are particularly determined to stamp out false and misleading marketing of these sorts of products because they prey on consumers' deepest fears and greatest hopes: the fear of aging and the hope for their children. The FTC will take action against companies that take advantage of consumers in this way.

II. Techniques that Deceive

Because it is so important – and so central to our agenda – I have devoted most of my time to telling you what we expect from marketers making health claims. But I would like to turn for a moment to a group of more general advertising practices that can result in consumer

[10] *In the matter of i-Health, Inc. & Martek Biosciences Corp.*, No. C-4486 (F.T.C. Aug. 21, 2014) (complaint), *available at* http://www.ftc.gov/enforcement/cases-proceedings/122-3067/i-health-martek-matter.

[11] *FTC v. Robert Titzer & Infant Learning, Inc*., No. 3:12-cv-2114 (S.D. Cal. Aug. 19, 2014) (order), *available at* http://www.ftc.gov/enforcement/cases-proceedings/112-3045/your-baby-can-llc-et-al.

deception – namely, inadequate disclosures, exploitation of celebrity hype, and native advertising.

A. Inadequate Disclosures and Our Warning Letters

I will start with disclosures. The Commission has long stated that, if a disclosure contains information necessary to prevent an ad from being misleading, the disclosure must be clear and conspicuous. Last year, we highlighted this principle in our revised *Dot.com Disclosure* guidelines.[12] We have also repeatedly emphasized that, to be "clear and conspicuous," a disclosure should use direct and unambiguous language, and it should stand out. Consumers should not have to go looking for the disclosure; they should notice it easily. If it is hard to find, tough to understand, buried in unrelated details, or obscured by other elements of an ad, it does not meet the "clear and conspicuous" standard.

Unfortunately, despite our robust law enforcement and guidance on this issue, many advertisers are still making prominent, potentially deceptive claims that they fail to qualify with adequate disclosures.

In an effort to remedy that, last week we announced *Operation Full Disclosure.* FTC staff contacted over sixty companies, including twenty of the 100 largest advertisers in the United States, and raised concerns about the adequacy of disclosures in their advertising.[13] Some of you or your clients may have received these warning letters.

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[12] FED. TRADE COMM'N, .COM DISCLOSURES: HOW TO MAKE EFFECTIVE DISCLOSURES IN DIGITAL ADVERTISING (Mar. 2013), *available at* http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf.

[13] FED. TRADE COMM'N, Press Release, *Operation 'Full Disclosure' Targets More Than 60 National Advertisers* (Sept. 23, 2014), *available at* http://www.ftc.gov/news-events/press-releases/2014/09/operation-full-disclosure-targets-more-60-national-advertisers.

In preparing for *Operation Full Disclosure*, we looked at more than a thousand TV and magazine ads and identified a number of recurring problems. These included disclosures that were buried in unrelated text or contrasted poorly against the background on which they were displayed. On TV, disclosures often did not remain on the screen long enough for consumers to read them, and sometimes were accompanied by distracting visuals. In print, disclosures were often presented in small fonts, at the bottom of the ad, and away from the claim they were supposed to modify.

Operation Full Disclosure is an ongoing effort – one that will continue until we are confident industry understands the need for "clear and conspicuous" disclosures and what "clear and conspicuous" means. We appreciate that many of you in this room who received warning letters are taking a fresh look at your ads. But we will continue to monitor advertisements to see if further follow-up is warranted.

B. Celebrity Hype

Another area we have focused on has been marketers piggybacking on the hype created by celebrities to buttress deceptive claims. Take Dr. Oz, for example. We have brought two cases this past year involving marketers capitalizing on the so-called "Dr. Oz effect."

One is the Commission's case against NPB Advertising, which we are actively litigating in Florida.[14] Our complaint alleges that, only weeks after *The Dr. Oz Show* featured green coffee as a weight-loss product, the defendants began selling their own green coffee supplement to consumers using deceptive efficacy and clinical-proof claims. Their websites featured footage from *The Dr. Oz Show* as purported evidence that consumers could lose weight rapidly without

[14] *FTC v. NPB Advertising, Inc.*, No. 8:14-cv-1155-SDM-TGW (M.D. Fl. May 15, 2014) (complaint), *available at* http://www.ftc.gov/enforcement/cases-proceedings/132-3116/npb-advertising-inc-et-al.

changing their diet or exercise regimens. They made similar claims on websites they set up to look like legitimate news sites or blogs, but which were in fact advertisements.

The second case is *Applied Food Sciences*, also involving green coffee. There, although the defendant did not tout its clinical trial on *The Dr. Oz Show*, the company issued a press release afterward asserting that study subjects lost weight without diet or exercise, even though subjects in the study were instructed to do both. Our settlement in *Applied Food Sciences* requires the company to pay $3.5 million, and to have substantiation for any future weight-loss claims it makes, including at least two adequate and well-controlled human clinical tests.[15]

C. Native Advertising

I also want to briefly mention our continued interest in native advertising. As we discussed in our workshop on this issue last December, we believe this technique has the potential to mislead consumers. When ads resemble editorial content, an advertiser risks implying the information comes from a non-biased source, which it does not. We are working through the lessons learned from our workshop and expect to have recommendations to share with you in the coming year.

III. Self Regulation

As a final note, I want to say a few words about self-regulatory efforts in these areas. As you all know, the FTC has long supported the BBB's initiatives as an important complement to our own law enforcement, policy, and educational programs. We believe that together, government oversight and meaningful self-regulation provide valuable efficiencies and benefits. Since the last NAD annual conference, we have received fourteen referrals for potential investigation from the Advertising Self-Regulatory Council's various groups. We appreciate

[15] *FTC v. Applied Food Sciences, Inc.*, No. 1:14-cv-00851-SS (W.D. Tex. Sept. 10, 2014) (order), *available at* http://www.ftc.gov/enforcement/cases-proceedings/142-3054/applied-food-sciences-inc.

these referrals and industry's role in offering a voluntary forum to address national advertising practices that may violate self-regulatory guidelines and the principles of the FTC Act.

IV. Conclusion

Oscar Wilde wrote "The truth is rarely pure and never simple." Today, I hope I have been able to convince you of the exact opposite – or at least to convince you that the FTC expects the exact opposite from advertisers. We expect marketing claims to be truthful and stated in simple terms, so that consumers are not misled about the products they are buying. I hope I have shed some light on how we plan to ensure there is truthful advertising in the marketplace.

Thank you.