**STATEMENT OF COMMISSIONER PERTSCHUK
TO THE CONSUMER SUBCOMMITTEE OF THE SENATE COMMITTEE
ON COMMERCE, SCIENCE, AND TRANSPORTATION**

July 22, 1982

The Chairman's proposal to amend Section 5 to specify which practices are "deceptive" is as extraordinarily complex as it is novel. In general, I think it is a well intentioned effort to embody a conservative political ideology into the country's principal consumer protection statute, but with very little appreciation of the risks of doing so. Unfortunately, since the Chairman and now the advertising associations have embraced the proposal, we must take it seriously and try to understand how drastically it would change current law.

Before I discuss the Miller proposal, however, it is useful to review the existing legal standard for "deceptive" practices that has evolved over more than forty years of Commission and court cases. A practice is deceptive if it has a "tendency or capacity" to mislead consumers. 1/ The misleading practices must concern practices which are "material," that is something which makes a difference to people in their purchasing decisions. 2/ "Puffing," that is, statements that are so vague or exaggerated as not to be taken seriously, are excluded. There is no need to prove that the seller intended to mislead

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1/ See, e.g., Charles of the Ritz Distributors Corp. v. FTC, 143 F.2d 676, 679 (2d Cir. 1944). Also, see Kintner, A Primer on the Law of Deceptive Practices (1971) at 33.

2/ See, e.g., FTC v. Mary Carter Paint Co., 382 U.S. 46 (1965).

anyone. 3/ The tendency to deceive is not evaluated on the basis of what an average or "reasonable" person believes but if it would deceive even unsophisticated consumers. 4/ It has never been required that the Commission prove actual injury to consumers, only to prove that practices had a tendency to deceive people. Consequently, harm to competitors or to the integrity of advertising generally has been a sufficient basis for prohibiting deception. Finally, the Commission, subject to the review of the courts, has always been able to analyze claims to determine if they are likely to deceive consumers without contracting for elaborate statistical surveys of the consuming public to establish how many people were actually misled. Evidence of this sort on either side of the issue is considered, however, and frequently presented. 5/ In addition, an advertisement is not deceptive if it will be misunderstood by only an "insignificant and unrepresentative segment of the class of persons to whom the representation is addressed." 6/

These principles have been fairly well understood for many years and have served the Commission and the public well,

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3/ DDD Corp. v. FTC, 125 F.2d 679 (7th Cir. 1942); Bockenstette v. FTC, 134 F.2d 369 (10th Cir. 1943).

4/ "[T]he fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced." FTC v. Standard Education Society, 302 U.S. 112 (1937).

5/ Cinderella Career & Finishing Schools, Inc. v. FTC, 425 F.2d 583, 588 (D.C. Cir. 1970).

6/ Universe Co., 63 FTC 1282, 1290 (1963).

particularly over the last decade. Heretofore, the primary complaint with the Commission's record was that it pursued "trivial" cases, that is, cases against practices which were no doubt technically deceptive, but which didn't affect many people or dealt with information about products that people didn't care about very much. This was the conclusion of the famous 1969 ABA Report, which culminated in a revitalized and aggressive Commission all through the decade of the 70's.

The Commission over the last decade, led by both Republican and Democratic Chairmen, used the existing legal standard to focus on deception which affected millions of consumers, rather than just a few, and which caused major injury. Until a year ago, no one was proposing that the Commission needed a new legal standard to enable it to focus only on "significant" cases. The recent history of the Commission proves just the opposite.

Directly in the path of this historical trend steps Chairman Miller with his very different ideas about what the FTC should do. The cornerstone of his philosophy is embodied in his proposal to amend the deception standard that has been with us since 1938. Although the Commission has never seen actual legislative language which incorporates the Chairman's proposal, I understand it to involve the following changes. Before the Commission could prevail in a deceptive practice case:

-- The Commission would have to meet a certain standard of proof of consumer injury.

-- The Commission would have to prove, not only that less alert, but "reasonable" consumers would be misled by the practice.

-- For groups which are "vulnerable" and are not reasonable in interpreting claims, e.g., the elderly and children, the Commission would have to prove knowledge or negligence on the part of the advertiser.

-- Misleading opinions would be exempt.

Each of these elements has to be analyzed separately to begin to understand the Miller proposal. 7/

Consumer Injury

Miller has made very clear that he feels it's essential to impose a legal requirement that the Commission establish a certain type of injury before we could stop any practice. Although this idea seems to make some sense, in practice it radically changes the nature of Commission enforcement.

First, we should ask what type of injury the Chairman has in mind. Here Chairman Miller and Mr. Muris enter a murky thicket and it becomes difficult to keep up with them. In his Senate testimony, Miller said not only must consumers be hurt, but they must be hurt a lot: "If the product is inexpensive and is something consumers purchase often and can easily evaluate for themselves, the marketplace will work in preventing deceptive ads." 8/ For example, says Chairman Miller, a misleading advertisement for denture cream would not be deceptive because

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7/ The Advertising Associations proposal appears to be basically the same but it does have a few significant differences. I discuss their proposal below also.

8/ Statement to the Subcommittee on Commerce, Transportation and Tourism of the House Committee on Energy and Commerce, April 1, 1982, p. 14.

elderly consumers would only lose a small amount before they learned the error of trusting the ads. 9/

On this basis it would seem we could conclude that there is no deception unless the Commission could prove consumers had lost quite a bit -- $25 maybe, $50? Hard to say. A column in Advertising Age assumed the products would have to cost over $10. 10/ But a recent letter from Mr. Muris to Advertising Age says that the products could be inexpensive after all. 11/ Since we know Mr. Muris supports the Commission's Listerine case, we can conclude that to violate the law, deceptively sold products must cost more than denture cream as long as they cost as much as mouthwash and their brand of mouthwash costs more than denture cream.

Unless, of course, the injury is not economic. In his House testimony, Chairman Miller says we should only bring cases "in which consumers have been hurt -- by spending money, or using time." 12/ That sounds like economic injury, but then he adds, "Of course, this injury doesn't always have to be monetary." The advertisers propose their own striking twist. The injury must cause "substantial economic injury to consumers" unless the advertiser has knowingly lied or engaged in gross negligence. Thus, the advertisers are at least clear that safety risks and

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9/ Miller, "Why FTC Curbs Needed," Advertising Age, March 22, 1982, p. 83.

10/ Advertising Age, June 28, 1982, p. 26.

11/ Advertising Age, July 12, 1982, p. 64.

12/ House testimony, op. cit., p. 13.

emotional injury are exempt unless we can prove something about intent.

We can also be confident that the Miller-Muris proposal does not include economic injury to competitors. That is, if a manufacturer makes a false claim about a small item, say denture cream, and consumers buy millions of them, we can't consider the injury to competitors. The honest advertisers of denture cream can lose sales but the FTC can't stop the false claims which are hurting them. Too bad for the competition.

Must the Commission prove tangible injury to consumers or can we assume injury because people are deceived? Mr. Muris says that the key question is whether "consumers have to give up something of value if the claim is false." 13/ On this basis, Chairman Miller and Mr. Muris don't like cases like those involving deceptive pricing where people aren't really "hurt" even though they are being misled about certain information. 14/

If the Miller-Muris standard were that the Commission had to prove consumers had suffered tangible harm, though unfortunate, it would shed some light of clarity. But Chairman Miller testified that people who bought ordinary hot dogs thinking they were kosher and bread containing sawdust, thinking it was ordinary bread, would be injured under his standard. This would be true even if there were no physical effects from the differences. What would be the injury there, asked Congressman Scheuer:

13/ See Muris, memorandum to the Chairman, March 25, 1982, p. 22.

14/ Id., pp. 23-25.

Chairman Miller: "Let me speak to the sawdust and kosher hot dogs. I think under my proposed standard for deception there would be injury. There would be psychological injury ... it would be evidence on its face that somebody had been damaged, that a person who bought the hot dog thinking it was kosher [had been] damaged." 15/

On the other hand, Mr. Muris says the proposed standard would "easily screen out" Commission cases such as deceptive pricing cases. In these cases, which typically involve claims that a product has been drastically reduced from its "regular" price, Mr. Muris, at least, says this deception is not important -- not even important enough to cause "psychological" damage. Why a false claim of "kosher" causes psychological damage but a false claim about regular prices does not is mysterious.

Now, applying the Miller standards -- which we are urged to adopt because of their clarity -- how would the Commission deal with the following:

a) a false claim that a cigarette did not contain tar or nicotine?

b) a false claim that a food contained no cholesterol or other fats?

It's hard to say what we would have to prove under the Miller-Muris proposal. It could be that the Commission would

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15/ Testimony before the Subcommittee on Commerce, Transportation and Tourism of the House Committee on Energy and Commerce, April 1, 1982, p. 61.

have to prove that cigarettes actually caused cancer in order to stop the first claim. That burden could be met, because of the overwhelming scientific evidence, though the tobacco industry would be the last to agree. But that's the exception. How about proving that cholesterol was bad for people? That's a scientific debate that has gone on for years and won't be proved or disproved in a FTC case. But Chairman Miller's standard could mean that a flatly false claim that a food had no cholesterol couldn't be stopped. Maybe, Chairman Miller would say it's not exempt because there's "psychological injury." But why some deception causes psychological injury and some does not is hard to understand.

In summary, the Miller test for injury is like a puzzle that is solved by looking at clues to find out what it does and doesn't cover. It does cover claims about kosher hot dogs because there is "psychological damage" but it doesn't cover all cases where people are misled. It doesn't cover denture cream because it's inexpensive but the product doesn't have to cost $10. It covers false claims about sawdust in bread, but it doesn't cover false claims about "regular prices." It recognizes injury to consumers which is not "economic" but it doesn't cover injury to competitors or to the integrity of the marketplace.

Another very tricky aspect of the Miller proposal is the requirement that the Commission prove consumers relied on the claim. 16/ To take our cholesterol claim example, the Chairman

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16/ See Muris memorandum, p. 22.

is apparently saying that the Commission must obtain a survey of some sort to insure that consumers bought, say, "Health Way" bacon because the manufacturer claimed it had no cholesterol. Under the existing standard, Commission lawyers would be expected to show only that "Health Way" bacon, after all, really did contain fats. Everybody in the room would rightly assume the claim was material and had a tendency to deceive. Under the Miller standard, Commission lawyers might have to hire a market survey firm first to launch a survey of contented (but misled) "Health Way" bacon eaters to ascertain why they bought it.

Perhaps realizing that the whole idea of proving injury is complicated, Mr. Muris' most recent statement about injury is that the question really amounts to whether consumers "do not get what they want." 17/ Happily, he sounds like he's getting at the current deception standard. If the question is simply whether consumers are likely to be misled, we don't need to change the law.

In short, there are a lot of questions about the injury standard, but this debate is only the first element of the new standard offered in the name of introducing clarity into the law. But that's just the beginning of the maze.

17/ Advertising Age, July 12, 1982, p. 64.

"Reasonableness" and "Vulnerable Groups"

The second component of the Chairman's proposal is the idea that the Commission should measure deception only by whether reasonable consumers are likely to be deceived. What is the Chairman getting at? One possibility would be that a claim should be interpreted only as a majority of people do. However, Mr. Muris has said "any claim may have more than one reasonable interpretation," so apparently the standard would not require that a majority of consumers would be deceived. Indeed, the number of consumers deceived does not seem to be determinative at all. What matters is that those who are deceived are "reasonable people."

But how should the Commission determine reasonableness? Must the Commission obtain statistical surveys in order to interpret all ad claims? Mr. Muris has said that the "interpretation of advertising should not be left solely to the subjective judgments of the Commissioners." However, in discussing the practicality of his own proposal, he also says, "In most appropriate cases, the advertisement itself may be the only evidence necessary" to determine how it would be understood by reasonable consumers. In other words, then -- as now -- the Commission will generally know what an ad means when it sees it.

Mr. Muris doesn't tell us why some claims should obviously be interpreted in a certain way and some should not so it's instructive to consider an example of an ad where he believes the meaning is "apparent on the face of the advertisement itself." He suggests this example: "[O]ur product will kill bacteria. Take it when you feel your next cold coming on." It is likely, he says, that this is a claim that the product will prevent colds. I might interpret the ad this way and so apparently does Muris, but it's not at all clear that the company would agree. In fact, this is the very kind of dispute that lawyers love and companies pay large fees for them to pursue. (I have no doubt some enterprising lawyer will argue the claim can't be read that way because colds are caused by viruses, in addition to assorted other arguments!) What Chairman Miller and Mr. Muris are hoping is that courts will agree with them about what's reasonable. Of course, the courts will on some and won't on others, but precious few will be obvious. For those that are not, it is not at all clear what kind of evidence they would require the Commission to have under the Miller-Muris law. 18/

18/ Under current law the Commission is able to conclude an ad's meaning by examining it but will consider evidence if appropriate. Chairman Miller says that in the Ford case the Commission said, "it should ignore a survey Ford produced." Actually, the survey was considered by the trial judge in a summary judgment motion and the judge decided the motion against Ford. The Commission did not reverse that ruling.

Chairman Miller does seem to object to the population the Commission has included within its protection in the past. What rankles them is the Commission's occasional willingness to consider how claims might be viewed by "that vast multitude which includes the ignorant, the unthinking and the credulous." 19/

The ignorant, the unthinking, and the credulous do not fit well in an economist's view of the world. They do not behave predictably, and they do not contribute to the efficient functioning of the marketplace. However, who among us (or at least our friends and relatives) has not been ignorant, unthinking, or credulous on occasion, or preoccupied with matters more central to our well-being than the optimum brand of analgesics. It is just such inattention that advertisers often seek to exploit. I suspect Chairman Miller realizes it does not set well with Congress to exclude such persons entirely from the protections the government offers the constantly alert consumer.

Thus, the Miller-Muris proposal includes a special provision to protect "vulnerable groups." The principal savings clause for vulnerable groups is that the Commission can stop an ad if it can show that the advertiser "knew or should have known" that the ad would mislead a vulnerable group of consumers. The Commission should have no trouble satisfying this standard, they assure us, because it is done all the time in tort cases (not to mention criminal cases).

19/ Charles of the Ritz Distributors Corp. v. FTC, 143 F.2d 676, 679 (2d Cir. 1944).

The idea of determining that an ad is addressed to a "vulnerable group" can be pretty tricky, however -- both in deciding who's vulnerable and in deciding who's the principal audience. 20/

In addition, intent is notoriously difficult to prove. Consequently, until now, it has been accepted without question by the advertising community and the Commission that the intent of the advertiser is irrelevant to stopping a false claim. Until now, no one has proposed that we should have to establish that a seller of quack arthritis cures knew that his product wouldn't work before the Commission could stop his ads. Most will swear mightily that they sure believe that they work. For Miller, their good intentions are enough.

What I think Miller and the advertisers primarily have in mind is that they don't like the Commission scrutinizing ads for implied claims. They like the approach of requiring the Commission to conduct expensive, national surveys to see how ads were interpreted. And at least Chairman Miller would like to see that happen with a greatly reduced budget. The result will almost certainly be lengthy litigation, endless disputes about the validity of the surveys, and, most importantly, a general slackening in the resolve of advertisers to worry about government scrutiny. Consequently, Miller's elusive search for

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20/ If the Commission couldn't establish the target group was "vulnerable" and didn't have enough evidence to establish how "reasonable" people viewed the ad, the claim couldn't be stopped even if it was clear the claim was false and the advertiser intended to deceive people!

what "reasonable" consumers think would primarily result in hamstringing the Commission's ability to enforce the law.

Exempting Opinions

The third component of Miller's deception proposal is that the Commission can't challenge opinions. A Miller press release says that he wants to prosecute "representations of fact" but not "mere statements of opinion." 21/ Mr. Muris says we should exempt "claims about which reasonable persons would disagree if they possessed all the facts, provided that the claim itself gives a fairly clear indication that it is merely opinion." 22/

In understanding the proposal, we might begin by asking, what's an "opinion." Chairman Miller testified:

> An opinion is something that is not fact. Essentially you cannot test it. Whether a particular statement is a fact or an opinion is the kind of distinction that would have to be drawn. 23/

That would seem to include the claim, "we believe you'll get 50 miles per gallon in our new Economobile," as well as any other claim where an honest belief was being claimed.

Possibly aware of the implications of all this, Chairman Miller adds a host of qualifications and exceptions to the rather startling idea of exempting opinions. First, to be an exempt opinion, it must be "correctly stated." Second, the person

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21/ FTC press release, March 18, 1982.

22/ Muris memorandum, p. 18.

23/ Hearings Before the Committee on Commerce Science and Transportation, U.S. Senate, March 18, 1982, p. 13.

holding the opinion must really believe it. Third, the person must not "misrepresent the degree of his expertise." Finally, the "extent" of the opinion must not be overstated. All these exceptions sound like the Chairman is straining hard to restate current law -- by saying opinions are "exempt" if they're not deceptive.

I do believe, however, that Chairman Miller has a real change in mind, but that he's chasing a small gnat with a very large cannon and threatening to shoot a lot of elephants in the process. I agree that some "opinion" claims are really "puffery," or they're so vague there is no tendency to deceive. The law already recognizes these situations. But Chairman Miller wants to exempt opinion claims, if sincerely and accurately stated, even if almost all other evidence pointed toward an opposite conclusion. Imagine a claim by a scientist in an ad that "Red Cross" brand cigarettes are good for you. Mr. Muris says this claim could be challenged because "there is no reasonable disagreement" that cigarettes have adverse health consequences. That may be, though it's a pretty extreme example. But what about a claim that "Red Cross" cigarettes don't cause cancer? Are we really confident that there is no "reasonable" disagreement about this under the Miller standard? How about a scientist's claim that cholesterol in a certain type of potato chip is good for you? The fact is that such claims are misleading without a fuller disclosure of the actual evidence on such important health and nutritional issues.

Maybe Chairman Miller believes that such an opinion claim is"exempt" so long as the full story is given, but that's another way of stating current law. If that's his view, I agree, but we don't have to change the statute.

Conclusion

After struggling with the Miller proposal, I have come to the tentative conclusion that the Chairman and Mr. Muris are engaged in a wistful exercise of seeking outcomes they like in particular cases by imposing radical changes in the legal standard for judging all cases. Their proposal does serve as something of a learning exercise for us all and, if it's left at that, we may actually have benefited. But the attempt to economically fine-tune the FTC statute, in a futile effort to achieve "efficiency" in law enforcement, could hobble the FTC, and degrade advertising in our country.