

Natural Products Association

Testimony to the Senate Commerce Committee

on

“Protecting Consumers from False and Deceptive Advertising of Weight-Loss Products”

Witness appearing before the

Senate Subcommittee on Consumer Protection, Product Safety and Insurance

Daniel Fabricant, Ph.D.

CEO and Executive Director

Natural Products Association

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Madam Chairperson and Members of the Committee;

Thank you for the opportunity to participate in this very important panel discussion. I am Dr. Daniel Fabricant, the CEO and Executive Director of the Natural Products Association (NPA). NPA is a 78-year old association and is the oldest and largest trade association in the natural products industry. We represent the interests of more than 10,000 locations, including retailers, manufacturers, suppliers and distributors of health foods, dietary supplements, natural personal care and the millions of Americans who use supplements each year.

While some of our members are household names, the majority of our members are small business owners -- many women-owned - who got into this business because they want to help people live healthier lives through the use of natural products. And Americans are looking more and more for natural products each and every day, because they see the difference natural products can make in their daily lives. In 2012, Americans spent \$2.8 trillion on health care, including \$267 billion on health-related products and services, like dietary supplements, weight-loss programs and fitness club memberships. Our first rule to all customers is to always consult with your health care provider, and that dietary supplements are part of a broader healthy lifestyle that includes diet and exercise.

Madam Chair, let me say at the outset that our members fully support efforts to combat fraud and to enforce the range of rules and regulations that the federal government has to protect consumers and to give them the information they need. Deceptive advertising is illegal and should not be tolerated, period.

Advertising for weight loss covers a broad jurisdiction that spans a growing range of the economy, from exercise regimens, to meal systems, to cosmetic/spa type services and also includes a sector of the natural products industry in the form of dietary supplements.

At the NPA, we share the concerns expressed by others at this hearing about the use of deceptive advertising, especially on the internet. Our association was founded by brick-and-mortar independent retailers, not internet only, fly-by night outfits. Our

members know that the public trust with their customers is one of the main reasons that natural products are so prevalent in the marketplace these days.

In short, no one has more of an interest in weeding out fraud than our members, because bad actors only tarnish their good integrity. That's why we strongly support the Federal Trade Commission's (FTC) efforts.

To support FTC further, NPA has its own industry policing program where members identify and report questionable ad claims so that bad actors can be disciplined by federal authorities, including the FTC. In short, our members are empowered to follow the homeland security rule as it relates to questionable ad claims: if you see something, say something.

NPA's educational foundation, The Natural Products Foundation (NPF) manages our Truth in Advertising (TIA) program. NPA members report questionable ad claims to an internal TIA committee of legal counsel. This special committee reviews claims to determine if they are over the line and then takes two actions.

The first is to mail a cease and desist letter to a company it deems has crossed that line. I have an example of that letter here that I will attach to my testimony. The second is to refer cases to FTC and FDA where potentially fraudulent advertising persists.

Since the truth in advertising program has begun, The TIA program has issued a total of 446 of these letters to companies. Of those, 320 acknowledged the issues noted and made immediate changes. If companies do not take immediate action, the TIA committee refers them directly to FTC and FDA. Our TIA group also meets regularly with officials at each agency to help identify and weed out fraud.

Our TIA program shows that NPA members want those who don't play by the rules brought into compliance or pushed out of any appearance of being a part of the legitimate industry that so many Americans look to for their health and wellness.

So we view our role as playing a strong partnership with regulatory officials, since we share their goals and objectives. But we do depend on federal authorities to provide

that enforcement action to make all of this a reality. In this arena, we see positive action, as well as some areas for consideration and some of concern.

As we have heard this morning, the dietary supplement industry is regulated both by the FTC as well as the Food and Drug Administration (FDA), where I served previously as the Director of Dietary Supplement Programs. FDA can take a substantial number of enforcement actions, and in the recent past has used some for the first time: including mandatory recall, administrative detention, and injunctions and seizures for those recidivist firms failing to meet minimal quality standards. As we heard earlier, under a Memorandum of Understanding (MOU) with the FDA, the FTC has primary regulatory responsibility with respect to the truth or falsity of all advertising (other than labeling) of foods, devices, cosmetics, and weight loss services. Under those current authorities, the FTC has taken substantial action against firms that have deceived consumers with regards to weight loss.

NPA fully supports those efforts, as they demonstrate FTC's ample and adequate current authority to enforce against deceptive advertising practices and protect consumers against fraud. But as helpful a deterrent as these high-profile cases are, we still wrestle with the internet advertising and fly-by-night issues we are discussing today, so what to do about that?

We believe one area for consideration would be to encourage FTC to use existing authorities more on the front end: to be more agile and disciplinary to companies without regard to revenues. In other words, we think that more aggressive enforcement of the internet fly-by-nights needs to be just as important a priority for FTC as the large-scale enforcement actions which we also support.

For example, FTC currently has as part of its enforcement arsenal very effective tools like misdemeanor prosecutions and civil monetary penalties which it uses very well for those already under consent orders or who have violated other applicable laws. But in our view, it appears that there is a predilection by regulators to pursue these more sizable and protracted cases, perhaps at the expense of more regulatory muscle on the front end against companies of any size or revenue stream.

A more balanced approach would both help curb the deceptive advertising and also serve as a helpful deterrent for other bad actors who might think they can get away with it. If FTC doesn't take down any fly-by-nights, more will unfortunately be tempted to get into the game.

Lastly, while we support the FTC's mission to prevent and punish unfair and deceptive acts, we are concerned with a recent development as it pertains to the use of FTC consent orders, which may have unintended consequences for consumers. Obviously, consent orders are case specific: they are not designed to be applied across the industry. However, we are seeing some evidence that this is happening, which we believe could have negative outcomes for consumers both from a cost perspective, but also in potentially *reducing* the quality and quantity of information about products available to them.

When application of extra-statutory interpretations moves from consent orders into rules of general applicability, such overreach is not beneficial to anyone and particularly to consumers. One example would be FTC's apparent new requirement that additional studies and research are necessary prior to advertising. Specifically, I'm referring to a requirement to conduct two double-blind, randomized control trials to support legal structure/function statements, which is not a current legal or regulatory requirement.

This is not only outside of the statute, but leads to unnecessary and inefficient use of resources, which chills innovation and dis-incentivizes the very research needed to substantiate claims (in an environment where recouping research dollars on natural products is very difficult because of the way the patent rules govern our industry, but that's a subject for another hearing).

Moreover, this is being done without any cost-benefit analysis on behalf of consumers or the economy. For example, if such standards are applied generally, a firm investing in the currently-required study that is well controlled and meets both the competent and reliable scientific standards would be prohibited from sharing those findings with consumers. It would actually result in less information being available to consumers – not more – and effectively changes the rules in the middle of the game. This is a critical concern, as it appears to abridge protected speech, which could constitute a

violation of the Administrative Procedure Act (APA) or present possible first amendment issues.

We would like to work with FTC and others to address these concerns, to help improve the enforcement regime and ultimately to protect consumers while giving them the widest access to the information they need.

Madam Chair, thank you for holding his hearing. We support efforts to stop illegal consumer fraud. We strongly support resources for government agencies to enforce the law, in addition to any discussion on how current programs can be aligned across agencies to better protect consumers.

We stand ready to work with the Committee, the government, NGO's and supporting agencies to help identify and remove criminal activity which is the root cause of this matter, from the system.

Thank you and I look forward to your questions.