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FTC Advertising Crackdown Provides Food for Thought

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The Federal Trade Commission has been clamping down on several major food companies regarding health claims in their advertising. Iovate Health Sciences USA and Nestle S.A. subsidiary, Nestle Healthcare Nutrition, Inc., were the first to come under FTC fire, both entering into settlement agreements last summer. Dannon Company, Inc. and POM Wonderful LLC were next. Dannon settled in December, while POM opted to fight the government for imposing what it sees as unreasonably burdensome new standards.

The FTC argued that the companies have not been able to sufficiently substantiate health claims regarding their products, such as reduction in likelihood of cold and flu, digestive improvement, and weight loss. The FTC argued the companies' ads therefore were deceptive in violation of the Federal Trade Commission Act.

The three companies that settled with the FTC are now subject to new stringent advertising standards that significantly raise the bar on what companies must be able to prove before making health claims. There is some debate whether the settlement agreements are binding on the whole industry. In a lawsuit filed against the FTC last September, POM argues that they are and that this is unreasonable. In fact, a later FTC complaint and proposed consent order

against POM support POM's contentions as the FTC indeed suggests that the same standards should apply to POM.

The three new standards in the agreements between the FTC and Nestle, Iovate and Dannon are problematic in many ways.

First, each of the agreements provides that the companies must obtain approval from the Food and Drug Administration before making certain claims in advertising. This additional hurdle is something that the FTC acknowledges is not required of advertisers under the act governing FTC powers.

Second, each of the agreements provides that the companies have two clinical studies to back certain other health claims. As developed by the FTC, such studies must be adequate and well-controlled human clinical studies conforming to acceptable designs and protocols with results sufficient to substantiate that the representation is true.

Third, for all remaining or new health claims made by the companies, the companies must be able to back those claims by nonspecific competent and reliable evidence, i.e. evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true.

These standards are both difficult to comply with and unclear. For a given product, there are different standards for different prospective health claims. For instance, if Dannon wants to claim that its Activia product helps reduce the risk of cold and flu, it must seek FDA approval first. If Dannon wants to claim

that Activia improves intestinal tract functions, it needs to pass the two clinical studies requirement. Any other claims for Activia must pass the wordy "nonspecific competent and reliable evidence" requirement. The existence of multiple standards for various claims (and on various products) makes it very difficult for a company to establish a clear FTC compliance policy.

The FTC has done little to clarify these matters. So companies looking to avoid FTC action are left wondering: How can they anticipate what claims they can make? How can they determine what standards to use? How can they establish an efficient and effective compliance policy?

Some companies have expressed legitimate concerns that concerns that excessively stringent standards will limit their commercial speech rights. In POM's September 2010 suit, in which it requests the court declare that the FTC acted outside its authority in establishing new standards, POM alleges the standards breach First and Fifth Amendment principles of free speech and impose significant new burdens and risks on advertisers.

The more hoops a company has to jump through before it can make a claim, the less likely the company will be to provide information. Ultimately, we run a significant risk that consumers will end up learning less rather than more about the health benefits of a product.

FTC Beat is authored by the Ifrah Law Firm, a Washington DC-based law firm specializing in the defense of government investigations and litigation. Our client base spans many regulated industries, particularly e-business, e-commerce, government contracts, gaming and healthcare.

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