

Recent Speech by FTC Chairman Muris Could Spell Trouble for Broadcasters

A recent speech to the Cable Television Advertising Bureau by Federal Trade Commission Chairman Timothy Muris could spell future trouble for broadcasters. The FTC is in the process of cracking down on false and deceptive weight-loss advertising, not a surprising thing for the independent regulatory agency to do. But now the FTC wants broadcasters to voluntarily review such advertising using an FTC-developed list of claims to prevent false and deceptive ads from ever airing.

The speech, "*Do the Right Thing*," delivered in New York City on February 11, pleads: "I am here to ask for your help. We know that most broadcasters and publishers already screen ads for taste and appropriateness. But too often the process stops short of questioning the accuracy of extravagant claims. This shortcoming is particularly apparent with weight-loss ads."

The speech comes less than five months after the FTC released a report by its staff, *Weight Loss Advertising: An Analysis of Current Trends*, which was sharply critical of the media: "Advertisements for weight-loss products and services too frequently contain extravagant and sensational efficacy claims that are scientifically groundless. Although many of them could be screened out by responsible media before they reach the public, mainstream newspapers, magazines, radio stations, and broadcast and cable TV outlets run ads for weight-loss products that strain credibility. . . . It is apparent that most media make little or no attempt to screen questionable ads for weight-loss products. The major television broadcast networks, ABC, CBS, and NBC, are an exception. These networks employ stringent advertising clearance standards that require advertisers to submit proposed advertisements, along with adequate substantiation for all claims, to the networks for review prior to dissemination. As an illustration, with regard to weight reduction and control products, ABC's published standards prohibit, among other practices, unsubstantiated claims and

representations that weight loss is simple, quick, or easy."

Chairman Muris' speech lists the following eight claims that may be made in weight-loss ads, which he says can be used to screen ads. Presumably, broadcasters would be expected to remove any of these "scientifically implausible" claims from ads before airing:

- (1) "Consumers who use the advertised product can lose substantial weight without reducing caloric intake and/or increasing their physical activity."
- (2) "The advertised product will cause substantial weight loss for all users."
- (3) "The advertised product will cause permanent weight loss."
- (4) "Consumers who use the advertised product can lose substantial weight while still enjoying unlimited amounts of high-calorie foods."
- (5) "Consumers who use the advertised product can lose weight only from those parts of the body where they wish to lose weight."
- (6) "The advertised product will cause substantial weight loss through the blockage or absorption of fat or calories."
- (7) "Consumers can lose substantial weight through the use of the advertised product that is worn on the body and rubbed into the skin."
- (8) "Consumers who use the advertised product can safely lose more than three pounds per week for a period of more than four weeks."

In his speech, Chairman Muris anticipates criticism of the voluntary screening from broadcasters:

“Some publishers and broadcasters have raised objections to more media screening. Some expressed concern about the depth of the review we seek. Or, as one newspaper publisher said recently, he will have to hire scientists to review ads. I want to be clear: our goal is not to require television network-style clearance procedure for weight loss ads. We know that every media outlet cannot support that type of review. We do, however, want to weed out the most egregious examples: weight loss earrings, miracle herbs that claim consumers can eat whatever they want and still lose weight, and products that make promises that are physically implausible, like ‘lose 30 pounds in 30 days.’ We are *not* asking media outlets to review clinical studies or other substantiation for weight loss ads. With the guidance that we are offering, the clearance process would simply mean comparing the claims in an ad with the claims on our list and making any necessary cuts.”

The FTC’s jurisdiction to prohibit false advertising is found in Title 15 of the United States Code. Historically, the FTC has taken enforcement action against the creator or manufacturer of the products and devices that were the subject of false advertising. On occasion, advertising agencies have been targeted by the agency; but the FTC has not commenced enforcement action against a broadcaster for airing false advertising.

While it is impossible to predict what course may develop over the coming months, broadcasters, while specifically exempted from criminal liability for false advertising as long as they cooperate with law enforcement, are not exempt from civil liability for airing false advertising. While Chairman Muris’ speech carried the traditional disclaimer (“This speech reflects the views of Chairman Muris, not necessarily those of the Commission or of any other Commissioner.”), just a week before the speech, Commissioner Sheila Anthony wrote an opinion piece for *Advertising Age* entitled “*Let’s clean up the diet-ad mess,*” in which she asserted that the FTC cannot handle the task by itself.

In our experience, speeches by agency Commissioners and staff are often “trial balloons” of ideas and rulemaking agendas that are put out for reaction only a relatively short time before the agency actually embarks on a new initiative. While there is no certainty that this will happen with the ad screening proposed by Chairman Muris in his speech, broadcasters should be alert to the possibility. It should be noted that the Chairman went to considerable length in his speech to label the proposed screening as “voluntary.”

While we are not recommending any action by broadcasters at the present time, we are encouraging our clients to notify us if they receive any communications from the FTC requesting voluntary screening such as that described by Chairman Muris. We will, of course,

monitor the situation closely, and report as events warrant.

ShawPittman LLP

Editors: Scott R. Flick, Esq.
Lauren Lynch Flick, Esq.

Assistant Editor: Brendan Holland, Esq.

**Managing Editor
and Principal Writer:** Ricky A. Pursley

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