PREPARED STATEMENT OF THE FEDERAL TRADE COMMISSION

IMPROVING SPORTS SAFETY: A MULTIFACETED APPROACH

Before the
House Energy and Commerce Committee
Subcommittee on Commerce, Manufacturing, and Trade

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I. INTRODUCTION

Chairman Terry, Ranking Member Schakowsky, and Members of the Committee, I am Richard Cleland, Assistant Director for Advertising Practices in the Federal Trade Commission's (FTC or Commission) Bureau of Consumer Protection.[1] The Commission is pleased to have this opportunity to provide information about the actions we have taken over the past few years with respect to concussion protection claims made for football helmets and other sports equipment. Claims that implicate serious health concerns – especially those potentially affecting children and young adults – are always a high priority for the Commission. Given the dangers that concussions pose for young athletes engaged in sports, it is essential that advertising for products claiming to reduce the risk of this injury be truthful and substantiated.

II. FTC AUTHORITY

The Commission strives to protect consumers using a variety of means. First and foremost, the agency enforces Section 5 of the FTC Act, 15 U.S.C. § 45, which prohibits deceptive or unfair acts or practices. The Commission also maintains a robust consumer and business education program, and works closely with self-regulatory entities, such as the Council of Better Business Bureau's Advertising Self-Regulatory Council.

In interpreting Section 5, the Commission has determined that a representation, omission, or practice is deceptive if (1) it is likely to mislead consumers acting reasonably under the circumstances; and (2) it is material; that is, likely to affect consumers' conduct or decisions with respect to the product at issue.[2] When the Commission considers whether an advertisement

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[1] This written statement represents the views of the Federal Trade Commission. My oral presentation and responses to questions are my own and do not necessarily represent the views of the Commission or of any Commissioner.

[2] FTC Policy Statement on Deception, appended to *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984). An act or practice is unfair if it causes or is likely to cause injury to consumers that

violates the FTC Act's prohibition against deception, the first step is to determine the messages that the ad is likely to convey to consumers. The Commission looks at the advertisement's "net impression," based on all of its elements; the advertiser is responsible for all reasonable messages, whether express or implied.

The next step is to determine whether those claims are false or misleading. The Commission does not test products for safety or efficacy. It does, however, require that the advertiser have a reasonable basis for all objective claims reasonably conveyed by the ad at the time it makes those claims. The Commission examines the specific facts of a case to determine the type of evidence that will be sufficient to support the claim.[3] However, when the claims at issue involve health and safety, the advertiser must have competent and reliable scientific evidence substantiating those claims. Moreover, if the advertiser represents that it has a particular level of substantiation for its claims – for example, the advertisement says that "clinical tests prove" the product works – it must have at least the level of substantiation specified in the advertisement.[4]

III. FTC LAW ENFORCEMENT EFFORTS

As awareness of the danger of concussions has grown and parents, in particular, have become more concerned about protecting their children from these brain injuries, sporting goods manufacturers have begun making concussion protection claims for an increasing array of

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is (1) substantial; (2) not outweighed by countervailing benefits to consumers or to competition; and (3) not reasonably avoidable by consumers themselves. 15 U.S.C. § 45(n) (1994). *See also* FTC Policy Statement on Unfairness, appended to *Int'l Harvester Co.*, 104 F.T.C. 949, 1070 (1984).

[3] *See Pfizer, Inc.*, 81 F.T.C. 23 (1972); *see also* FTC Policy Statement Regarding Advertising Substantiation, appended to *Thompson Medical Co.*, 104 F.T.C. 648, 839 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986).

[4] *Removatron Int'l Corp.*, 111 F.T.C. 206 (1988), *aff'd*, 884 F.2d 1489 (1st Cir. 1989).

products. Accordingly, in recent years, the Commission has scrutinized concussion protection claims made for a variety of products, including football helmets, jaw protectors, and related products.

In August 2012, the Commission announced a settlement with the marketers of the Brain-Pad mouth guard.[5] The Commission's complaint alleged that Brain-Pad, Inc. and its president lacked a reasonable basis for their claims that Brain-Pad mouth guards reduced the risk of concussions, especially those caused by lower jaw impacts, and that they had falsely claimed that scientific studies proved that those mouth guards did so. The final Order in that case prohibits the Respondents from representing that any mouth guard or other equipment used in athletic activities to protect the brain will reduce the risk of concussions, unless that claim is true and substantiated by competent and reliable scientific evidence. The Order also prohibits them from misrepresenting the results of any tests or studies on such products, and from misrepresenting the health benefits of such products. As the Director of the FTC's Bureau of Consumer Protection noted when the settlement was announced, "Mouthguards can help to shield a person's teeth from being injured, and some can reduce impact to the lower jaw. But it's a big leap to say these devices can also reduce the risk of concussions. The scientific evidence to make that claim just isn't adequate."[6]

When the Brain-Pad Order became final in November 2012, Commission staff sent out warning letters to nearly 20 other manufacturers of sports equipment, advising them of the Brain-Pad settlement and warning them that they might be making deceptive concussion protection

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[5] *Brain-Pad, Inc.*, FTC Dkt. No. C-4375 (2012) (consent), *available at* http://www.ftc.gov/enforcement/cases-proceedings/122-3073/brain-pad-inc.

[6] Press Release, FTC, Settlement with FTC Prohibits Marketer Brain-Pad, Inc. from Claiming that Its Mouthguards Can Reduce Risk of Concussions (Aug. 16, 2012) *available at* http://www.ftc.gov/news-events/press-releases/2012/08/settlement-ftc-prohibits-marketer-brain-pad-inc-claiming-its.

claims for their products.[7] FTC staff then monitored the websites of these manufacturers, working with them as necessary to modify the claims on their sites and, in some cases, ensure that necessary disclosures were clear and prominent. Commission staff continues to survey the marketplace for concussion risk reduction claims, and to alert advertisers who are making potentially problematic claims of our concerns and of the need for appropriate substantiation for any such claims.

Commission staff also investigated concussion reduction claims made by three major manufacturers of football helmets: Riddell Sports Group, Inc., Schutt Sports, Inc., and Xenith, LLC. In these matters, the staff determined to close the investigations without taking formal action, by which time all three companies discontinued potentially deceptive claims from their advertising, or had agreed to do so.[8] The letters closing these matters may be instructive as to the types of concerns that these marketing claims may raise.

For example, Xenith, which the staff believed had represented that its helmets were significantly better than other helmets at reducing the risk of brain injury, agreed to remove from its advertising references to results of player surveys and statements about reductions in the occurrence of concussive episodes. Schutt, whose advertising had, among other things, showed

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[7] *See* http://www.ftc.gov/system/files/attachments/press-releases/ftc-approves-final-order-settling-charges-against-marketer-brain-pad-inc.allegedly-deceptive-claims-its-mouthguards-can-reduce-risk-concussions/121129brainpadwarningletter.pdf (template for warning letters).

[8] Copies of the staff's closing letters to the three companies are posted on the Commission's website. *See* Letter from Mary K. Engle to John E. Villafranco, Esq. (April 24, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/closing_letters/riddell-sports-group-inc./130430riddellvillafrancoltr.pdf; Letter from Mary K. Engle to Michael E. Antalics, Esq. (April 24, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/closing_letters/schutt-sports-inc./130430schuttatalicsltr.pdf; Letter from Mary K. Engle to Sheryl M. Bourbeau, Esq. (April 24, 2013*), available at* http://www.ftc.gov/sites/default/files/documents/closing_letters/xenith-llc/130430xenithbourbeaultr.pdf.

the company's helmets performing better than competing helmets in impact absorption tests, agreed: to remove from its website a statement that all of the company's helmets "are designed with the intent to reduce the risk of concussions"; to change how it presented the results of those impact absorption tests; and to accompany any representations that Schutt helmets absorb impact better than competing helmets with a clear and conspicuous disclosure that better impact absorption has not been shown to be correlated with reduced risk of concussion.[9]

The staff's investigation into Riddell's advertising focused on the company's claims that research proved that Riddell Revolution® varsity and youth football helmets reduced the risk of concussion by 31% compared to "traditional" helmets. In support of these claims, Riddell cited the results of a study, published in the journal *Neurosurgery*, that compared the concussion rates over three years between high school football teams that received new Revolution® helmets and teams that wore "traditional" helmets from their schools' existing stock.[10]

After consulting with experts in the field, FTC staff concluded that this study did not substantiate Riddell's advertising claim, given two "significant limitations" identified by the study's authors. First, the Revolution® helmets had not been randomly distributed across all of the participants in the study. The study's authors stated that without random assignment of helmets, it was impossible to determine whether there were other important variables that might have influenced concussion rates and recovery times. Second, the players in the control group who suffered concussions were younger than the concussed players in the Revolution group.

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[9] Although less impact on the brain generally is certainly better than more impact, a specific correlation between a reduction in impact as measured by standard drop tests and a corresponding reduction in concussion risk has not yet been identified.

[10] M. Collins, et al., "Examining Concussion Rates and Return to Play in High School Football Players Wearing Newer Helmet Technology: A Three Year Prospective Cohort Study," 58 Neurosurgery 275 (Feb. 2006).

The authors acknowledged that this statistically significant difference in age "may have played a role in the higher incidence of concussion seen in the traditional helmet."

The staff concluded that these limitations were so significant that they precluded a finding that the Revolution® helmet itself was responsible for the difference in the concussion rates experienced by the two groups of players and, therefore, that the study did not substantiate Riddell's claim that Revolution® varsity football helmets reduce concussions or the risk of concussion by 31% compared to other varsity football helmets. Furthermore, because the study only included high school players wearing Revolution® *varsity* helmets, the staff concluded that it did not substantiate Riddell's claim that Revolution® *youth* football helmets reduce concussions or the risk of concussion by 31% compared to other youth football helmets.

Nonetheless, the staff decided not to recommend enforcement action against Riddell based on a number of factors, including the fact that Riddell had discontinued use of the 31% claim,[11] and that subsequent testing conducted by researchers at Virginia Polytechnic Institute and State University (Virginia Tech) appeared to show that Revolution varsity helmets did perform better than Riddell's own "traditional" helmet, the VSR-4, in reducing concussion risks attributable to one of the major causes of these brain injuries (linear acceleration).[12]

IV. CONCLUSION

Sports are a strong and enduring thread in the fabric of our nation. The long-term health implications of concussions are a serious concern, however, as are misleading claims that

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[11] Although cessation of the conduct at issue does not bar the Commission from bringing an enforcement action under Section 5, it is a factor the agency can consider in deciding how to exercise its prosecutorial discretion.

[12] *See* Press Release, Virginia Tech College of Engineering, Virginia Tech Announces Football Helmet Ratings for Reducing Concussion Risk (May 10, 2011), *available at* http://www.eng.vt.edu/news/virginia-tech-announces-football-helmet-ratings-reducing-concussion-risk.

particular products reduce the risk of concussion. Accordingly, the Commission plans to continue monitoring the market for products making these claims, to ensure that advertisers do not mislead consumers about their products' capabilities or about the science underlying them. At the same time, we are mindful of the need to tread carefully, so as to avoid inadvertently chilling research or impeding the development of new technologies and products that truly do provide concussion protection.[13]

The Commission appreciates the Committee's interest in this very important area, as well as this opportunity to discuss our agency's efforts to ensure that the information being provided to consumers – in particular, to the parents of young athletes – is truthful and not misleading.

[13] Indeed, the Riddell closing letter noted that the staff disagreed only with Riddell's use of the Neurosurgery results as the basis for its unqualified concussion protection claims for Revolution® helmets, but not with Riddell's attempt to develop a better helmet or with the underlying research conducted by the authors of the *Neurosurgery* article.