



March 30, 2009



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## QVC To Pay \$7.5 Million Fine Over Deceptive Ad Charges

QVC, Inc. agreed to pay \$7.5 million to settle charges by the Federal Trade Commission that it made false and unsubstantiated claims about three types of dietary supplements and an anti-cellulite skin cream. The U.S. District Court for the Eastern District of Pennsylvania entered the new order in March.

The Department of Justice's Office of Consumer Litigation, acting at the request of the FTC, filed the complaint against QVC in 2004. The agencies alleged that the TV home shopping channel—one of the world's largest multimedia retailers—violated a 2000 FTC order prohibiting QVC from making deceptive claims for dietary supplements. According to the FTC, QVC aired approximately 200 programs which included false and unsubstantiated claims about For Women Only weight-loss pills, Lite Bites weight-loss food bars and shakes, and Bee-Alive Royal Jelly energy supplements. The complaint also alleged that QVC violated Section 5 of the FTC Act by making unsubstantiated claims for Lipofactor Cellulite Target Lotion.

Under the settlement, QVC will pay \$6 million for consumer redress and a \$1.5 million civil penalty. The settlement also broadens the 2000 order by barring QVC from making unsubstantiated claims that any drug or cosmetic eliminates or reduces cellulite.



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## UPCOMING EVENTS

**April 2-3, 2009**

**PLI's Information Technology Law Institute 2009: Web 2.0 and the Future of Mobile Computing: Privacy, Blogs, Data Breaches, Advertising, and Portable Information Systems**

**Topic:**

"Mobile Advertising and Web 2.0"

**Speaker:** [Linda Goldstein](#)

PLI California Center  
San Francisco, CA

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The complaint included allegations that claims that For Women Only and Lite Bites supplements could cause users to lose significant amounts of weight, keep it off for a long time, prevent fat from being absorbed into peoples' bodies, and prevent carbohydrates from being stored as fat were false and unsubstantiated. The complaint also alleged that ads for Bee-Alive energy supplements made unsubstantiated claims that the supplements could reduce fatigue and increase energy in people with severe fatigue and other physical ailments. In addition, QVC was charged with making unsupported claims that Lipofactor lotion could reduce cellulite and cause measurable decreases in the sizes of people's arms, legs, and abdomens.

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## FTC Could Set Standards For Food Marketing To Teens

By changing the government's focus on food marketing and childhood obesity to children 17 or under from children 12 or under, a short provision in the omnibus appropriations bill signed into law by President Barack Obama on March 11 could have a big effect on television advertising for food and beverages.

Specifically, the bill calls for a study on whether the government should establish criteria for assessing which foods are healthy and appropriate to market to youths under 18.

The under 18 language remained in the bill after Sen. Sam Brownback, R-Kan., one of the study's co-sponsors, included a statement in the Congressional Record suggesting that it was a mistake. "I think it would be more appropriate to limit the scope . . . to children under 12," he said.

The other co-sponsor, Tom Harkin, D-Iowa, continues to support the change. In a statement, Harkin's communications director, Kate Cyrul said, "Childhood obesity is on the rise and nearly at an epidemic proportion. And we know the obesity rate does not end with children [who are] 13. It affects all school-age children." She noted that "[c]onsidering the health risks that are involved and the potential impact on our nation as a whole, it would be irresponsible to only focus on a portion of school-age youth."

According to a report attached to the bill, the legislation directs the FTC, the Commissioner of the Food and Drug Administration, the Director of the Centers for Disease Control and Prevention, and

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**April 22-23, 2009**  
**Food and Drug Law Institute 52d Annual Conference**

**Topic:**  
"Food Advertising: Campaigns and Claims"

**Speaker:** [Christopher A. Cole](#)

L'Enfant Plaza Hotel  
Washington, DC  
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**April 29, 2009**  
**American Advertising Federation Webinar**

**Topic:**  
"Budget Busters: Bongs, Blogs, and Brand Wars."

**Speaker:** [Jeff Edelstein](#)

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**June 4-6, 2009**  
**American Advertising Federation National Conference 2009**

**Speaker:** [Jeff Edelstein](#)

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**June 18-19**  
**ABA Antitrust Section's Consumer Protection Conference**

the Secretary of Agriculture to establish an Interagency Working Group on Food Marketed to Children. Specifically, the legislation directs the Working Group to study and develop recommendations for standards that take into account "calories, portion size, saturated fat, trans fat, sodium, added sugars, and the presence of nutrients, fruits, vegetables, and whole grains to the diets of such children," as well as "evidence concerning the role of consumption of nutrients, ingredients, and foods in preventing or promoting the development of obesity among such children."

The bill gives the Working Group until July 15, 2010 to report back to Congress.

Many marketers have already changed how they advertise food to children. Adherents to the 2006 Children's Food & Beverage Initiative have altered their ad mix and modified products to focus on selling healthier products to children under 12. However, children's health advocates, lawmakers, and the FTC have criticized the self-regulatory initiative as giving individual companies too much leeway to craft their own standards, and have argued that the government should step in to develop uniform standards.

The bill also directs the FTC to conduct a second study on whether legislation is necessary to prevent minors from accessing explicit content on "virtual-reality web programs."

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## Ad Groups Request That FTC Rethink Proposed Changes To Endorsement Guides

Earlier this year, the Federal Trade Commission proposed changes to its guides concerning the use of endorsements and testimonials in advertising. If adopted, the changes would be the most sweeping in nearly 30 years and would not only impose liability on certain endorsers, but would also prohibit advertisers from relying on general typicality disclaimers (i.e., "results may vary").

In response, a number of major advertising groups have filed comments with the FTC opposing many of the proposed changes. Comments submitted by the American Association of Advertising Agencies and the American Advertising Federation claim that the "elimination of typicality disclaimer[s] would deprive consumers of an advertising technique that has been instrumental in inspiring Americans to make positive lifestyle changes" and argued that the proposed new standard—to disclose the generally expected

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Use, Misuse, and Disregard of Evidence of Actual Confusion in Federal and State Regulatory Proceedings

Speaker: [Christopher Cole](#)

Georgetown University Law Center  
Washington, D.C.

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**June 25-26, 2009**

Food and Drug Law Institute  
Introduction to Drug Law and Regulation:  
A Program on Understanding How the Government Regulates the Drug Industry

Speaker: [Ivan Wasserman](#)

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performance of the product in the circumstances shown—would be impractical and "in some instances, impossible—to implement."

The AAAA and AAF also contend that the broad language of the proposed revisions could serve to make "an endorser per se liable for claims in an advertisements." In addition, they ask the FTC to refrain from issuing the portion of the guidelines affecting blogs, online message boards, and other forms of new media, arguing that it would be premature to do so. Instead, the groups point to the Word of Mouth Marketing Association guidelines which they suggest already address what the FTC is looking to regulate further.

The AAAA and AAF also joined with the Council for Responsible Nutrition, the Direct Marketing Association, the Direct Selling Association, the Electronic Retailing Association, the Interactive Advertising Bureau, the Promotion Marketing Association, and the U.S. Chamber of Commerce in sending a joint letter to the FTC opposing many of the proposed changes. Among other issues, the letter addresses the new requirement that bloggers, online commenters, and others disclose any connections they have to marketers. The groups point out that reviewers in traditional outlets do not disclose the receipt of free copies. Further, they contend that "[m]any consumers expect that critics have received a reviewed item for free, or they generally assume that an independent, expert reviewer is providing his or her honest opinions regardless of whether the reviewer purchased the item."

The letter also expresses concern that marketers might be held liable for bloggers' failure to disclose any ties. "It is virtually impossible for marketers to make certain that employees and other individuals compensated by the marketer disclose their connections to the marketer when making favorable statements."

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## Google: Most Takedown Notices Are Suspect

In a submission to New Zealand lawmakers regarding an amendment to the country's Copyright Act, Google posits that most of the takedown notices it receives are suspect.

Specifically, Google contends that 57 percent of the takedown notices it received under the Digital Millennium Copyright Act were sent by businesses trying to undermine a rival, while 37 percent of the notices were not valid copyright claims.

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Section 92a, the amendment that prompted Google's submission, was scheduled to take effect in March and would have required Internet service providers to implement a system for cutting off Internet access of users accused of copyright infringement three times. At the last minute, however, New Zealand Prime Minister John Key announced that he was deep-sixing Section 92a.

"Section 92a is not going to come into force as originally written," Key said, according to *Agence France-Presse*. "We have now asked the minister of commerce to start work on a replacement section."

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## NAD Gives Excedrin A Headache

The National Advertising Division of the Council of Better Business Bureaus has recommended that Novartis "modify or discontinue" its claim that Extra-Strength Excedrin provides headache relief within 15 minutes.

NAD reviewed Novartis' advertising for Extra-Strength Excedrin in response to a challenge by Wyeth, one of Novartis' competitors in the pain relief products market. NAD's review centered on claims made in a television commercial for Extra-Strength Excedrin that featured a woman at an outdoor café grimacing and rubbing her head. As a digital clock at the bottom of the screen fast-forwards to 15 minutes, the woman smiles, while a voiceover states, "What's the only gel tab with a triple ingredient formula to start relieving your headache in just 15 minutes?"

In support of its claim, Novartis pointed to a study showing that a "statistically significant percentage" of respondents reported reduced pain intensity after 15 minutes, and argued that reasonable consumers would understand that the woman's smile in the ad reflects only relief that her pain has decreased.

NAD rejected Novartis' arguments, finding that while the percentage of respondents in the study who experienced any relief was statistically significant, it was "very small" and that "the overwhelmingly vast majority of respondents did not experience first perceptible relief—let alone meaningful relief—at fifteen minutes." Because NAD recognized that statistical significance was achieved and that most consumers identify onset of relief as one of the most important characteristics of a pain product, it recommended that Novartis modify its claim to "more closely" reflect the fact that some people may begin to experience pain relief in as little as 15 minutes. NAD also recommended that

Novartis stop using the visual shot of the woman pre- and post- the 15 minutes of dosing.

A statement from Novartis said that while the company "appreciates having participated in the NAD process, Novartis respectfully disagrees with NAD's decision regarding how consumers interpret the express claim 'Start[s] relieving your headache in just 15 minutes'" and plans to appeal the decision to the National Advertising Review Board.

Last fall, Novartis also ran a promotion related to the 15 minutes message, awarding \$15,000 to the best consumer-made YouTube commercial promoting the claim: "new Extra-Strength Excedrin Express Gels for headache relief that starts in 15 minutes."

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