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Author

JOEL WINSTON

Joel Winston is a partner in the Washington DC office of Hudson Cook, LLP. Previously, he served for thirty-five years at the Federal Trade Commission's Bureau of Consumer Protection in a variety of staff and management positions, including Assistant Director of the Division of Advertising Practices and Associate Director of the Division of Financial Practices.

"UP TO" ADVERTISING CLAIMS:

THE FTC WEIGHS IN

You see them all the time--advertisements claiming that a product or service will achieve a benefit of "up to," "as much as," or "as low as" a specified figure. Car dealers and finance companies, for example, may promote prices "as low as $ 16,995," or rates "as little as 3% APR." Sellers of energy-savings devices may promise savings of "up to 50%" off your utility bills. [n1]

It's not uncommon that there is a disconnect between what messages advertisers intend to convey and the ones consumers perceive. In this case, it seems fair to conclude that what advertisers are trying to say through a phrase such as "up to" is that the results individual consumers will achieve will vary and that the stated figure is a best-case scenario that not everyone, or even most, will obtain. Unfortunately, that may not be the same message that consumers (or the government) understand such language to be conveying, and it is consumer perception--not advertiser intent--that ultimately counts.

Recent actions by the Federal Trade Commission involving window replacement advertisements--including five consent orders, warning letters to fifteen additional advertisers, and a report on the results of a copy test involving claimed energy cost savings--suggest that at least one agency of the government believes consumers read "up to" claims very differently from what most advertisers may have assumed. They also may provide considerable insight into what the FTC believes might be a deceptive practice under Section 5 of the Federal Trade Commission Act.

The FTC is to be commended for its efforts to provide guidance to advertisers on when "up to" claims are permissible, and especially for its reliance on actual evidence of how consumers interpret such claims. Nonetheless, a number of important questions remain about what exactly the FTC's guidance means, and additional clarity from the FTC would be useful. In the meantime, businesses should exercise caution about using "up to" claims in their advertising.

The Legal Framework

[n1] For ease of reference, this article will refer to all claims of this type as "up to" claims.

Section 5 of the Federal Trade Commission Act [n2] prohibits unfair or deceptive acts or practices in or affecting commerce. An advertisement is deceptive if it contains a representation that is likely to mislead consumers acting reasonably under the circumstances, and that representation is material. [n3] Therefore, to determine whether an ad is deceptive, advertisers first need to consider what messages, or representations, the ad communicates to reasonable consumers. [n4]

Advertisements may convey both express and implied claims. [n5] Express claims are self-defining--the ad speaks for itself. Conversely, determining whether an ad makes an implied claim requires analysis of the advertisement and the relevant context. For its part, the Commission first views the advertisement on its face to ascertain its "net impression." If, based on this facial analysis, it is unable to determine with confidence what claims consumers are likely to take from the advertisement, the Commission looks to extrinsic evidence of how consumers actually interpret the ad, often consumer copy tests. [n6]

The Five Replacement Window Cases

On February 22, 2012, the FTC released five settlements with manufacturers of replacement windows. [n7] In each case, the Commission challenged advertisements claiming energy and cost savings that consumers could achieve by installing the respondent's windows. In two of the cases, the respondent's advertisements claimed energy savings and reductions in energy bills of "up to" a certain percentage. The respondent in *Winchester Industries* ran ads which, among other things, claimed that consumers would achieve "energy savings" of "up to 47%." [n8] In *Serious Energy,* some of the ads stated that the window "reduces heating & cooling costs by up to 50%" and "cuts your energy bills by up to 40%." [n9] The ads also included energy savings and cost reduction claims that were not qualified by any "up to" language.

[n2] 15 U.S.C. § 45.

[n3] Fed. Trade Comm'n, Policy Statement on Deception, *reprinted at* 103 F.T.C. 174, 175 (1984) [hereinafter Deception Statement].

[n4] FTC v. Pantron I Corp., 33 F.3d 1088, 1096 (9th Cir. 1994).

[n5] **FTC v. Kraft, Inc., 114 F.T.C. 40 (1991)**, *aff'd*, 970 F.2d 311 (7th Cir. 1992); FTC v. Thompson Med. Co., 104 F.T.C. 648, *aff'd*, 791 F.2d 189 (D.C. Cir. 1986).

[n6] A copy test is a form of market research in which a sample of consumers is exposed to a stimulus, such as an advertisement, and then asked a series of questions to elicit what messages they perceive in that stimulus. *Kraft*, 970 F.2d at 318; *Thompson Med.*, 104 F.T.C. at 788-89.

[n7] *See* Press Release, Fed. Trade Comm'n, Window Marketers Settle FTC Charges that They Made Deceptive Energy Efficiency and Cost Savings Claims--Companies Must Have Scientific Evidence Before Making Marketing Claims (Feb. 22, 2012), *available at* http://www.ftc.gov/opa/2012/02/windows.shtm. An FTC administrative settlement consists of a complaint asserting the alleged violations and an order constraining the respondent's future behavior and, in some cases, requiring additional relief related to the past violations.

[n8] Consent Order, Winchester Indus., FTC Docket. No. C-4362 (May 16, 2012), *available at* http://www.ftc.gov/os/caselist/1023171/120518winchestercmpt.pdf.

[n9] Consent Order, Serious Energy, Inc., FTC Docket No. C-4359 (May 16, 2012), *available at* http://www.ftc.gov/os/caselist/1123001/120518seriouscmpt.pdf.

In the other three cases, the advertisements quoted in the complaint did not make "up to" claims. In *Gorell*, the ads "pledged" that consumers would save "40%" or "at least 40%" in energy for both heating and cooling. [n10] In *Long Fence*, the ads included a "guarantee" of "50% savings," and promised to reimburse consumers for any shortfall. [n11] In *THV Holdings*, the advertisements included a "guarantee" that the consumers' savings would equal the installation cost within eight years and that "homeowners will typically experience a 35% to 55% reduction in monthly energy bills." [n12]

Despite the differences in the express statements made in the five companies' ads, the Commission alleged in each of the complaints that the respondent represented that consumers are "likely" to achieve savings of the specified amount or percentage. The Analyses to Aid Public Comment [n13] issued with the proposed consent orders explain the FTC's view that, at least in the circumstances of these cases, an "up to" performance claim operated no differently than an unqualified performance claim. [n14]

Part I of each order prohibits unsubstantiated energy savings claims for any covered product, [n15] and mandates that the respondent must be able to substantiate that, for any "up to" claims, "all or almost all consumers are likely to receive the maximum represented." [n16] On its face, requiring substantiation that "all or almost all are likely" to achieve the outcome connotes a more rigorous standard than showing the outcome is "likely." And both standards appear to impose a more rigorous test than the FTC has required previously.

The Copy Test

The FTC may be signaling its intention to apply its new, tougher standards for "up to" claims broadly through its recent release of a copy test of an advertisement based on one used in the window marketer cases as well as its issuance of a series of warning letters to other window manufacturers.

On June 29, 2012, the FTC published a report summarizing the results of a copy test it had conducted on how consumers interpret "up to" claims and how such claims influence consumers' beliefs about the product. [n17] Among other things, the copy test found that adding "up to" to a performance claim was ineffective in qualifying the claim. The study tested the communication of an advertisement from the *Winchester Industries* case. Using a mall-intercept methodology, 360 consumers in five markets were exposed to one of three mocked-up versions of the ad:

[n10] Consent Order, Gorell Enters., Inc., FTC Docket No. C-4360 (May 16, 2012), *available at* http://www.ftc.gov/os/caselist/1123053/120518gorellcmpt.pdf.

[n11] Consent Order, Long Fence & Home, LLLP, FTC Docket No. C-4352 (Apr. 5, 2012), *available at* http://www.ftc.gov/os/caselist/1123005/120518longfencecmpt.pdf.

[n12] Consent Order, THV Holdings LLC, FTC Docket No. C-4361 (May 16, 2012), *available at* http://www.ftc.gov/os/caselist/1123057/120518thvcmpt.pdf.

[n13] The FTC releases an Analysis to Aid Public Comment when it issues a consent agreement for public comment. The Analysis provides a nontechnical summary of the complaint, proposed order and, in some instances, the reasons for entering it.

[n14] *See, e.g.*, Analysis of Proposed Order to Aid Public Comment, In the Matter of Long Fence & Home, LLLP, *available at* http://www.ftc.gov/os/caselist/1123005/120222longanal.pdf.

[n15] The five orders with the window marketers define the term "Covered Products," broadly speaking, to include windows or window components and any other product or service for which the respondent makes any claim about energy usage or savings, cost savings, insulating properties, thermal performance, or the like. *See, e.g., id.*

[n16] Under this proviso, advertisers that limit the claim to specific circumstances need only have substantiation for the performance of the product under those circumstances. *Id.*

[n17] Manoj Hastak & Dennis Murphy, *Effects of a Bristol Windows Advertisement with an Up To Savings Claim on Consumer Take-Away and Beliefs: Report Submitted to Federal Trade Commission* (May 2012), *available at* http://www.ftc.gov/os/2012/06/120629bristolwindowsreport.pdf.

. Ad 1 stated that the window is "PROVEN TO *SAVE UP TO 47%* ON YOUR HEATING AND COOLING BILLS."

. Ad 2 was identical to Ad 1, but omitted the words "UP TO."

. Ad 3 was identical to Ad 1, but with an added disclosure: "The average Bristol Windows owner saves about 25% on heating and cooling bills."

The testers asked survey respondents a series of open-ended and close-ended questions about the claims they perceived in the ad they had viewed and the beliefs they had formed about the product as a result. The report concluded that both the "up to" qualifier and the disclosure of average results were generally ineffective to change consumer perception about their likelihood of achieving the maximum outcome.

. About half of the consumers who viewed Ad 1 (with the "up to" qualifier) took the claim to mean that users could expect to receive approximately a 47% savings. [n18]

. The "up to" language made no difference in consumers' understanding of the ad--the percentage of consumers to whom the 47% savings claim was communicated was statistically the same for those who viewed Ad 1 and those who viewed Ad 2.

. The disclosure of average results in Ad 3 was also ineffective--the percentage of consumers to whom the 47% savings claim was communicated was statistically the same as for those who viewed Ads 1 and 2.

. Similarly, the persuasiveness of the advertisement was not affected by the "up to" qualifier--there was no statistically significant difference between Ad 1 and Ad 2 in the percentage of consumers who believed that most consumers could expect to save about 47% on their bills. The disclosure in Ad 3, however, did reduce that belief somewhat.

The copy test also measured how consumers interpreted an "up to" claim in terms of the likelihood of achieving the maximum result. Of the participants who perceived the ad to be making a 47% or about 47% savings claim, about 28% interpreted that to mean that "all" or "almost all" consumers would achieve such savings. An additional 14% interpreted the claim to mean that "most" consumers would achieve that result. [n19]

Although the report contains no enforcement or other recommendations, the FTC issued a press release with the report that included the following statement: "The FTC believes the report will help guide advertisers to avoid the use of misleading 'up to' claims. It reinforces the FTC's view that advertisers using these claims should be able to substantiate that *consumers are likely to achieve the maximum results promised under normal circumstances*." [n20] It is unusual for the Commission to issue an admonition of this type through something as informal as a press release.

The Warning Letters

[n18] An ad is misleading if at least a significant minority of reasonable consumers are likely to take away the misleading claim. *See, e.g.,* ***Kraft*****, 114 F.T.C. at 122**; **Telebrands Corp., 140 F.T.C. 278, 291 (2005)**, *aff'd*, 457 F.2d 354 (4th Cir. 2006).

[n19] Only those participants who had perceived the ad as claiming savings of 47% or about 47% were asked the question of how many consumers could expect that level of savings. Nearly half of the sample did not perceive the 47% or about 47% claim in the first place. When those participants are factored in, only about 15% of the entire sample took an "all" or "almost all" claim, and an additional 7% took a "most" claim (which the FTC presumably equates with "likely.") These percentages may be high enough to establish, as a matter of law, that the claims were conveyed *See* Novartis Corp., 127 F.T.C. 580, 684-85 (1999) (claim is conveyed if it is perceived by a "significant minority" of consumers; 30 to 45 percent is "more than a significant minority"). Nonetheless, in considering how broadly to apply its "likely" or "all or nearly all are likely" standard beyond the specific claims at issue for window replacement products, it is important to keep in mind that, even for these specific claims, fewer than 1 in 6 consumers (15%) took the "all or nearly all" message and fewer than 1 in 4 (15% plus 7%) took the "likely" message.

[n20] Press Release, Fed. Trade Comm'n, FTC Report: Many Consumers Believe "Up To" Claims Promise Maximum Results (June 29, 2012) (emphasis added), *available at* http://www.ftc.gov/opa/2012/06/uptoclaims.shtm.

On August 29, 2012, the FTC announced that it had issued letters to fifteen additional companies marketing windows or window glass warning them that they might be making unsubstantiated energy savings claims similar to those challenged in the five settled cases. [n21] Each of the letters included the following bullet point:

> Avoid Deception When Making "Up-to" Claims. A recent FTC study shows that many consumers interpret claims that windows will save "up to" a specified amount of energy to mean that all or almost all users are likely to get the specified savings. . . . Therefore, to avoid deception, you must clearly convey the results consumers are likely to get. For example, if you say that consumers will save "up to" a specified percentage in savings, your substantiation should prove that all or almost all consumers are likely to get that percentage in savings.

The FTC's Past Treatment of "Up to" Claims

The FTC has been challenging "up to" claims for many years. In many cases, the Commission has declined to interpret what the "up to" claim implied. In those cases, the representation alleged in the Complaint--i.e., the FTC's characterization of what message it believes consumers took from the statements in the advertisements--simply repeated the ad language without any attempt to interpret it. [n22] Other cases, however, have included various interpretations of "up to" language:

. "[A]n appreciable number of consumers" will receive the maximum or close to the maximum result under normal conditions. [n23]

. Consumers will receive "consistently significant" results. [n24]

. The product will "consistently produce results in the range of the stated [maximum]." [n25]

[n21] *See* Press Release, Fed. Trade Comm'n, FTC Warns Replacement Window Marketers to Review Marketing Materials; Energy Savings Claims Must be Backed by Scientific Evidence (Aug. 29, 2012), *available at* http://www.ftc.gov/opa/2012/08/windows.shtm. The FTC frequently issues such letters when it believes that there is a particular deceptive practice widespread in an industry.

[n22] Complaint, Motor Up Corp., FTC Docket No. 9291 (1999), *available at* http://www.ftc.gov/os/1999/04/motorupadmincmp.pdf; Consent Decree, FTC v. Skechers USA, Inc., Case No. 1:12-cv-01214-JG (N.D. Ohio, May 16, 2012), *available at* http://www.ftc.gov/os/caselist/1023069/120516skecherscmpt.pdf.

[n23] *E.g.*, Plaskolite, 101 F.T.C. 344 (1983); Cynex Mfg. Corp., 104 F.T.C. 464, 475 (1984); GCS Electronics, 108 F.T.C. 158 (1986). The FTC has never revealed what it considers to be an "appreciable number," but the traverse paragraphs (the standard paragraph in FTC complaints that in some cases explains why the Commission believes the representation is unfair or deceptive) in these cases alleged that "few if any consumers" achieved the maximum or close to the maximum result. How many more would comprise "an appreciable number" is unresolved. At least one court has expressed a view on this question, however. In *FTC v. Pacific Medical Clinics Management, Inc.*, 1992-1 Trade Cas. (CCH) P 69,777, the FTC challenged claims that consumers who enrolled in a weight loss clinic would lose "up to thirty pounds in thirty days." The court found that the claim was deceptive because only 1.07% of consumers achieved this result, holding that this percentage was not "an appreciable number."

The National Advertising Division of the Council of Better Business Bureaus, the advertising industry's self-regulatory group, still applies the "appreciable number" test in adjudicating advertising disputes, even though the FTC has not used it in recent years. *See* CableVision Sys. Corp., NAD Case No. 5412 (1/6/12) ("up to" claims about internet speed "must be supported by evidence demonstrating that the maximum level of performance claimed can be achieved by an appreciable number of consumers under circumstances typically encountered by consumers.").

[n24] Automotive Breakthrough Sci., Inc., 126 F.T.C. 229, 301 (1998) ("The claim, 'tests show up to 30% reduction,' in our view, conveyed a message that respondents had and relied on tests that showed consistently significant reductions in stopping distances. In fact, the record is devoid of test results that demonstrate that ABS/Trax consistently reduced stopping distances by any substantial percentage, let alone 30%. To the contrary, the record contains both reliable and probative evidence that respondents' product did not and could not perform as claimed.").

[n25] *See* Telemarketing Sales Rule, 75 Fed. Reg. 48,458 (Aug. 10, 2010): "Providers should be cautious in purporting to qualify their savings claims to make sure that the qualifications are effectively communicated to consumers. For example, phrases such

. The product will produce "substantial" results. [n26]

. The stated maximum is the "typical" or "average" result. [n27]

The Commission Has Not Explained the Variations in Its Interpretations. It is worth noting that the representation alleged in the window manufacturer complaints (whether the ad included the "up to" language or not) was itself a qualified one--that consumers are "likely" to receive the advertised performance. The FTC has typically interpreted unqualified performance claims in an unqualified way, i.e., that the product will achieve that performance. [n28] The *Gorell, Long Fence*, and *THV Holdings* cases represent a departure from that practice, in effect reading unqualified claims to be qualified, i.e., that consumers are "likely" to receive that performance, thereby suggesting that some consumers may not. [n29] Whether the Commission intended these five cases to signal a new way of interpreting performance claims, or whether it is limiting that interpretation to the facts of these cases, is unclear, but it seems reasonable to think that at least in some cases, depending on the context, consumers may understand that not everyone will receive the result claimed in the ad. [n30]

In another change from past FTC practice, until this year, the Commission had based its reading of "up to" claims on its own facial analysis of the advertisements employing them. The copy test marks the first time that the Commission has stated publicly that it had empirical evidence of how consumers understand "up to" claims.

The FTC's Current Standard

It is important to note that the FTC has not issued a formal interpretation of "up to" claims, such as might appear in an FTC rulemaking, Guide, Enforcement Policy Statement, or litigated opinion. Rather, advertisers have to try to glean whether the Commission's formulation of the "likely" or "all or almost all are likely" tests change the prior interpretations by reading the complaints and orders in the five window cases, the survey report and press release, [n31] and the subsequent warning letters. It is important for advertisers to understand what the FTC's actions mean and conform their practices to the extent possible, particularly because the press release issued with the Report noted that it was intended to "help guide advertisers to avoid the use of misleading 'up to' claims." Businesses that ignore this guidance may become the targets of FTC cases.

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as 'up to' or 'as much as' (e.g.,'up to 60% savings') are likely to convey to consumers that the product or service will consistently produce results in the range of the stated percentage or amount." *Id.* at 48,500 n.578.

[n26] Consent Decree, FTC v. Edge Solutions, Inc., CV 07-4087 (E.D.N.Y. Oct. 1, 2007), *available at* http://www.ftc.gov/os/caselist/0723025/071001edgesolutionscmplt.pdf.

[n27] FTC v. Febre, No. 97-1230, 1996 U.S. Dist. LEXIS 9487 at *5 (N.D. Ill. 1996) ("Thus, while it might not be reasonable to believe that everyone who participates in the program would earn the stated amount, it can be presumed that a consumer would reasonably believe that the statements of earnings potential represent typical or average earnings.")

[n28] *E.g.*, Complaint, FTC v. Telebrands Corp., FTC Docket No. 9313 (Sept. 30, 2003) P 19, *available at* http://www.ftc.gov/os/2003/10/telebrandcomp.pdf.

[n29] Although a departure from standard practice, this approach is consistent with the one taken by the court in *FTC v. Five-Star Auto Club, Inc.*, which held that an unqualified performance claim implies that the result is "typical," in other words likely but not necessarily universal. No. 99 Civ. 1695, slip op. at 32 (S.D.N.Y. May 17, 2000), *available at* http://www.ftc.gov/os/1999/03/fivstardecision.pdf.

[n30] *See, e.g.*, Initial Decision, California Milk Producers Advisory Board, 94 F.T.C. 429, 546-47 (1979) (claim that "every body needs milk" was not deceptive even though a small percentage of consumers are lactose-intolerant); *but see* Firestone Tire and Rubber Co. v. FTC, 481 F.2d 246 (6th Cir. 1973) (unqualified claim for "the safe tire" implied absolute safety and that all of the advertised tires were entirely free of defects).

[n31] Although FTC press releases are ordinarily drafted by the Office of Public Affairs without input or a vote from the full Commission, it would be unlikely for the agency to issue a press release reflecting a significant policy change without at least an informal consensus among the Commissioners.

Since the FTC has, even in these recent actions, set out two different formulations for "up to" claims--that advertisers must be able to show that (1) consumers are "likely" to receive the stated maximum result; or (2) that "all or nearly all consumers are likely" to receive that result--advertisers face confusion as to what level of performance they will need to be able to show in order to make an "up to" claim. It seems clear that the days of "an appreciable number" are over and that the threshold is at least 50 percent. But, is it sufficient that a majority of consumers will receive the maximum? Or must it be virtually everyone? Or is it something in between?

Are There Two Standards or One? In ascertaining what standard the FTC may be seeking to establish, we must first understand why the agency has offered the two different formulations. One possible explanation is that the FTC considers the phrases to be synonymous, and therefore there is only a single standard applicable to all "up to" claims. For example, one passage in the warning letters appears to equate the two formulations:

> Therefore, to avoid deception, you must clearly convey the results that consumers are *likely* to get. For example, if you say that consumers will save "up to" a specified percentage in savings, your substantiation should prove that *all or almost all consumers are likely* to get that percentage in savings. [n32]

If the FTC intended to establish a single standard, however, it is unclear why it would risk confusion by using different formulations. Moreover, at least on their face, the terms do not mean the same thing. The addition of "all or almost all" as a modifier accompanying "likely" must have some significance and presumably indicates a percentage higher than "likely" alone.

A more probable explanation is that the FTC intended to articulate two standards, with the "likely" test applying to "up to" claims generally, while the more rigorous "all or almost all are likely" standard limited to the claims challenged in the five settlements and tested in the consumer copy test--energy savings claims for replacement windows. In its statements, the FTC has taken some pains to say that the "all or almost all are likely" standard does not necessarily apply outside the circumstances that were before it. In the five settlements, the "up to" claim proviso to Part I of the orders, which includes the "all or almost all are likely" standard, only covers energy savings and cost reduction claims for replacement windows.

The Analyses to Aid Public Comment for those cases caution that the complaints and orders should not be interpreted as a general statement of how the FTC might interpret "up to" claims in other contexts, and they describe the proviso as fencing-in relief. [n33] Consistent with this explanation, the Commission's subsequent statement in the press release accompanying the copy test report, which is directed at "advertisers" generally, follows the broader "likely" formulation.

This bifurcated approach is a sensible one. The Commission has empirical evidence in the form of a copy test of a particular ad for a replacement window that indicates that at least some consumers interpreted "up to" in that ad to mean that "all or almost all" consumers will receive the maximum savings. It has no such evidence for "up to" claims for other products or in other circumstances.

What Do the Standards Actually Require? Whether or not they are intended to be different, the question remains what the two formulations--"likely" and "all or almost all are likely"--actually mean. Dictionary definitions for "likely" vary; some indicate that it means a simple majority, while others suggest it means more than that. [n34] Whatever

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[n32] *See, e.g., Letter West Window Corp.* (Aug. 17, 2012) (emphasis added), *available at* http://www.ftc.gov/os/2012/08/120829windowswestletter.pdf.

[n33] Fencing-in relief is a remedy that goes beyond what the law requires to ensure that a company that has engaged in the alleged wrongdoing does not continue it in a new guise. *See e.g.*, FTC v. Ruberoid Co., 343 U.S. 473 (1952). It is not uncommon for the FTC to impose stricter standards on companies under order than those to which it holds companies generally. Note, however, that the warning letters sent to companies not under order use the same "all or nearly all" language. Thus, it seems that the order provisions are not fencing-in relief but rather are statements of more general applicability.

[n34] The primary definition in the *Merriam Webster Dictionary* is "having a high probability of occurring or being true . . . very probable," suggesting more than 50 percent, http://www.merriam-webster.com/dictionary/likely. Other dictionaries have

"likely" is intended to mean, as discussed above, "all or almost all" would seem to imply a higher degree of probability.

Regardless of what "likely" and "all or almost all" mean, combining the two terms as the FTC has done here creates a further issue. It requires handicapping both how likely the result is and separately what percentage of people will achieve a particular result. One way to understand the concern is to assign quantities to the two terms. For example, we could assume, for purposes of analysis, that "likely" means more than 50 percent and that "all or almost all" means more than 90 percent. Applying the standard, then, would mean that 90 percent (or more) of consumers has a 50 percent (or more) chance of obtaining the maximum result. Doing the math, this means that an "up to" claim would be substantiated so long as 45 percent (.90 x .50) or more of consumers will actually achieve the stated maximum. Assigning different quantities to "likely" and "all or nearly all" would produce different percentage outcomes, of course, but the concept would be the same.

It seems doubtful, however, that the FTC intends the standard to be some sort of combination of two probabilities, particularly because the outcome suggested above would result in a lower threshold for the claim than "likely" alone. Further clarification from the Commission would be helpful in this regard.

How Broadly Should the FTC's Approach Apply? A key question is whether, and the extent to which, the FTC's requirement that "all or almost all" achieve the result was intended to apply to all "up to" claims. Had it only appeared in the five window settlements, it could be viewed as limited to "fencing-in" relief against violators. But the recent warning letters show the FTC intends to apply it at least to advertisements for replacement windows broadly. How will the Commission determine the breadth of application, and how will businesses know which standard applies to their advertising?

In the Analyses to Aid Public Comment for the five settlements, the FTC seemed to recognize that, in other circumstances involving other products or services, "up to" claims may not convey the "likely" or "all or almost all are likely" messages:

> Some promotional materials challenged in the FTC's complaint include the words "up to" in an apparent attempt to qualify representations that consumers who replace windows with respondent's windows are likely to achieve specific amounts of residential energy savings or reduction in residential heating and cooling costs. In the context of the specific ads in this case, the words "up to" do not effectively qualify such representations for replacement windows. The FTC's complaint and the proposed consent order should not be interpreted as a general statement of how the Commission may interpret or take other action concerning representations including the words "up to" for other products or services in the future.

In fact, there undoubtedly will be circumstances in which an "up to" claim does not communicate that "all or almost" consumers will achieve the maximum result, or even that consumers are "likely" to achieve it. How consumers interpret a particular claim depends on what else the ad says and depicts, the type of product involved, and consumers' pre-existing knowledge or beliefs about the product or category. [n35] For example, viewing a claim that a replacement window will save up to 47 percent in energy costs, individual consumers might reasonably expect results of that magnitude--47 percent seems on its face to be a reasonable savings that consumers could expect to achieve, and there is no obvious reason the savings would vary dramatically from person to person. In other cases, however, consumers might well understand that individual variation may be high and that the stated figure represents a best-case scenario.

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definitions more akin to a simple majority. *E.g.*, DICTIONARY.COM ("probably . . . destined to happen"), http://www.macmillandictionary.com/dictionary/british/likely; MACMILLAN DICTIONARY ("probably going to happen"), http://www.macmillandictionary.com/dictionary/british/likely. The fact that "likely" commonly is modified by terms such as "highly" or "very" would seem to indicate that "likely" by itself means only a majority.

[n35] *See, e.g.*, Deception Statement, *supra* note 3, 103 F.T.C. at 176; Novartis Corp., 127 F.T.C. 580, 680 (1999), *aff'd*, 223 F.3d 783 (D.C. Cir. 2000).

To pick an extreme example, an ad stating that consumers can win "up to" $ 100,000 playing the slots at a casino probably does not convey to consumers that they, themselves, are likely to win that amount. [n36] Or, an ad stating that users of a weight loss product will lose "up to" 150 pounds almost certainly does not convey that consumers are likely to achieve a 150 pound weight loss, much less that all or almost all will do so. Indeed, most consumers will not want or need to lose that much weight and certainly understand that how much weight they lose will depend in large part on their own behavior. [n37] Or, when a lender offers open-end credit with a limit "up to" a certain dollar amount, or rates "as low as" a certain percentage, consumers likely understand that many will not qualify for the best terms, for example, if they have a poor credit rating. Moreover, "up to" claims often are used in situations where consumers will know before they purchase whether they will be able to achieve the maximum promised benefit, for example, when a store advertises a sale with savings "up to" a certain amount.

Thus, to extrapolate from a single copy test of a particular ad for a particular product to all advertising would ignore the impact that context can have and how much variation there can be in how consumers interpret advertisements. The FTC certainly understands this and has included some general cautionary language about extending its guidance on "up to" claims too far. But, a clearer acknowledgment that in some cases such claims may not communicate that "all or almost all" consumers will achieve the maximum result--or may not even communicate that consumers are "likely" to achieve the maximum--would be helpful.

The FTC Endorsement and Testimonial Guides

In evaluating the FTC's new policy on "up to" claims, it is useful to compare it to what the FTC recently did in an analogous context--the use of consumer testimonials in advertising. Many advertisements include testimonials from users of their product describing the results those individuals achieved. In this way, a **testimonial** is very similar to an "up to" claim; both purport to represent best-case results and not necessarily a typical or average result.

The FTC recently revised its Guides Concerning the Use of Endorsements and Testimonials in Advertising, originally issued in 1980. [n38] The original Guides stated that a consumer **testimonial** would be interpreted as representing that the consumer's experience was "representative of what consumers will generally achieve," but provided a safe harbor for advertisers who could not meet that standard if they disclosed (1) what the generally expected performance would be; or (2) the limited applicability of the consumer's experience. [n39] Many advertisers took advantage of the second safe harbor by including testimonials touting best cases, with a fine print disclosure along the lines of "your results may vary" or "results not typical."

[n36] This is the very fact scenario that the FTC used when it revised its Guides on Endorsements and Testimonials, discussed below, in acknowledging that not all consumer testimonials convey a typicality claim and that disclosures or other factors could influence how consumers interpret testimonials. *See* Guides Concerning the Use of Endorsements and Testimonials in Advertising, Notice of Proposed Changes to Guides, Request for Public Comment, 73 Fed. Reg. 72,378 (Nov. 28, 2008). The similarity of testimonials to "up to" claims as advertising techniques also is discussed below.

[n37] Acknowledging that consumers may not read claims of this sort as applying to them in a literal way, the complaints in a number of FTC weight loss cases interpret "up to" claims and testimonials touting extreme weight loss results as implying that consumers generally will lose a "substantial amount of weight," or typically are successful in reaching their "weight loss goal," rather than the specific maximum result portrayed. *See, e.g.*, Consent Decree, FTC v. Medlab, Inc., CV 08 0822 (N.D. Cal. Feb. 6, 2008), *available at* http://www.ftc.gov/os/caselist/0623068/080208medlabzyladexcmplt.pdf; Consent Order, Nutri/System, Inc., 116 F.T.C. 1408 (1993).

[n38] 74 Fed. Reg. 53,124 (Oct. 15, 2009), codified at 16 C.F.R. Part 255. FTC Guides are administrative interpretations of the law. As such, they do not have the force and effect of law and are not independently enforceable. The Commission may take action under the FTC Act, however, if a particular use of a **testimonial** or endorsement is inconsistent with the Guides. In such an enforcement action, the Commission has to prove that the challenged act or practice was unfair or deceptive.

[n39] 45 Fed. Reg. 3870 (1980).

In 2009, the FTC substantially revised the Guides. Based on consumer surveys showing that many consumers ignored the "results may vary"-type disclaimers and interpreted testimonials as reflecting what they themselves would achieve, [n40] the second safe harbor disclosure was eliminated. The current Guides thus require that the advertiser either (a) have substantiation that the testimonialist's results are representative of what consumers will generally achieve, or (b) disclose the generally expected performance. [n41]

There are obvious similarities between the FTC's treatment of testimonials and its new interpretation of "up to" claims. The FTC's view that testimonials convey that they are "representative" of what consumers generally achieve resembles the "likely to achieve" or "all or nearly all are likely to achieve" standards for "up to" claims. It is unclear, however, whether the Commission views the standard to be the same for the two types of claims. [n42]

Another possible difference between the two approaches relates to whether the claim can be qualified. As noted, the Guides permit advertisers to qualify testimonials with a disclosure of the average result, while the FTC's statement regarding "up to" claims mentions no such safe harbor. This is unsurprising given that a disclosure of this kind was ineffective for the ad tested in the FTC copy test. But it raises the question whether any sort of disclosure in any context would be considered adequate to qualify an "up to" claim.

More broadly, the Guides acknowledge that context is important in determining what messages a **testimonial** might convey and that not all testimonials will imply typicality. In its 2008 request for comment on modifying the Guides, the Commission stated:

> [T]he Commission believes that certain advertisements employing testimonials may not convey that the endorser's experience is representative of what consumers will generally achieve with the advertised product or service . . . . The Commission therefore proposes to qualify the currently unequivocal language [of the existing Guides] to state that 'an advertisement employing an endorsement reflecting the experience of an individual or a group of consumers on a central or key attribute of the product or service will likely be interpreted as representing that the endorser's experience is representative of what consumers will generally achieve . . . . [n43]

The FTC reinforced this qualified approach in promulgating the final revised Guides. Addressing a commenter's argument that consumer perceptions of testimonials will vary depending on the circumstances, the Commission stated:

> The [revised Guide] would recognize that, depending on how a **testimonial** is crafted and used in a particular ad, it might not convey a typicality claim . . . . [T]he revision makes the Guides less restrictive, by allowing for the possibility that a **testimonial** will not convey a typicality claim, and thus not require any further qualification. [n44]

The Commission also was careful in the revised Guides to leave open the possibility that even a disclaimer of typicality alone might be sufficient to qualify a claim: "[T]he revised Guides would not prohibit the use of disclaimers

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[n40] *See* 72 Fed. Reg. 2214 (Jan. 18, 2007); 73 Fed. Reg. 72,375, 72,378-80 (Nov. 28, 2008).

[n41] 16 C.F.R. § 255.2(a).

[n42] One indication that the FTC might consider the standards to be the same can be found in a case filed after the publication of the FTC "up to" survey. Consent Decree, FTC v. Fitness Brands, Inc., Case No. 12-23065-CIV-ALTONAGA (S.D. Fla. Aug. 27, 2012, entered on the docket Aug. 28, 2012), *available at* http://www.ftc.gov/os/caselist/1023047/120823abcircledigeststip.pdf. The case challenged weightless and fitness claims for an exercise device that were made, among other ways, through consumer testimonials. Paragraph 57 of the FTC Complaint alleges that, through these testimonials, the defendants represented that consumers who use the device are "likely" to obtain the benefits depicted in the testimonials.

[n43] 73 Fed. Reg. at 72,378.

[n44] 74 Fed. Reg. at 53,131.

of typicality. Although the Commission is, admittedly, skeptical that most disclaimers of typicality will be effective in preventing deception [the revised Guide] does not rule out the possibility that a clear, conspicuous, and informative disclaimer would accomplish this goal." [n45]

The FTC's pronouncements about "up to" claims have not explicitly acknowledged that disclaimers might be effective in certain circumstances, although it has said that advertisers can limit their claims to specific circumstances. Further clarification on this point from the Commission along the lines of what it said in the Guides would be helpful.

Conclusion

Over this past year, the FTC has made a laudable effort to provide guidance to businesses on the use of a common advertising technique--"up to" claims. But, questions remain as to exactly what that guidance means and how far it extends. When it comes to advertising claims, context always matters; as a result, it is difficult to state a principle of broad application as to how claims will be interpreted and when they are permissible. And, there is an unavoidable tension between providing certainty to businesses by stating a principle or rule that applies across the board, and discouraging useful advertising claims that, in a particular context, would not be deceptive. For example, there is an important policy consideration in clarifying whether and how advertisers can convey potential benefits that a substantial minority of consumers might realize, even though most or all will not do so.

Thus, whether or not the FTC has achieved the optimal balance with respect to "up to" claims remains to be seen, and further clarification of its guidance will always be helpful. In the meantime, advertisers should be very cautious about using such claims unless they can substantiate that a high percentage of consumers will achieve the maximum result, or carefully and clearly qualify and limit to the claim to the circumstances where that is the case.

End of Document

[n45] *Id.* Several commenters on the revised Guides noted that calculating the "average" result may be difficult in many cases as advertisers may not have data on the experiences of all of the consumers who used the product. Thus, if they were not permitted to qualify their claims, they could never use testimonials.