

ALERT

FTC Issues New Guidance to the Media Concerning False Weight Loss Claims in Ads; Sen. McCaskill Urges Prompt Compliance and Promises Hearing

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As many consumers have just made new year's resolutions to slim down and shape up, the Federal Trade Commission (FTC) has announced a new initiative—called "Operation Failed Resolution"—aimed at cracking down on false and deceptive claims made by marketers of fad weight loss products. As part of this initiative, the FTC sent letters to publishers, broadcasters, and other media outlets, asking for their cooperation in screening ads for false and deceptive claims and rejecting ads for products that claim to produce weight loss results that are too good to be true. The FTC has also published on its website "Gut Check: A Reference Guide for Media on Spotting False Weight Claims," and an accompanying quiz designed to hone the skills of media sales staffs to recognize and screen out ads for clearly fraudulent weight loss products. These releases accompanied an announcement by the FTC that it has reached settlements with marketers of products promised to produce dramatic weight loss results, including some that advertised extensively on radio and television stations (including in infomercials), on cable channels, in newspapers, and on the Internet. The settlements will result in payments of approximately \$34 million for consumer redress.

In the wake of the FTC's announcements, Senator Claire McCaskill (D-MO), Chairman of the Senate Commerce Subcommittee on Consumer Protection, urged the media to quickly implement the FTC's new guidelines. She also announced her own plan to lay the groundwork for a Senate hearing on the subject during the first half of this year.

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What role do media outlets play, and what is the FTC doing to help the media identify the claims that cause consumer harm? The FTC letters encourage the media to recognize that accepting ads for “bogus weight loss product[s]” not only harms consumers, but also “undermines the credibility of advertising and does incalculable damage to the reputation for accuracy that broadcasters and publishers work hard to earn.” Therefore, the FTC states that “the most effective front-line defense is when media outlets have an effective in-house clearance program that screens out clearly deceptive diet ads before they harm” the outlets’ “customers and credibility.” In “Gut Check,” the FTC offers a number of additional reasons why the media should have standard operating procedures to screen weight loss ads for false or deceptive claims, including because:

- Legitimate media outlets should want to avoid association with others who commit fraud;
- An advertiser that is willing to cheat consumers is likely to cheat the media outlet by failing to pay its bills;
- The media should want to protect loyal readers, listeners, and viewers from deception; and
- Other advertisers do not want to use outlets used by those who make false claims.

The FTC developed “Gut Check” especially for media sales professionals, and designed it to clue media sales staff “in to the latest diet scams and schemes” used by weight loss marketers who make false claims. In particular, “Gut Check” identifies seven specific claims that it says should cause a media salesperson to think twice before agreeing to run an ad. These seven claims are ones that, according to the FTC, scientists have established simply cannot be true. They include claims that a product:

1. “Causes weight loss of two pounds or more a week for a month or more without dieting or exercise;”
2. “Causes substantial weight loss no matter what or how much the consumer eats;”
3. “Causes permanent weight loss even after the consumer stops using product;”
4. “Blocks the absorption of fat or calories to enable consumers to lose substantial weight;”
5. “Safely enables consumers to lose more than three pounds per week for more than four weeks;”
6. “Causes substantial weight loss for all users;” or
7. “Causes substantial weight loss by wearing a product on the body or rubbing it into the skin.”

The tutorial explains that “substantial weight loss” means “a lot of weight,” for example, “a pound a week for more than four weeks or a total weight loss of more than 15 pounds in any time period.” While many ads use specific numbers to convey these messages, the FTC cautions that an ad may suggest “substantial weight loss”—and thus should prompt a “gut check”—if it references decreased dress size, loss of inches, or reduction in body fat.

In the tutorial, the FTC also discusses the subject of consumer endorsements and testimonials, which it notes are “a staple of weight loss ads.” FTC guidance requires advertisers using endorsements or testimonials to make one of two choices: “Either the results in the ad must be typical or what other consumers can expect to

achieve or the ad must clearly and conspicuously disclose what the typical results are.” Noting that “weight loss of more than a pound a week over a long period is unusual,” the FTC states that any endorsement claiming weight loss of more than 15 pounds should include disclosure of how much weight the average person can expect to lose. The disclosure also has to be clear and conspicuous, meaning that “it stands out in an ad,” and it is “not enough to say ‘results not typical’ or ‘your results will vary.’” The FTC notes, moreover, that these rules apply beyond weight loss supplements and creams, to *all* advertisements that feature endorsements or testimonials, pursuant to its “ Guidelines Concerning the Use of Endorsements and Testimonials in Advertising.” In addition, the FTC’s guidance on both weight loss advertising and endorsements and testimonials applies not only to traditional media outlets, but also to websites that they or others may operate. As noted above, Senator McCaskill specifically urged the media to quickly implement the FTC’s new guidelines.

What are the potential consequences for media outlets that do not comply with the FTC’s new weight loss advertising guidelines? That remains to be seen. At a press conference on January 7, an FTC official confirmed the agency’s view that it has authority to prosecute broadcast stations, newspapers, and others that carry ads containing false or deceptive claims. As John Eggerton reports in *Multichannel News*, however, the letters sent to the media “were not meant to be a shot across the bow.” According to the article, the FTC said it does not plan to pursue media outlets directly, “but instead wants to continue to work with them to identify and reject ads with obviously bogus claims” using voluntary guidelines. The Federal Communications Commission generally defers to the FTC with regard to false or deceptive ad claims, but generally expects broadcasters, as part of their public interest obligations, to be responsible to the community they serve by using reasonable care to ensure that advertisements aired on their stations are not false or misleading. For her part, Senator McCaskill has asked the media to cooperate with the FTC and for her constituents to provide information about personal experiences with deceptive advertising of fake weight loss products. It remains to be seen whether issues surrounding media responsibility will feature at the hearing the Senator plans to hold on the subject in the next few months.

So, even though the FTC’s guidelines are currently voluntary, the renewed attention to false weight loss claims being paid by the agency and on Capitol Hill provide good reasons for the media to remain on the lookout for such claims, think twice before running ads that contain them, and consult with legal counsel when questions arise.