Federal Trade Commission

"SELF-REGULATION AND CONSUMER PROTECTION: A COMPLEMENT TO FEDERAL LAW ENFORCEMENT"

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before

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Good morning. I am delighted to be here with you today. I am very familiar with the long and impressive history of advertising self-regulation. In fact, the National Advertising Review Council, the National Advertising Division of the Council of Better Business Bureaus, and the National Advertising Review Board got up and running just a short while before I began my tenure at the Federal Trade Commission in 1973. The Children's Advertising Review Unit was established a short time later. I am an early admirer of the good work that these organizations have done and the impact that they have had on a variety of consumer protection issues.

At that time, the backbone of the FTC's consumer protection mission consisted of challenges to national advertising. There were several reasons for that.

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[1]The views expressed herein are my own, and do not necessarily represent the views of the Federal Trade Commission or any other individual Commissioner. I am grateful to my attorney advisor Beth Delaney for her assistance with this speech.

First, the wages of sin were *de minimus*. When I came to the Commission, a respondent had "two bites at the apple" before there were real sanctions. The only consequence of the initial violation was a Commission order. It was not until that order was violated that civil penalties were levied. There was no Magnuson-Moss Act, which permitted the Commission to seek consumer redress from the federal courts until the beginning of 1975. Section 13(b), which allows the Commission to seek equitable relief like restitution and disgorgement, was enacted in the Fall of 1973, but it was in its infancy and was not applied in consumer protection cases until the end of 1975 and then only sporadically, until the 1980s. Thus, there was a premium on putting law breakers under an "all products" order so that any misstep would result in civil penalties, and the best way to do that was to focus on national advertisers who had multiple products.

Second, private actions brought under the Lanham Act were not as ubiquitous as they are now. Today, deceptive comparative ads at least are susceptible to such suits and are frequently challenged under the Lanham Act.

Third, frankly, the various programs operated by the Council of Better Business Bureaus have done an excellent job of monitoring and policing national advertising. This is not to say that it is not necessary or advisable for the Commission to demonstrate "the cop is on the beat," - - - I'll have more to say about that later. But there are now several cops on the beat.

Today I would like to start by sharing some of my views about the importance of self-regulation and its unique role within the larger framework of government regulation and private

litigation. I will wrap up with a brief discussion about my thoughts regarding some of the recent enforcement and regulatory activities at the FTC.

I. Why Self-Regulation?

Why have self-regulatory programs and initiatives even developed in the first place? Some may argue, for example, that law enforcement is preferable to self-regulation. However, the efforts of federal law enforcement can be constrained. With respect to the Federal Trade Commission and its jurisdiction, I see three possible impediments to broad federal law enforcement efforts – constitutional limitations, statutory limitations, and political considerations. Each of these restraints has helped shape the scope of federal law enforcement as well as the corresponding self-regulatory efforts in the consumer protection area. It is my opinion that in some cases, self-regulation serves a unique role, complementing the federal law enforcement framework by providing consumers with more information and protection than the FTC would be able to offer under the same circumstances.

A. Possible Constitutional Impediments To Federal Law Enforcement

When thinking about federal law enforcement efforts to protect consumers, the primary constitutional consideration is, of course, the First Amendment. In analyzing governmental restrictions on speech, the Supreme Court traditionally has divided speech into two categories – "fully protected," non-commercial speech and commercial speech. As set forth in *Central Hudson*, governmental restriction of ***commercial speech*** must undergo a four-part analysis to determine whether it meets constitutional muster. The first determination is whether the speech at issue is actually protected by the First Amendment. For commercial speech to receive First

Amendment protection, it must concern ***lawful activity*** and ***not be misleading***. Second, the governmental interest underlying the proposed restriction upon commercial speech must be substantial. If these first two prongs of the analysis are met, then the next determination is whether the proposed regulation directly advances the governmental interest asserted, and whether it is no more extensive than necessary to further that interest.[2]

The Commission has wrestled with constitutional issues regarding commercial speech on several occasions. Examples of our efforts that have touched upon First Amendment concerns include – to name just a few – the Cigarette Labeling Rule, our work examining the marketing of violent entertainment products to children, the Do Not Call rulemaking and its subsequent proceedings, and disclosure requirements placed upon those selling certain funeral products. For example, as you may or may not be aware, the Funeral Rule, among other things, requires funeral homes to give consumers a list of prices for the merchandise and services they offer. The Rule ensures that consumers have access to price information, that they understand that they only have to buy the services that they want or that are required by law, and that it is okay to talk about prices. When the Rule was first promulgated, it was challenged on the basis that it exceeded the Commission's authority under Section 5 of the FTC Act and violated funeral directors' First Amendment rights of commercial free speech. The Commission's decision to promulgate the Rule was subsequently affirmed by the Fourth Circuit.[3] Similar challenges were

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[2]*Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980).

[3]*Harry & Bryant Co. v. F.T.C.*, 726 F.2d 993 (4th Cir. 1984), *cert. denied*, 469 U.S. 820 (1984).

made with respect to the Do Not Call Registry, and the Tenth Circuit reversed a lower court decision that held that the Registry violated the First Amendment.[4]

On a going-forward basis, I think constitutional issues might also be raised in the context of "green marketing and advertising," to the extent that there is a question about whether or not the advertising relates to product attributes or whether it would instead be considered "image" or "message" advertising. This is an area that continues to pose difficult constitutional issues. These issues were teed up for the Supreme Court in the *Nike v. Kasky* case in 2003.[5] In that case, plaintiffs challenged the truthfulness of a public relations campaign Nike had launched regarding the working conditions in its overseas factories. Although the lower courts in California had dismissed the complaint on the basis of protected speech, the California Supreme Court reversed and remanded, stating that "[b]ecause the messages in question were directed by a commercial speaker to a commercial audience, and because they made representations of fact about the speaker's own business operations for the purpose of promoting sales of its products, . . . [the] messages are commercial speech."[6] The Supreme Court recognized that the case "present[ed] novel First Amendment questions because the speech at issue represents a blending of commercial speech, noncommercial speech and debate on an issue of public importance," however, it didn't reach these tough issues because it determined on jurisdictional grounds that

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[4]*Mainstream Marketing Services v. F.T.C.*, 358 F.3d 1228 (10th Cir. 2004).

[5]*Nike, Inc., et al. v. Kasky*, 539 U.S. 654 (2003).

[6]*Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 946, 119 Cal. Rptr. 2d 296, 45 P. 3d 243, 247 (2002).

the writ of certiorari was improvidently granted.[7]

I understand that the First Amendment shields noncommercial advertising from challenges except in very unusual circumstances, and I think that shield is available to many, if not most, pure image and message advertisements – including ads relating to things such as to reforesting and environmental issues, for example – regardless of whether the "message" is true or false. However, that being said, I am not convinced that all image ads are shielded. Some such ads may be predominantly commercial in their purpose and effect. As I've said, there are commercial reasons for engaging in this kind of advertising. The closer the image claims are associated with specific branded products, I think the less likely it is that the First Amendment provides absolute protection.

The second prong of the *Central Hudson* test – whether the proposed restriction or requirement directly advances the government interest – can also offer a challenge to regulatory efforts. In some areas, the Commission has had to grapple with the difficult task of showing a causal connection between the proposed regulation or restriction and the consumer injury that it is attempting to prevent. For example, in our work on the marketing of violent entertainment products to children, we were faced with evidence that although there was a high ***correlation*** between exposure to media violence and aggressive and at times violent behavior, studies were less conclusive on the issue of ***causation***.[8] Likewise, in addressing issues relating to the

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[7]*Nike, Inc., et al. v. Kasky*, 539 U.S. at 663.

[8]Report of the Federal Trade Commission, *Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording &*

marketing of food to children and childhood obesity, the Commission has recognized that it could be difficult for the government to develop advertising restrictions that are practical and effective, and that tailoring such restrictions to conform to First Amendment constraints could present significant challenges.[9] Alcohol advertising and underage consumption of alcoholic beverages is a third area where regulators have grappled with these issues. Self-regulatory initiatives in all three of these areas have been able to accomplish a regulatory framework that government efforts may not have been able to accomplish.

B. Possible Statutory Impediments to FTC Law Enforcement

Other considerations that arise with respect to law enforcement efforts by the FTC include statutory limitations on the Commission's rulemaking process and its interpretation of unfair acts and practices. Let me briefly address each of these in turn.

The FTC's substantive rulemaking authority was codified in 1975 by the Magnuson-Moss Act,[10] which added Section 18 to the FTC Act. Section 18 authorizes the FTC to issue "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce" within the meaning of Section 5.[11] The Mag-Moss

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Electronic Game Industries, Sept. 2000, Appendix A at 1.

[9]A Report on a Joint Workshop of the Federal Trade Commission and the Department of Health and Human Services, *Perspectives on Marketing, Self-Regulation, & Childhood Obesity*, Apr. 2006, at 4, *available at* www.ftc.gov.

[10]Pub. L. No. 93-637, § 202(a), 88 Stat. 2183 (1975).

[11]15 U.S.C. § 57a(a)(1)(B).

amendments require certain procedures to be followed ***in addition*** to the notice and comment procedures of the Administrative Procedure Act. These procedures include the requirement that the notice of proposed rulemaking include the text of the proposed rule as well as the reason for the proposed rule.[12] The Commission must also allow interested persons to submit written data, views, and arguments, and make all these submissions public. The Commission must provide an opportunity for an informal hearing on the proposed rule during which interested parties can present their views either orally or through written submissions, and to the extent there are disputed issues of material fact, present rebuttal evidence and cross examination.[13] If the Commission decides to promulgate the rule, it must base the rule on the rulemaking record and accompany it with a statement of basis and purpose that describes the prevalence of the acts or practices treated by the rule, how the acts and practices are unfair or deceptive, and a description of the economic effect of the rule, taking into account its effect on small business and consumers.[14]

As you can see, a rulemaking pursuant to Section 18 of the FTC Act is both time consuming and resource intensive. And, as some commentators have noted, one result of these "hybrid" procedures – the multistage process of alerting the public, identifying designated issues, and collecting written and oral comments – is delay.[15]

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[12]15 U.S.C. § 57a(b)(1)(A).

[13]15 U.S.C. § 57a(c)(2).

[14]15 U.S.C. § 57a(d).

[15]William F. West, Administrative Rulemaking: Politics and Processes, 167-71 (1985).

The Commission is also arguably constrained by statute with respect to our law enforcement efforts relating to unfair acts and practices. In 1994, Congress codified the definition of "unfair acts and practices," that had previously been articulated in a FTC policy statement.[16] The statute defines an unfair act or practice as one that "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[17] The statute goes on to require that when determining whether an act or practice is unfair, the Commission may consider "established public policies as evidence to be considered" but that they "may not serve as a primary basis for such determinations."[18] This multi-pronged test, which requires substantial injury and an analysis of offsetting benefits, limits FTC law enforcement efforts somewhat, although I don't think that they have crippled our consumer protection mission.

C. Political Impediments to FTC Law Enforcement

When it comes to political impediments to FTC law enforcement, the best example, and probably the most memorable one for this audience, would have to be our experiences with the initiative dubbed the "Kid Vid" rulemaking.[19] Beginning back in the 1970s, there was a concern about the large amount of television advertising directed to young children, particularly ads for

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[16]Reprinted in H.R. Rep. No. 98-156 at 33 (1983) and 4 Trade Reg. Rep. (CCH) ¶ 13,203.

[17]15 U.S.C. §45(n).

[18]*Id.*

[19]*See* Teresa Moran Schwartz and Alice Saker Hrdy, *FTC Rulemaking: Three Bold Initiatives and Their Legal Impact*, presented at the 90th Anniversary Symposium of the Federal Trade Commission, Sept. 22, 2004, at 10-18, *available at* http://www.ftc.gov/ftc/history/docs/040922schwartzhrdy.pdf.

sugary foods that might cause cavities. Four different public advocacy groups filed petitions with the FTC, seeking various bans, limits and informational disclosures in televised advertising aimed at children.[20] In addition, the FTC staff prepared a comprehensive report addressing these issues and recommending that the Commission begin a rulemaking proceeding to explore possible unfairness and deception in children's advertising.[21] In 1978, the Commission issued a Notice of Proposed Rulemaking (NPR) seeking comment on a number of proposals to regulate televised advertising to children.[22] In particular, the NPR invited comment on three approaches to children's advertising set forth in the staff report: a ban on all television advertising at specific times; a ban on television advertising of highly sugared foods at specific times; and a requirement that television advertising of other sugared food products be balanced with disclosures about health and nutrition.

And, at this point, Congress stepped in. After six weeks of legislative hearings in early 1979, culminating in 6,000 pages of testimony and another 60,000 pages of filed comments, Congress effectively ended the rulemaking proceeding.[23] Responding to strong and widespread criticism of the rulemaking,[24] Congress enacted the FTC Improvements Act of 1980,[25] which

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[20]*See* 46 Fed. Reg. 48,710 (Oct. 2, 1981).

[21]FTC Staff Report on Televised Advertising to Children (Feb. 1978).

[22]43 Fed. Reg. 17,967 (Apr. 27, 1978).

[23]46 Fed. Reg. 48,710 (Oct. 2, 1981).

[24]The Washington Post in fact accused the FTC of trying to be the "National Nanny." Editorial, *"The FTC as National Nanny,"* Wash. Post., Mar. 1, 1978 at A14.

[25]Pub. L. No. 96-252, 94 Stat. 374 (1980).

allowed the rulemaking to continue, but only under a theory of deception, not unfairness. Ultimately, the rulemaking proceeding was terminated by the Commission, in part because although the record showed some cause for concern, there did not appear to be a way to develop workable rules to address those concerns.[26]

D. Desirability of Self-Regulation

As a result, sometimes self-regulation is the best, or even, only solution when constitutional or statutory limitations constrain the government from otherwise acting. Apart from its importance as a "necessity" in such instances, however, self-regulation serves many other valuable functions.

Meaningful self- regulation provides a critical complement to the FTC's law enforcement actions. It relieves the FTC from supervision of some issues, and frees up resources that can be used in other areas. It allows the FTC to focus more efficiently on the activities of those who don't comply with the self-regulatory regime. For example, the FTC receives referrals from NAD, CARU, and the Electronic Retailing Self-Regulatory Program (ERSP) when marketers fail to respond or refuse to comply with findings. A recent case brought by the FTC exemplifies the importance of participating in the NAD process. The NAD requested substantiation from a seller of the dietary supplement Oreganol for print advertising claims relating to the product's ability to kill germs and protect users from viruses. The company refused to cooperate with the NAD, and the matter was referred to the FTC. In August, following a staff investigation, the

[26]46 Fed. Reg. 48,710 (Oct. 2, 1981).

supplement marketers agreed to pay $2.5 million to settle false advertising claims that its products were scientifically proven to prevent or treat colds and flu.[27] In my opinion, a case like this should really remind everyone of the possible ramifications of not participating in the self-regulatory process.

Self-regulation can offer timeliness and cost efficiencies that may not always be present in government enforcement actions or private litigation. As you are all probably aware, the time frames for NAD, CARU, and ERSP actions are very short – the time to respond ranges from five to 15 business days, depending upon the action instituted, and the overall target for completion is 60 business days. Bringing a case against a competitor under the Lanham Act, for example, would be much more expensive, time consuming and burdensome.

The judgment and experience of an industry in crafting rules themselves also can be of great benefit, especially where the business practices are complex and industry members have inside knowledge and experience to craft "best practices."

Self-regulatory initiatives also make good business sense. The more energy an industry puts into regulating itself, the less chance the government will get involved in trying to legislate the same results. In addition, developing and implementing self-regulatory initiatives can protect and improve an industry's reputation and goodwill with consumers. As you all know,

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[27] *FTC v. North American Herb and Spice Co., LLC*, No. 08 CV 3169 (N.D. Ill. filed Jul. 31, 2008), *available at* http://www.ftc.gov/os/caselist/0623214/index.shtm.

one bad apple can spoil the barrel and taint the reputation of other participants, or even an entire industry. Having a rigorous and effective self-regulatory program in place not only assists in keeping down the number of "bad apples," but it also can provide an even playing field for all industry participants and encourage fairness, honesty and integrity between them.

An excellent example of self-regulation working in this fashion is the initiative between NAD and the Council for Responsible Nutrition (CRN) that will increase monitoring of advertising for dietary supplements. CRN, the leading trade association for the dietary supplement industry, has launched an advertising campaign to encourage supplement companies to file competitive challenges with NAD. I think this campaign is wonderful – it empowers supplement companies who are, as the campaign puts it "tired of having the supplement industry referred to as the Wild West," by encouraging them to file a competitive claim with NAD if they see a supplement ad that's misleading, untruthful, or includes claims that can't be substantiated. In addition, it is my understanding that the CRN eventually intends to reach out to consumer publications and advertising agencies and ask for their support in taking responsibility for the ads that they accept and the ads they produce.[28]

Self-regulatory programs can also be effective in mandating conduct and speech in a way that is arguably more acceptable than if imposed by the government itself. To the extent that a self-regulatory initiative goes beyond what is legally required, and proposes further "best

[28]Press Release, "CRN Launches Advertising Campaign Urging Supplement Companies to Support NAD Self-Regulatory Program," *available at* http://www.crnusa.org/PR07_CRN_NAD043007.html.

practices" for an industry, such innovation reinforces the true value of self-regulation. Not only are industry participants complying with the basic requirements, but they are also offering additional benefits to consumers. These best practices can also serve to improve goodwill and business reputations. A good example of this is the Children's Food and Beverage Advertising Initiative.[29] This voluntary self-regulatory program has 14 members, representing many of the largest food and beverage companies.[30] Most of these companies have agreed that all of their advertising directed at children under the age of 12 would promote healthier foods; a few have pledged that they will not advertise to children under 12 at all. Compelling industry to limit its advertising in this way would be difficult, if not impossible, for the government to mandate. As a general matter I would like to point out that while progress has been made on this front, much remains to be done. I urge more companies to step up to the plate and to join the Children's Food and Beverage Advertising Initiative.

II. Limits on Self-Regulation

Self-regulation can be the most appropriate or effective method of addressing issues that otherwise would be difficult for law enforcement to manage because of constitutional, statutory or other political limitations. However, on the flip side, there are some limits upon the use of self-regulation.

First, self-regulation cannot be a substitute for law enforcement. Section 5 of the FTC

[29]Information about the Initiative is available at www.cbbb.org/initiative/.

[30]According to the CBBB website, it is estimated that these companies accounted for more than two-thirds of children's food and beverage television advertising expenditures in 2004.

Act ***directs*** the Commission to prevent persons, partnerships and corporations from "using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."[31] The Commission cannot cede or delegate its law enforcement responsibilities under Section 5. Although self-regulation serves as an important complement to our law enforcement efforts and cooperation with the self-regulatory process often obviates the need for Commission action, the Commission can still investigate matters that have been otherwise resolved by a self-regulatory entity.

Second, self-regulatory regimes also are limited by the strictures of competition law. Standard-setting organizations can run afoul of competition law if their regulations or practices exclude or competitively disadvantage a competitor or a group of competitors. An agreement by competitors to refrain from certain behavior or impose certain industry standards potentially implicates the Sherman Act. An agreement could also unlawfully exclude new competition. It could also unlawfully limit output. These days, such agreements are unlikely to be condemned without consideration of their justifications, but care should be taken to consider these consequences nonetheless.

III. Update on Recent FTC Activities

I would like to conclude my remarks today by giving you an update on some recent activities at the Commission – Operation False Cures, the Airborne settlement, and the Commission's review of the Green Guides.

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[31] 15 U.S.C. § 45(a)(2).

A. Cancer Cure Sweep

Last week, the Commission announced the results of Operation False Cures – a collaborative undertaking by the FTC, the Food and Drug Administration, and "MUCH," the Mexico-United States-Canada health fraud group to reduce consumer harm caused by online marketing of bogus cancer cures. Operation False Cures was a multi-phase attack. After conducting an Internet surf in June 2007 to identify web sites making cancer cure and treatment claims, staff sent emails warning these web sites that such claims had to be substantiated with competent and reliable scientific evidence. Staff then conducted a follow-up review a few months later to identify web sites that had not reviewed or modified their cancer claims. This final review resulted in the Commission issuing five complaints and accepting 6 settlements. These matters involved cancer-related claims for laetrile, essiac tea and related products, and "natural" products, such as mushroom extracts and various blends of herbs and other ingredients.

In addition to the cases brought by the FTC, 17 non-compliant sites were referred to the FDA, 4 to Canadian authorities, and 17 to enforcement authorities in other countries, including China, Switzerland, India, the United Kingdom, the Philippines, Australia and New Zealand.

There are a couple of points I think are particularly important about this sweep. First, the FTC continues to work with its domestic and global counterparts in fighting deceptive and unfair acts and practices. This is an ongoing effort on the Commission's part – to coordinate and leverage our resources. Second, marketing bogus cancer cures is a particularly harmful practice. Some cancer patients, afraid of conventional treatment, may turn to "natural" cures only to find out too late that the treatment does not work. Or, other patients that take conventional treatments

might find that the addition of "natural" remedies has caused unexpected side effects or has made conventional treatment less effective. These types of consumer injury goes beyond the consumer's pocketbook. Third, in conjunction with the announcement of the Operation False Cures cases, staff is rolling out a consumer education campaign regarding cancer and other health claims. This campaign continues the Commission's efforts to educate consumers and to provide them with the tools to avoid injury in the first place.

B. The Airborne Settlement

Another item I would like to touch upon briefly is the Commission's settlement with the Airborne Health defendants. As you are probably aware, last month the Commission announced that Airborne Health, Inc., the maker of a popular effervescent tablet marketed as a cold prevention and treatment remedy, had agreed to pay up to $6.5 million to settle FTC charges that it did not have adequate evidence to support its advertising claims.[32] The defendants added this money to the funds they have already agreed to pay to settle a related private class-action lawsuit, *Wilson v. Airborne, Inc. et al.*,[33] bringing the total settlement fund for consumers to $30 million.

I dissented in this matter because I was concerned about the remedy – the Stipulated Final Order allows the defendants to deplete their existing inventory of paper cartons and display

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[32]Press Release, "Makers of Airborne Settle FTC Charges of Deceptive Advertising; Agreement Brings Total Settlement Funds to $30 Million," (Aug. 14, 2008) *available at* http://www.ftc.gov/opa/2008/08/airborne.shtm.

[33]Case No. 5:07-cv-00770-VAP-OP (C.D. Cal. filed Jun. 22, 2007).

trays until October 31, 2008. I believe that this provision will only continue to perpetuate misperceptions about this product's ability to prevent, reduce or fight colds, sickness and infection. In addition, this version of the packaging also contains claims about Airborne's "immune-boosting" qualities. I would like to have seen the Complaint and the Order address these claims as well. Finally, it is my opinion that the only way to effectively remove these lingering misperceptions would be to require the defendants to engage in corrective advertising.[34]

Another point I would like to make about this case is that it illustrates how important it can be to comply with decisions issued by the NAD. In 2002, the NAD challenged Airborne's print advertisements that created the impression that consumers could protect themselves from catching colds by taking Airborne. Airborne discontinued the ad on other grounds, but the NAD – in a comprehensive case report – outlined the substantiation requirements for making such claims: competent and reliable scientific evidence. In addition, the NAD also reminded Airborne that anecdotal evidence from consumers about the product's efficacy was not sufficient to substantiate claims.

C. "Green Marketing"

The last topic I want to touch upon briefly is the Commission's work on its review of the Green Guides, which is also a good segue to the very next panel, "Going Green." I just gave an

[34] *See, e.g.*, *Novartis Corp. v. F.T.C.*, 223 F.3d 783 (D.C. Cir. 2000); *Warner-Lambert v. F.T.C.*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978); *Eggland's Best, Inc.*, 118 F.T.C. 340 (1994).

entire speech on Responsible Green Marketing in June,[35] and that speech is posted on the FTC website, so I will just reiterate a point or two today.

I think the Green Guides are alive and well, and I am optimistic about their utility in the future. I make this point for two reasons.

First, because the Commission has not brought any environmental marketing cases that relate to conduct described in the Guides since 2000,[36] and one may legitimately ask why that is so. I think the answer relates to the Commission's views as to whether and to what extent the Green Guides' teaching has been absorbed by the firms making environmental claims and whether and to what extent alternatives to Commission law enforcement exist. I think the Guides have been very successful as guides. That doesn't surprise me. I was skeptical when the

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[35]J. Thomas Rosch, *Responsible Green Marketing*, Speech before the American Conference Institute's Regulatory Summit for Advertisers and Marketers, Washington, DC, June 18, 2008, *available at* http://www.ftc.gov/speeches/rosch/080618greenmarketing.pdf.

[36]*Dura Lube Corporation, et al.*, D-9292 (May 3, 2000) (challenging claims that the companies' motor oil additive, among other things, reduces emissions). From 1990 to 2000, the FTC brought 37 cases involving environmental marketing claims. *See* Energy & Environment microsite *available at* www.ftc.gov/energy/ (cases listed under the Enforcement tab of the Environment portion of the microsite).

Since 2000, the Commission has brought other cases, however, that relate to energy efficiency. *See, e.g., U.S. v. Northwestern Ohio Foam Packaging, Inc.*, Civil Action No. 3:06-cv-02407 (filed Oct. 5, 2006)(alleging that an insulation made exaggerated R-value claims for its insulation product); *F.T.C. v. Intl. Research and Dev. Corp. of Nevada, et al.*, Case No.: 04C 6901 (filed Oct. 7, 2004)(alleging deceptive claims about an "automatic fuel saver" device); *In the Matter of Kryton Coatings Intl., Inc.*, Docket No. C-4052, File No. 012 3060 (decision issued June 14, 2002)(alleging unsubstantiated performance and R-value claims for building coatings).

FTC issued the Fuel Economy Guides[37] in 1975, that guides, as opposed to rules, would be obeyed. But they were obeyed by the automobile industry, and I think the same thing is true of environmental claims. Additionally, the extent to which there is self-regulation and private enforcement – through the Lanham Act – in the advertising world far surpasses anything we saw in the early 70s.

Second, my own view is that if the incidence of deceptive claims increases or the enforcement alternatives dissipate, the FTC cop can and should get on the beat vigorously – because these are very important claims in today's world (and they will increasingly be important, I think in our grandchildren's world). Indeed, staff is currently investigating a variety of environmental product claims. Although some of these products may be new innovations – for example, "green" building materials and "environmentally friendly" textiles – and their advertising may use creative terminology, I believe that the current Green Guides, and any revisions to them, will continue to offer an extremely helpful framework to enforce truthful and accurate advertising.

Thank you for your time and interest today. I am happy to take a couple of questions.

[37]Guide Concerning Fuel Economy Advertising for New Automobiles, 40 Fed. Reg. 42,003 (Sept. 10, 1975); *see also* Guide Concerning Fuel Economy Advertising for New Autmobiles, 16 C.F.R. § 259 (2008).