Remarks on

THE IMPACT OF STATE EFFORTS TO REGULATE ADVERTISING

by

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Thank you. I am pleased to have the opportunity to discuss with you today the impact of state efforts to regulate advertising, and I am particularly pleased to be appearing on a program sponsored by the Council of Better Business Bureaus. The Federal Trade Commission and the Council of Better Business Bureaus both believe strongly in the importance of a free and fair marketplace, and we have a solid and good, day-to-day working relationship. On more than one occasion I have cited the work of the Council's National Advertising Division as an example of a successful industry self-regulatory program. The AND and state and local business bureaus review an enormous volume of advertising each year. They routinely achieve quick and efficient correction of questionable ads without the complicated and time-consuming legal maneuvering that often accompanies government intervention.

But my topic today is not the advantages and disadvantages of self-regulation of advertising. It is, instead, the advantages and disadvantages of state regulation of advertising _vis-a-vis_ federal regulation of advertising -- in particular, Federal Trade Commission regulation of advertising.

Recent press reports suggest that the FTC has stopped regulating false and deceptive advertising, leaving that job to state and local governments. Earlier this year, a headline in the Washington _Post_ said, "States Step In To Fight False Advertising," quoting an assistant attorney general from Texas who claimed that the FTC was "understaffed, underfunded, and

under Reagan." Another headline in the Wall Street Journal said, "Firms Fret As States Threaten Restrictions On Ads." An article in the New York Times said, "In the last six years the FTC has been pursuing fewer cases of false advertising . . . so the states are taking over."

These and other reports really make two different allegations. First, that the FTC is not doing as much as it once did to control deceptive advertising. Second, that state governments have stepped forward to fill the void left by the Commission. Let me briefly discuss each of those two claims.

Contrary to what some observers have said, the Commission is not pursuing fewer false advertising cases today than it did five or ten years ago. As one of my colleagues wrote in response to one of the news articles I quoted a moment ago, the FTC's advertising enforcement record has been "remarkably consistent" since 1977. Neither has the nature of those cases significantly changed. Our current caseload includes investigations of both small companies and large ones, such as, for example, our well-publicized recent complaint against R.J. Reynolds. Some of those cases involve clearly dishonest and fraudulent conduct, while others involve more subtle deceptions. Some of the deceptive claims we investigate would, if believed by consumers, jeopardize their health and safety. Others involve purely monetary harm. This "mix" of cases is characteristic of the Commission's traditional activity in the regulation of advertising. Our case

selection record is by no means perfect, but I think the Commission is doing as good a job -- and probably a better one -- with fewer resources than ever before.

What about the second claim, that the states have been forced to do the FTC's job with respect to national advertisers? Again, the facts do not substantiate the claim. The examples cited by the Commission's critics of which I am aware are very few in number. One of the only, if not the only, instance where a state attorney general took formal law enforcement action after the Commission's staff declined to investigate involved Kraft's claim that "Cheez Whiz" is "real cheese made easy." The Texas Attorney General concluded that four Kraft print ads containing that language implied that Cheez Whiz consists of all natural cheese with no other ingredients, even though the ads and the product's label disclose that Cheez Whiz is "a blend of . . . cheeses and other wholesome ingredients." Kraft agreed not to resume publication of the ads, which were part of a campaign that had been discontinued by that time, and it paid Texas $5000 to cover its investigative costs. The agreement not only stated that it did not constitute an admission by Kraft that it had violated the law, but it also noted that Kraft "specifically and categorically" denied the Texas Attorney General's contention that its ads were deceptive.

Another well-publicized instance that supposedly saw a state attorney general rushing in to fill the vacuum left by FTC inaction involved McDonald's ads for its "Chicken McNuggets." McDonald's claimed that McNuggets were "100% chicken" and "made

from whole breasts and thighs." According to a petition filed with the FTC by the Center for Science in the Public Interest, those claims were false because Chicken McNuggets contain chicken skin and are fried in beef-fat shortening. After reviewing the matter, the FTC staff declined to take action on the petition because they believed that McDonald's ads did not make any representations whatsoever about whether the chicken in Chicken McNuggets was skinless, or what kind of fat they were fried in. CSPI then sent its petition to the New York Attorney General's Office, which also concluded that no law enforcement action was appropriate because McDonald's ads contained no unlawfully deceptive claims. New York officials did urge McDonald's to make nutritional information more readily available in its New York restaurants, and McDonald's voluntarily agreed to do so. I understand that other fast-food chains have also agreed to provide such information in New York and several other states.

Do these and the handful of other state actions directed at national advertisers mean that "the states are taking over" regulation of deceptive advertising, as some have claimed? I think not. But there is no doubt that many national advertisers are quite concerned about the possibility. They perceive what an Advertising Age editorial called a "disturbing drift toward piecemeal, crazy-quilt, state-by-state regulation of national advertising."

That concern can be explained in two ways. It could result from a belief that the FTC is a more sophisticated regulator, more likely to interpret advertising claims as reasonable

consumers do than to insist on obscure and unintended implications, or perhaps that the Commission is less likely to impose unnecessarily burdensome corrective provisions on advertisers.

But the concern about state regulation of national advertising seems to be more the result of the desire of advertisers for predictable, uniform regulatory standards. Making the FTC happy is already sufficiently difficult if you're an advertiser. How much more difficult must it be if you serve 50 different masters instead of just one?

While some advertising campaigns are purely local, many are regional or national in scope. The problems that advertisers would face if even a handful of states applied inconsistent standards when judging the content of advertising are obvious. The extra time and expense involved in designing and disseminating different ads in states with different regulatory schemes would increase the cost of advertising and, consequently, would reduce the flow of the useful information that advertising provides to consumers. Particularly troubling would be the ability of a single state to impose its standards on the rest of the nation.

Of course, not all state actions against national advertisers present this problem. The Chicken McNuggets controversy I mentioned a few minutes ago led to McDonald's agreeing to make nutritional information available in its New York restaurants. It was not required to provide that information in the other 49 states as a result of New York's

action -- just as it is not required to meet the standards of New York's health and sanitation codes or pay New York taxes in any other states. But the Texas action had a different effect. It resulted in Kraft's agreement not to republish those allegedly deceptive Cheez Whiz claims in Texas. Practically speaking, however, that agreement is almost as effective a means of ensuring that those ads will never appear anywhere in this country as an FTC order would have been. If you believe those claims were deceptive, you would probably agree that it is unfair to make Texas taxpayers bear the entire burden of regulating deceptive advertising in all 50 states. And if you believe those ads were not deceptive, you also probably would agree that it is not right to allow state officials in Texas to impose their regulatory standards on all 50 states.

That is why I have concerns about Senate Bill 1313, which would authorize state attorneys general to bring cases in federal court seeking injunctions, civil penalties, or other remedies for alleged violations of the FTC Act, FTC trade regulation rules, and FTC cease and desist orders -- concerns that I understand are shared by many national advertisers and other businesses. S. 1313, which was introduced in 1985, was not enacted by the 99th Congress, but I understand it will probably be reintroduced next year. As the Department of Justice said in a letter opposing S. 1313, the bill is inconsistent with the general principle that federal agencies have authority to interpret and implement their own statutes. Interpretation and enforcement of the FTC Act has traditionally been the exclusive province of the

FTC, subject only to review by the courts. Congress created the FTC in part to ensure uniform and consistent interpretation and enforcement of the FTC Act's proscription of unfair and deceptive acts or practices. The courts have repeatedly denied attempts by parties other than the FTC to enforce the Act directly because such enforcement would be contrary to the original Congressional intent. S. 1313 would create administrative problems for the Commission, but the real victims of the uncertainty and inconsistency that could result from its enactment are businesses and, ultimately, consumers.

Recently, when it passed the "Comprehensive Smokeless Tobacco Health Education Act of 1986," Congress not only regulated the advertising of smokeless tobacco products but also explicitly preempted inconsistent state and local regulation. While Congress might choose to preempt inconsistent state regulation of the advertising of other products on a case-by-case basis, I am not aware of any legislative proposals to take away current state authority over advertising generally.

Frankly, there seems to be little reason to propose such legislation at this time. To date, as I noted earlier, there have been only a handful of cases where individual states have taken action that, in essence, regulated advertising on a nationwide basis. The states play an important role in the regulation of unfair or deceptive marketing practices. At the FTC we work closely with the state attorneys general, and we agree much more often than we disagree. I believe that any concerns about "crazy-quilt" regulation of national advertising

that are based on those few instances of disagreement between federal and state authorities are somewhat exaggerated, although no doubt sincere. Inconsistent or duplicative demands from state and federal government officials are part of the price we pay for federalism. And it does not appear that advertising currently bears a heavier burden due to multi-level government regulation than do banking, transportation, health care, or other industries. That burden, however, could certainly increase if legislation along the lines of S. 1313 were enacted.

Thank you very much for your attention. I look forward to the remarks of Lorraine Reid and John O'Toole, and I will be happy to respond to any questions or comments you may have at the conclusion of those remarks.