Federal Trade Commission

PREPARED REMARKS OF COMMISSIONER JANET D. STEIGER

FEDERAL TRADE COMMISSION

BEFORE THE

BUSINESS DEVELOPMENT ASSOCIATES AGRESSIVE ADVERTISING
and the Law Conference

Chicago, Illinois

February 5, 1996

* The views expressed are those of the Commissioner and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

Good Morning. It is a pleasure to be here and to be the first speaker in this Aggressive Advertising and the Law Conference. Looking over the program, I can say that you will have a fascinating two days. Before I begin, let me make the standard disclaimer that the views I express today are my own and do not necessarily reflect the views of the Commission or any other Commissioner. I would also like to say that in my remarks today I will be discussing Commission cases as illustrations of a particular point, and not to single out any individual company.

I. Commission Philosophy of Advertising Regulation

The very name of this conference -- Aggressive Advertising -- suggests the fundamental tension that exists in advertising policy in the United States. To many in this audience, I am sure that "aggressive advertising" conjures up the image of cutting-edge advertising, aggressively targeting a competitor's franchise or boldly announcing the introduction of a new product or improvements to an old product line, grabbing the consumer's attention and exciting their interest. To others however, the concept of "aggressive advertising" may suggest advertising that cuts corners, shaves the truth or overcomes the concerns of "worry wart" corporate attorneys during their advertising review. In fact, poll after poll suggests that consumers have skepticism about advertising.

At the Federal Trade Commission our goal is to foster a national advertising environment in which we can have aggressive advertising that is also truthful and substantiated. We attempt

to pursue that goal by applying some very commonsense "Rules of the Road" that are pretty much the same no matter what road you travel. The Commission requires that advertisers tell the truth and not mislead consumers whether a claim is express or implied and that all objective claims must be substantiated. We do not and will not pre-clear advertising claims. We believe that that is your responsibility, and we try to encourage advertisers to shoulder that responsibility in a variety of ways including guidance provided through, for example, our Environmental Guidelines, Food Advertising Policy Statement, the Consumer Testimonial and Endorsement Guidelines, and carefully selected law enforcement actions.

II. Future Directions

I know that one of the questions you will be focusing on for the next two days is what changes you can expect in the FTC advertising program. My own view is that you will see relatively few changes in the direction of this program. Thus, I believe that you will continue to see the Commission emphasizing the importance of working closely with the states, industry, and consumer groups as we continue to educate the public and ourselves. At the same time, you can expect that the Commission will continue to be a leader in enforcing high--but fair--deception and substantiation standards. Most changes that do occur will be a natural progression of the advertising program as the Commission, like all other federal agencies, strives to meet its responsibilities.

III. Current Focus of Enforcement

I think that you can see both continuation and progression in the actions the Commission has taken during the past year. We have been active in food supplement advertising, challenged advertising for high octane gasoline claims, and moved against deceptive environmental marketing. Moreover, in cases where we believe the advertising agency has helped create the advertising and knew or reasonably should have known that the advertising is deceptive or unsubstantiated, we have also held advertising agencies accountable. As in the past, much of our focus has been on claims that involve the potential for the greatest consumer harm: those involving health and safety issues. We continue to challenge false and unsubstantiated weight-loss and weight-maintenance claims for diet products or programs. We have also challenged unsubstantiated success rate claims for weight-loss and smoking-cessation hypnosis seminars, varicose vein and spider vein treatments, as well as fertility and impotence treatments. In the food area, we have challenged a number of claims regarding the level of "fat," "saturated fat," and "calories."

IV. Regulatory Review

During the past year the Commission also adopted a sunset policy for its administrative orders. That means that after 20 years orders that have not been violated will sunset. In addition, the Commission has continued to examine our regulatory past.

Four years ago, the Commission began a process of evaluating each of our rules and guides to determine their usefulness. To date we have examined over 50 percent of our rules and guides and eliminated 22 of them. In some instances, technology has changed or other circumstances have rendered the rule or guide obsolete. In still other cases, our guides have become the industry standard and hence are no longer necessary. The Commission has found that Section 5, which prohibits unfair or deceptive acts or practices, will be able to handle potential problems that may arise in the future in areas covered by the guides or rules that have been eliminated.

V. Challenges for the Future

A. Remedies

Despite a record of which I believe the Commission can be justifiably proud, there are a number of challenges confronting the advertising program that I would like to discuss today. One major challenge for the Commission is determining whether the remedies we traditionally use for advertising cases are doing the job. In determining the appropriate remedy the Commission focuses on protecting consumers from future false and unsubstantiated claims, making the consumer whole -- where possible -- and educating consumers. The Commission seeks to stop the allegedly deceptive practice by, for example, prohibiting false claims or requiring that claims be properly substantiated. Injunctive relief also often requires that specific disclosures be made when there has been a deceptive omission. In the Arco Chemical/Safe

Brands settlement,[1] for example, the Commission alleged that the two companies misrepresented that Sierra antifreeze was safer than traditional antifreeze. The settlement, among other things, required that a statement be placed on the antifreeze containers cautioning consumers about the safety of the product.

Consumer education is another important goal for the Commission, but it is not always a part of the remedy. Recently, the Commission required the dissemination of an FTC consumer education brochure as part of a Franchise Rule settlement where the respondent, a franchise-show promoter, allegedly misrepresented the success rate of its franchisees. The settlement required that the Commission's consumer education franchise rule brochure be disseminated at trade shows for the next five years.

In the advertising context, the Commission uses redress to attempt to make consumers whole if it is found that the company was engaged in dishonest or fraudulent conduct, the company has the financial wherewithal to provide such redress, and we can ascertain which consumers are due a refund. Where the conduct meets the dishonest and fraudulent standard but redress is impractical, either because the consumers cannot be identified or there is insufficient money to make redress meaningful, the Commission has obtained disgorgement for a company's ill-gotten gains and directed a payment to the Treasury. Although disgorgement is a remedy the Commission frequently uses in the fraud area, it is also used from time to time in advertising cases. In 1991, for example, the Commission entered into a settlement with Volvo North

[1] Safe Brands Corporation, Warren Distribution, Inc. and ARCO Chemical Company, (consent agreement subject to final approval, Nov. 28, 1995).

America Corporation and its ad Agency, Scali, McCabe, Sloves, Inc., settling charges concerning their "Bear Foot" ad campaign[2].

As you may recall, these ads depicted a monster truck running over a row of cars., crushing all but a Volvo 240 station wagon. The FTC's complaint alleged that some of the Volvos used in the demonstration had been structurally reinforced and subjected to less severe monstertruck treatment than the competing cars, and that structural supports in some of those competing cars had been severed. The orders prohibited deceptive demonstrations and required a total of $300,000 to be paid to the Treasury on a disgorgement theory.

Where a company has violated an existing administrative order the Commission will refer the matter to the Department of Justice and seek civil penalties for violation of that order. There were a number of civil penalty actions for order violations in the advertising area last year. In the Dahlberg, Inc.,[3] matter the Commission alleged that Dahlberg was making misrepresentations regarding its Miracle Ear Clarifier in violation of a 1976 order, prohibiting misrepresentations regarding the performance of its product. The Commission obtained a $2.75 million civil penalty, the largest civil penalty judgement in a consumer protection order violation case. General Nutrition Corporation paid $2.4 million in civil penalties for its alleged violation of an existing order in 1994. And the third largest settlement for a Consumer Protection order

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[2] Volvo North America, Inc. FTC Docket No. C-3367 (Jan. 28, 1992).

[3] U.S. v. Dahlberg, Inc., Civil No. 4-94-165 (D Minn.) (Complaint filed Jan. 25, 1994), 5 Trade Reg. Rep. (CCH) ¶23,536 (1994); consent decree announced in Nov. 21, 1995 press release.

violation was also entered into in 1995 with STP, Inc., for $888,000 for alleged violations of a 1976 order[4] which prohibited STP from making false and unsubstantiated claims for its motor oil additives. You will, I think, continue to see a trend towards larger civil penalties and disgorgement in appropriate cases. At the same times we are strengthening our remedies in appropriate cases, we are also exploring other innovative remedies for violations which may not require formal corrective action. I predict that you will see increased use of these informal remedies in carefully selected areas.

In addition, I believe there are some important opportunities for industry self regulation. I would rather see the industry take steps to correct problems than have the government or Congress step in and create rules and regulations. Industry is generally more aware of where the potential problem areas exist. At the Commission's Global hearings last fall we learned that while network television enjoyed 92 percent of prime time TV usage in 1965, today it accounts for 5 percent. In 1965, only 5 percent of consumers had cable TV. Today 63 percent do. In 1965, the average number of channels available to consumers was seven; today it is 41. This has some very obvious implications for the FTC traditional approach to ad monitoring. And, indeed, during the past year, we have brought a number of cases that illustrate that some fairly obviously deceptive ads are slipping through the cracks in both print and broadcast media screening. Thus, you will see the Commission encouraging better screening of advertising for deception before it runs.

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[4] FTC v. STP Corp., Civ Action No. 78 Civ 559 (SDNY) (complaint and proposed consent decree filed Dec. 1, 1995), 5 Trade Reg. Rep. (CCH) ¶23,935 (1995).

B. Adapting Traditional Consumer Protection Standards to New Media

The other challenge I will address today is applying basic FTC consumer protection principles in a changing environment without unduly interfering with dynamic and competitive market forces. As the explosion of information and marketing technology continues, it seems to me that it is imperative that we all mount a vigilant defense against those who tarnish legitimate efforts to communicate with and market to consumers.

Although our basic mission remains the same, we attempt to apply our standards in a rational and fair manner to meet the problems created by new technologies, new forms of communication, and new marketing strategies. This task has taken a variety of forms, including the adoption of guidelines in the burgeoning areas of environmental marketing and labeling claims, the development of new investigative techniques and legal strategies for attacking telemarketing fraud, the search for harmonization between food advertising and labeling laws, and increased cooperation with our international law enforcement counterparts as we enter the age of the global marketplace. Let me give you some examples.

In 1992, the Commission adopted the Environmental Guidelines in response to petitions from the states and industry and after two days of public hearings. The Guidelines were an effort to reduce consumer confusion by preventing the deceptive use of environmental terms such as "recyclable," "degradable," and "environmentally friendly" in the advertising and labeling of products in the market place. The Guidelines apply general Commission principles to a specific topic by way of examples. We found that our Section 5 precedent was relevant and useful in

addressing the problems that had been developing in the green marketing area. The Commission just recently held a workshop reviewing the Green Guides after their three-year anniversary. Although the Commission has not received any recommendation from the staff, I can assure you that we will look carefully at all the issues raised. I anticipate, however, that there will not be a major overhaul of the Green Guides.

The Commission's 1994 Food Policy statement attempted to harmonize FTC food advertising enforcement with the regulations FDA issued to implement the provisions of the Nutritional Labeling and Education Act. Throughout this effort as well, the Commission sought input from industry, government, and consumer groups. In developing the policy statement the Commission was faced with a wide variety of issues -- including the role of advertising versus labeling, the roles and effectiveness of disclosures in advertising, and the limits of the Commission's deception authority under Section 5. The goal of the Food Policy Statement is to help ensure that the message consumers get from food advertising are consistent with those they see in food labeling today and in the future, given the FDA nutritional-labeling regulations. The Statement cautions advertisers that claims not specifically allowed by the FDA regulations will be carefully scrutinized for deception. It is my belief that our approach has produced results that are consistent with the FDA regulations in the vast majority of cases and that recognizes the legal and practical distinctions between advertising and labeling.

C. Infomercials

As new technologies develop, it is often the unscrupulous who first attempt to use the

new mediums. In 1989, the Commission brought its first action against an infomercial producer. In that case, the complaint alleged deception in the format of the program, but did not challenge the claims made for the product. In the three dozen subsequent infomercial cases involving a variety of products--from diet patches to baldness cures to bee pollen--the Commission has attacked the claims for the product being sold, as well as the format of the show. The creation of the National Infomercial Marketing Association -- NIMA -- and its guidelines demonstrated a commitment by the industry to improving the accuracy of and substantiation for claims made in infomercial advertising. Just last week USA Today reported that companies such as Ford, State Farm Insurance, and Schering-Plough were using infomercials on a cable network that shows only infomercials during prime time. Although we still have some concerns about advertising in this industry, it appears, therefore, that infomercials are clearly accepted in mainstream advertising, and I am told the cost of infomericals reflect that acceptance.

D. 900 Numbers

The 900-number area is another one in which scam operators were quick to spring to action. It provided them with an incredible opportunity to take people's money merely by persuading them to place a telephone call. The Commission was quick to act in bringing law enforcement action in federal district court in the 900-number area. In addition, through the Telephone Disclosure and Dispute Resolution Act of 1992, Congress directed the Commission to promulgate a Rule dealing with many of the problems that had arisen. The Rule, which is primarily a disclosure rule, establishes procedures for resolving consumer billing-disputes for pay-per-call services and requires specific disclosures in billing statements. This Rule which

provides for enforcement by both the states and the FTC appears to have corrected many of the most egregious problems which previously existed in this industry.

E. Cyberspace

The newest challenge confronting the Commission's advertising program is the cyberspace revolution. As General Humphrey stated at the Commission's Global Hearing last fall, the Internet is different for a variety of reasons: computer networks are interactive, computers are portable, users can remain anonymous, and there are low barriers to doing business on the Net. In addition, the Internet is not just an advertising or communications medium, but a delivery medium for products and services, and it operates in an environment of constant technological change.

While I do not have a crystal ball, I can say that I anticipate that the Commission will apply its body of advertising law to issues that arise in Cyberspace; indeed, we have done so already. The Commission has brought actions involving the Internet as a medium involving plain old credit fraud[5] and there are a number of others in the pipeline. As always, the challenge will be to bring cases where there is the most serious consumer injury and attempt to provide the most appropriate remedy to correct the violations. I believe that Section 5 and our past precedents provide a strong starting point for the Commission as a law enforcement agency.

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[5] FTC v. Brian Corzine a/k/a/ Brain Chase D/b/a Chase Consulting, Civil Action No. CIV-5-94-1446 DFL JEM (E.D. Cal.) (Consent Settlement filed Nov. 15, 1994) 5 Trade Reg. Rep. (CCH ¶23,715 (1994).

But Cyberspace is also a medium that is different enough so that it is essential for the Commission to keep itself informed of new technological or marketing developments by working with the states, other law enforcement entities and consumer and business groups. As I have already mentioned, the Commission has used a public forum through workshops and hearings to become informed about new developments in this area, and I am certain that we will continue to do so.

VI. Conclusion

The Commission will meet the challenges the end of the twentieth century brings us. Our tools have proven to be flexible and adaptable in the past, and I think they will hold us in good stead in the future. We have a strong tradition of rational law enforcement and what I believe is an excellent track record in acting judiciously and effectively. However, we are always looking for ways to do our job better, and along those lines, we will continue to work with the states and other government entities in bringing enforcement actions. We will also maintain an open dialogue with industry and consumer groups. But, in order to keep pro-competitive advertising viable, it will take all of us acting responsibly, sensibly, and cooperatively.