TESTIMONY OF

COMMISSIONER PATRICIA P. BAILEY

Before the

Subcommittee on the Consumer

of the

Committee on Commerce,

Science and Transportation

United States Senate

concerning

Proposals to Redefine the Federal Trade Commission's

Jurisdiction over Deceptive Practices

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Mr. Chairman and members of the Committee, I am pleased to have the opportunity to testify here today along with my fellow Commissioners about proposals which have been made in recent months to redefine and narrow the Federal Trade Commission's jurisdiction over deceptive trade practices. As you know, I, together with Commissioners Clanton and Pertschuk, oppose proposals to alter the "deception" standard of Section 5 of the FTC Act and I appreciate this opportunity to explain my views more fully.

All of the proposals which have been advanced so far to alter the statute's language would substantially narrow the FTC's authority over deceptive practices. I oppose them because I am unaware of any sustained criticism of the Commission's exercise of its deception jurisdiction by the business or advertising communities. Those who live with the standards of conduct the agency has developed over the years appear to understand well both the law's parameters and the agency's procedures for enforcing it. My observation is that the system works and works effectively for all concerned. Also, I believe considerable legal mischief would ensue should any change be made, no matter its purpose or intent. Prevention of deceptive practices would inevitably be made more difficult, time-consuming and costly at a time when shrinking budgets demand the opposite.

To understand the potential impact of each of the proposals to redefine deception, it is necessary to analyze critically what such changes would mean to 44 years of precedent defining the agency's and the states' authority to proscribe deceptive practices and therefore how the proposals would affect future federal and state enforcement in this area.

I mention state enforcement because one important aspect of any revision to Section 5 which cannot be overlooked is the impact it would have on state law enforcement. Any changes to Section 5 of the Federal Trade Commission Act could also affect the law in many states which have adopted "little FTC Acts" modeled on the federal law. Forty-nine states and the District of Columbia have enacted statutes more or less like the FTC's to prevent deceptive and unfair trade practices. In many of the states, these "little FTC Acts" track the FTC Act's exact language, and several states either by statute or court decision also provide that Commission cases shall be used in interpreting the scope of state law. */ It is clear, then, that the states would be affected by any limitation of the FTC's authority to police deceptive practices, and to the degree that

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*/ See, e.g., statutes in Illinois, Ill. Ann. Stats. ch. 121 - 1/2 §262 (Smith-Hurd 1960 & Supp. 1981); Washington, Wash. Rev. Code Ann. §19.86.020,.920 (1978 & Supp. 1981); Massachusetts, Mass. Gen. Laws Ann. Ch. 93A §2 (West 1972 & Supp. 1981); Maryland, Md. Com. Law Code Ann. §§13-105, 13-301, 13-303 (1975 & Supp. 1981); Maine, Me. Rev. Stat. Ann. title 5 §207 (1979 & Supp. 1981); and New York, N.Y. Gen. Bus. Law §349 (McKinney Supp. 1981).

confusion and uncertainty over the scope of our jurisdiction followed such a change, the same confusion and uncertainty would also be introduced into state enforcement activities. I believe that the Committee is scheduled to receive testimony on this subject later in these hearings from the National Association of Attorneys General.

The FTC Act has prohibited "deceptive acts or practices" since 1938, and during the ensuing 44 years there have been hundreds of administrative and judicial decisions construing that term. Even before the 1938 Wheeler Lea Amendments added jurisdiction over deceptive practices to the FTC Act, a large body of common law had developed the concept of false, deceptive or misleading trade practices. Since 1938, cases brought under the UCC and other state laws have continued to amplify on these concepts and on the principle that fraud in the inducement of a contract, through misleading representations or material omissions of fact, is illegal.

A large body of case law has developed in this way, and there is little evidence that I am aware of that the authority to prohibit deceptive practices has been used by the FTC, (or the states or private litigants for that matter) in a manner that has consistently injured consumers or businesses--except, of course, for those businesses that have engaged in deceptive practices. Without some substantial indication of what types

of worthwhile business practices are supposedly being stifled by the application of the current statutory definition, Congress is being asked to remedy a "problem" which cannot be demonstrated to exist.

As the Committee is aware, it is no trivial matter to alter 44 years of jurisprudence. If the prohibition on "deceptive practices" is altered, no matter how benign the intentions of those making the change, the natural assumption of the legal community, including state and federal judges, will be that Congress intended to change the actual effect of the law. The inevitable result will be that at least some deceptive practices which are now illegal under current law will become legal, as judges and lawyers are cast adrift from precedent to search for the new law's meaning. Only one thing is certain -- any change will be a bonanza for lawyers. With 44 years of legal doctrine in doubt, every new FTC case will have to be decided in an atmosphere of uncertainty concerning the applicability, if any, of established precedent.

Following a change in the statute, the first step for lawyers representing a company which has been sued by the FTC for engaging in "deceptive practices", no matter how blatant the client's practices, would be to ask the agency or the federal courts to reconsider the action, and determine first whether the lawsuit could be justified under the new statutory standard. Added litigation and delay in the work of the

Commission and the courts is virtually certain. Further, any change could cast into doubt the validity of hundreds of cease and desist orders issued in accordance with past precedent. It is fully predictable that the agency would be flooded with requests to reopen and reconsider all orders issued over the past four decades. This kind of administrative nightmare could also occur on the state level, particularly in states which pattern enforcement on FTC precedent.

Before turning to an analysis of the specific proposals which have been offered thusfar, there is one additional general observation that I would like to share with the Committee. Over the past two or three months since these proposals have been advocated seriously before the Congress, I have had many opportunities to discuss them with Members of Congress and their staffs, the business community, the private bar, consumer organizations, state attorneys general and representatives of the media. On each of these occasions, I have been struck by the fluid and confusing nature of the proposals. Most of those with whom I have spoken cannot agree on the correct interpretation of each proposal or how any or all of them would operate. Indeed, it has often happened that as soon as they have finished debating one proposal, another, completely different suggestion is advanced.

For example, after initially advocating one approach before this Committee last March, it is my understanding that the Chamber of Commerce and the National Association of Manufacturers now advocate a different approach. In addition, representatives of three advertising trade associations, who earlier did not support proposals to redefine deception before this Committee, later testified before the House Subcommittee on Commerce, Transportation and Tourism that they supported Chairman Miller's desire to modify the law, but had different language to propose. Finally, the Committee has before it Chairman Miller's proposal. To my knowledge, however, the Chairman has not yet suggested the actual legislative language he would use to accomplish the modifications he proposes and I have heard several different interpretations of how such language would both read and operate.

Faced with what can only be described as a moving target, the constituencies interested in the subject of the FTC's deception authority have responded in a variety of ways. As mentioned above, the state attorneys general have expressed alarm over the proposals and urged the Congress to consult with them further before any step is taken to amend the statute. Consumer groups perceive these changes as an assault on the FTC's consumer protection mandate and have responded to that effect. The most recent reaction has come from within the business community, and I believe it should not be ignored.

As word of the various proposals becomes more widespread, additional individual reactions from affected businesses can be expected.

In a recent speech to the American Advertising Federation's 1982 national convention, David McCall, Chairman of the Board of McCaffrey and McCall, Inc., said to his fellow advertisers:

> I stand before you as someone whose agency and clients have been stung more than once by the Federal Trade Commission. I have considered them to be arbitrary and unfair on occasion. I, in a flight of rhetoric, even likened their young lawyers to the Baader-Meinhof gang. So, I am not a wooly-head who has no sympathy with the annoyance that people feel for the FTC.
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> However, the Federal Trade Commission is in place for a purpose. And, it is an important one. It is to protect the American consumer against the actions of unscrupulous businessmen. In protecting the American consumer against dishonest practice, it is, of course, protecting the honest businessman -- the vast majority -- against the activities of the unscrupulous businessmen, who are few but dangerous. You can't compete fairly with a crook whose methods and practices are not governed by a reasonable code of ethics.
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> That is the reason why the Federal Trade Commission has asked for substantiation of claims made on behalf of products. That's why the Federal Trade Commission has said that advertising should not be deceptive or unfair. . . .
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> [Now] . . . both of these pillars of public protection have been attacked, and I have found it disappointing to see some of the leaders of the advertising business in full support of Chairman Miller's comments, when even his fellow Republican Commission members were not in agreement. . . .

> [O]ur business must hew to the principle of judging each issue by its impact on the welfare of the public as well as its impact on business.
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> Substantiation of claims and a reasonable demand for fairness in advertising are in the interest of the public and in the interest of legitimate business. I am not the only advertising practitioner who would prefer to see our associations stand in back of these important contributors to a strong Federal Trade Commission.

In response to these remarks, Ronald J. Moss, vice president of Kenyon and Eckhardt, wrote Mr. McCall a letter expressing support for his views on the FTC. Mr. Moss has been kind enough to provide me with a copy of that letter. Among other things, he said:

> Our colleagues in the agency business have short memories. When I started as general counsel to Kenyon and Eckhardt in the sixties, every vigilante with a few dollars and a postal meter could start an avalanche of adverse publicity about an ad or commercial. They did so knowing that with any luck at all, they would become the darlings of some media (preferably the nightly network news, New York Times or Washington Post). Typical of those groups, the attacks were often vicious, subjective and usually grossly unfair.
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> Eventually, the FTC regained its vigor . . . and while I agree with your suggestion that a few of the FTC lawyers were Kamikaze pilots at heart, things finally sorted themselves out and sanity or near sanity emerged. Now our brethren smell an easy victory over a shell-shocked FTC. Budget constraints have already severely limited its ability to do its job.
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> What I think our colleagues fail to grasp is that the media will quickly seize an old opportunity and begin once again to legitimize every crackpot "environmentalist/consumerist" with an axe to grind. Heaven help us!

Mr. McCall and Mr. Moss are both addressing, in different ways, the perception that could be created if the Congress adopts any of the various proposals to redefine and narrow the FTC's deception authority. I find their predictions particularly interesting because they have both been highly successful in a profession devoted to the creation of clear public images or perceptions of given products and services. Beyond the specifics of their viewpoints, the very fact that both chose to speak out on these issues illustrates the absence of any firm consensus among the business community concerning the need for, much less the details of, any statutory change. I hope that this Committee will take the opportunity to explore further these differing views.

Turning to the various proposals, I am aware of three separate propositions contained in them. The first, incorporated in S. 1984 (introduced by Seantors McClure and Melcher) and advocated by the Chamber of Commerce, the NAM and the advertising trade associations, would require the Commission to go beyond proving that a sales claim was false or misleading, and also prove that the ad caused substantial consumer injury which can be quantified. Under S. 1984 and the Chamber/NAM proposal, the Commission would further be required to prove that the benefits of halting such injury do not outweigh the costs to business of ceasing its deceptive

activities or claims, or, that is to say, that there are not countervailing benefits (which accrue from the deceptive practice) which outweigh the consumer injury caused by it.

The second modification, also incorporated into the proposals made by the Chamber, NAM and the advertising trade associations, would allow the FTC only to prosecute claims which consist of misrepresentations "known to be false or made in reckless disregard of their truth or falsity."

A third approach, suggested by Chairman Miller, would (1) require a finding that the challenged act or practice was "material" as that term is understood in the common law; (2) exempt statements of opinion; and (3) limit deception to situations where "reasonable" consumers are likely to be deceived, except in cases where vulnerable groups of consumers are involved and the company knew or should have known a practice was deceptive.

"Actual" Injury and Benefit/Cost Proof Requirements

The bill introduced by Senators McClure and Melcher, S.1984, would require a showing that a deceptive act or practice "causes substantial consumer injury that outweighs the benefits derived from such act." The Chamber of Commerce and NAM have proposed to amend Section 5 to prohibit "...deceptive acts or practices... where such acts or practices directly cause or may forseeably result in substantial injury to consumers and such injury is neither reasonably avoidable by consumers themselves nor

outweighed by countervailing benefits to consumers or competition...". */ The advertising trade associations have proposed instead that deceptive acts or practices should be declared unlawful where they "consist of misrepresentations that directly cause or my foreseeably result in substantial injury to consumers acting reasonably in the circumstances."

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*/ The Commission itself, in December 1980, formulated the "substantial injury/not reasonably avoidable/not outweighed by countervailing benefits" standards in explaining the exercise of its authority to proscribe unfair trade practices. These standards were derived from an analysis of all prior unfairness cases. That analysis took several months and involved a painstaking effort both to describe the development of unfairness law and to distinguish it from the development of deception law. Any effort to apply the unfairness standards to the Commission's deception authority ignores the separate development of these two doctrines and it would be done without the benefit of an in-depth analysis of how the deception doctrine has evolved over 44 years in both federal and state caselaw. (See Letter from Federal Trade Commissioners to Senators Wendell H. Ford and John C. Danforth (December 17, 1980). See also the Commission's opinion in the matter of Horizon Corporation, 97 F.T.C. 799, 847 (1981), which incorporated the standards stated in the letter.)

These proposals appear similar in intent--i.e. to require that the Commission find that costs outweigh benefits before prohibiting deception under Section 5. However, since the Chamber, NAM and the advertisers have discussed in some detail how they intend such a provision to operate, I will focus my comments on their statements. I would note, though, that the kind of approach taken in S.1984 could easily pose the same problems for future Section 5 enforcement that I identify below.

The Chamber of Commerce and NAM have charged that in applying its authority to proscribe deceptive acts or practices, the Commission has ignored the "requirement" intended by the Congress that it prove consumers suffered "actual injury" as a result of the deceptive practice. The Chamber and NAM explain that proof of "actual injury" means proof that consumers would have made a different purchasing decision but for the deceptive misrepresentation. They have criticized a long line of Commission cases, upheld by several federal circuit courts, which stand for the principle that the Commission need not probe the minds of all those who heard the deceptive statement to determine whether they would have bought the product without it; rather, the

Commission need only show that the statement has the "tendency and capacity to deceive" consumers. Their proposal appears to be designed to reverse this doctrine and to require instead that the Commission prove a direct causal link between the deceptive representation and substantial, "actual" consumer injury.

The Chamber asserts that its proposal would not impair the Commission's ability to condemn and prevent "actual" deception. It says that falsehoods and "intentionally misleading" representations have no proper place in a well-functioning free market and that "by their very nature" such "fraudulent" behavior is "intended to inflict and does inflict substantial injury on consumers." Because such conduct "has no redeeming virtue and cannot reasonably be avoided," Commission enforcement actions against such acts or practices could continue under the Chamber/NAM proposal. */

Despite the Chamber's contention that law enforcement efforts against "actual" deception could continue uninterrupted, it is clear that both the Chamber and NAM intend their proposals

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*/ Statement of the Chamber of Commerce (at page 28) before the Subcommittee on the Consumer of the Commerce, Science and Transportation Committee, United States Senate (March 19, 1982).

to change dramatically the burden of proof the Commission must assume to prove even a false (much less a misleading, or unsubstantiated) advertising case:

> [The proposal] would require the Commission to take questionable consumer practice one step beyond the intuitive finding that conduct may potentially or even actually result in consumer injury. The Commission would be required to show, on the record, that the actual injury at issue could reasonably have been foreseen. Thus, the Commission must clearly prove that enough information exists by which the Commission can draw the conclusion that absent federal intervention injury is not only likely to occur, but is foreseeable under the circumstances. (emphasis added) */

Perhaps the most helpful way to illustrate how the Chamber/NAM proposal could operate in practice is to review how it would change the prosecution of one of the Commission's best-known false advertising cases -- the case involving Listerine mouthwash. **/

That case challenged the claim that Listerine could "cure" or "prevent" colds, which was one of several claims included in a typical advertisement for the product. The Commission proved to the satisfaction of the circuit court of appeals that there probably is no "cure" for the common cold and that, in any event,

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*/ Statement of James F. Carty on Behalf of the National Association of Manufacturers (at page 9) before the Subcommittee on the Consumer of the Committee on Commerce, Science, and Transportation, United States Senate (March 18, 1982).

**/ Warner-Lambert Company v. FTC, 562 F.2d 749 (D.C. Cir., 1977).

Listerine was not such a cure. Satisfied by this fundamental finding of false advertising, the court upheld the Commission's order barring future misrepresentations and requiring corrective advertising to reverse the general misimpression in the minds of the American public that gargling with Listerine every morning would prevent colds and sore throats.

Under the Chamber/NAM and advertisers' proposals, future Listerine cases could not be considered in nearly such a straightforward manner. In fact, as I read the proposal, the Commission could be forced to jump through the following procedural hoops in order to find the same violation of Section 5:

First, we would have to conduct a statistically valid survey to prove that a substantial number of the consumers who bought the mouthwash after seeing the ad did so because they thought it would cure colds and not for any other reason. It would not be enough for us to draw the common sense inference that this central claim probably caused consumers to purchase the product; instead, we would have to prove a direct causal link between the claim and their behavior.

Second, once we had proven that a substantial number of people bought the product only because they thought it would cure colds, we would then have to explore whether consumers could have avoided any injury caused by their purchase of the product. Could they, and if so, how long would it take for them to discover that repeated applications of the mouthwash did not dispose of their colds?

Once we had assembled empirical evidence to show that consumers could not discover Listerine's failings for themselves -- by proving through expert testimony, for example, that all colds go away sooner or later anyway and so it is hard to tell whether time or mouthwash "cures" them -- we would then have to explore exactly what kind of injury consumers suffered when they bought the product. Did they pay more for Listerine than they would have otherwise had they not been subjected to the deceptive claim? Even if they did, could the Listerine have helped ease their cold symptoms more than other products and was the additional relief worth the extra money? What was the alternative to Listerine? Another, cheaper mouthwash which was not as good? Or no mouthwash at all? What are the health or cosmetic benefits of using a mouthwash? What if consumers hadn't bought Listerine or any other mouthwash but instead had realized they needed to buy a completely different kind of symptom reliever? Would those other products have been effective? Answers to all of these questions and possibly others could be necessary to demonstrate and quantify the "actual" injury caused by the concededly false advertisement.

Finally, under the Chamber/NAM proposal we would have to show that this injury was "reasonably forseeable" by Listerine. In the original case, the company had some inadequate studies showing that Listerine might help ease the symptoms of a cold. Would these studies immunize its false advertising from an FTC "cease and desist" order? Why should intent be an element of

proof when the remedy for the practice is not criminal but merely a prospective order prohibiting its repetition?

The preparation of the kind of case I have outlined above would be very costly not only for the Commission but also for the respondent company. The higher the FTC's burden of proof, the more information we would have to obtain by compulsory process from the target of an investigation. We would undoubtedly bring far fewer cases, but the targets of those we did bring might soon wish the definition of deception had never been changed.

In addition to severely complicating the prosecution of a straight falsity case, the revised standards of proof could also have the effect of eliminating the Commission's advertising substantiation program because it might be almost impossible for us to establish a causal link between the lack of substantiation and consumer behavior. The purpose of the ad substantiation program is to encourage advertisers to have support for the claims they make before disseminating commercial messages. Under the Chamber/NAM and advertisers' proposals, we might have to prove that had consumers known a specific claim could not be substantiated, they would have changed their purchasing behavior. We might also have to prove that the claim was in fact false since otherwise it would probably be argued that consumers suffered no injury from relying on it.

In sum, the Chamber of Commerce, NAM and advertisers' proposals could require the Commission and the states to carry a well-nigh impossible burden of proof by having to demonstrate that the majority of those exposed to a deceptive claim would

have made a different purchasing decision but for the deception. */ The proposals threaten continuation of the Commission's advertising substantiation program, which is the basis for an extensive network of industry self-regulatory mechanisms. And finally, they would cast doubt on 44 years of precedent and severely complicate Commission's efforts to exercise its authority to proscribe deceptive acts or practices for many years to come.

Proof Requirements Concerning Intent to Deceive or Reckless Disregard of Truth or Falsity

The advertising agencies have proposed that a two-prong test be enacted to define deception. The first, "misrepresentations that directly cause or may foreseeably result in substantial injury to" reasonable consumers is discussed in the foregoing section. The second prong of their test would allow the Commission to prosecute deceptive acts which:

> consist of material representations known to be false or made in reckless disregard to their truth or falsity.

The trade associations stated in their testimony before the House of Representatives that "any definition should require advertisers to act responsibly and should reinforce the requirement for bona fide ad substantiation." **/ I sincerely doubt

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*/ In the case of advertising in the mass media, the Commission would presumably have to track down not only those who saw the ad, but also those who subsequently brought the product.

**/ Joint Statement of the American Advertising Federation, the American Association of Advertising Agencies and the Association National Advertisers Proposing and Supporting Amendments to the Federal Trade Commission Act (at page 9) before the Subcommittee on Commerce, Transportation and Tourism of the Committee on Energy and Commerce, United States House of Representatives (April 1, 1982).

whether either of these laudable goals could be met if the Congress adopts the changes they advocate.

Advertising trade association representatives have said to me that the "intent to deceive/recklessness" standard they propose -- as opposed to the "substantial injury" prong of their two-part test -- would be the standard governing ad substantiation cases. Although the advertisers believe that the substantiation program, and other cases challenging deceptive advertising, could continue under this "recklessness" standard, it is far from clear that the Commission could pursue a credible law enforcement program should it be enacted into law. "Recklessness" is an extremely high legal standard, never before a part of the law governing advertising. To apply it in this area, the courts will turn to the case law of libel and torts, from which the standard is directly derived.

In the well-known cases of New York Times Co. v. Sullivan, 376 U.S. 254 (1964) and Time, Inc. v. Hill, 385 U.S. 374 (1966), the Supreme Court articulated the standard for libel concerning matters of "public interest" as "proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth." The Supreme Court has consistently emphasized that such a high standard for libel in cases involving public officials or matters of public interest is necessary in order to safeguard First Amendment guarantees of free speech and a free press. It is probably unnecessary to point out what is generally conceded: given the "reckless

disregard" standard and the virtual impossibility of proving it, public officials and public figures cannot hope to win a libel case except perhaps in the grossest kind of circumstances.

Commercial speech, on the other hand, was not held by the courts to be entitled to basic First Amendment protections until the mid-1970's. The Supreme Court's most recent exploration of the constitutional protections to which commercial speech is entitled is Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980), where the Court held that a three-part balancing test should be applied in deciding whether an infringement on commercial speech is constitutional: (1) the speech must concern lawful activity and not be misleading; (2) it must be determined whether the asserted governmental interest to be served by the restriction on commercial speech is substantial; and (3) if both inquiries yield positive answers, it must then be decided whether the restriction directly advances the governmental interest asserted and whether it is the least drastic alternative available.

Thus, it is clear that the recklessness standard for libel concerning matters of public interest and the Central Hudson three-part test stand at opposite ends of the spectrum of constitutional protections afforded these very different types of speech. The advertisers ask the Congress to cut the FTC's ability to police deceptive advertising back to the libel standard. Such a change would mean that consumers would have no more protection from deceptive advertising than public

figures have from free-wheeling (and often false or totally unfounded and damaging) press commentary about them.

The second place to look for the legal meaning of "recklessness" is tort law. The term "recklessness" is applied there to actions of gross negligence and has been described as one of "quasi-intent". In the state of Washington to take one example, the courts have held that a person who drove at 50-60 miles per hour without slowing down between a row of parked cars and a truck, all of which were standing with their headlights on and so close together so that there was barely enough room to pass, and struck a pedestrian, was behaving recklessly. Liebhart v. Calahan, 434 P. 2d 605 (Wash. 1967). It is difficult to imagine what kind of dramatically irresponsible conduct an advertiser would have to engage in before its actions reached an analogous level of recklessness. I think we can predict some decidedly bizarre results should the courts ever have occasion to apply the tort standard in FTC advertising cases.

Finally I would point out that all of these proposals and the discussion about them ignores the highly significant point that "deceptive trade practices" is a far wider category than just advertising. To my knowledge, neither Chairman Miller nor

the ad associations have addressed the potential impact of their proposals on the myriad of deceptive practices challenged by the Commission and the states over the years which have nothing to do with advertising. For that reason alone the Congress should hesitate to alter this statutory standard pending at least a review of the impact of a new statute outside the world of Madison Avenue.

Chairman Miller's Proposals to Redefine Deception

Chairman Miller has proposed to redefine deception by incorporating a "materiality" element, exempting statements of opinion and limiting the agency's jurisdiction to practices which would deceive only "reasonable" consumers, except in those cases involving practices aimed at vulnerable groups where instead of having to demonstrate "reasonableness" on the part of members of vulnerable groups, the Commission could show the proposed respondent "knew or should have known" the practice was deceptive.

A "material" misrepresentation, under the common law, is a misrepresentation on which consumers are likely to rely to their detriment in making a marketplace decision. The Commission and the federal courts have already construed Section 5 to apply only to "material" misrepresentations. */ However, the Courts have recognized that the Commission may reasonably infer that a deceptive statement would materially affect consumers' marketplace decisions without requiring the Commission to conduct an expensive survey of actual

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*/ FTC v. Colgate-Palmolive, 380 U.S. 374, 392 (1965).

consumer behavior. If addition of an express "materiality" standard to the FTC Act would mean imposing this type of proof requirement before the Commission can prohibit a demonstrably deceptive practice, the Commission will find it prohibitively expensive to pursue many cases of false advertising in the marketplace for the same reasons noted in my comments on the Chamber/NAM proposal. If the Chairman's change is not designed to eliminate the Commission's authority to infer materiality, then the change is unnecessary. Unfortunately -- or fortunately -- however, courts do not assume that Congress legislates for no purpose and so any change is likely to invite litigants and judges to read in the proof requirement noted above.

As for the second change, limiting deception to statements of "fact," not "opinion," I would observe that existing law already makes that distinction to the extent it is desirable, and the proposed modification is likely at best to sow confusion and at worst to provide a refuge for future false advertising.

The FTC and the courts have long recognized that "mere puffery" is not actionable by our agency. If a claim is not objectively verifiable, and is by its nature a matter of opinion, an advertiser cannot be sued for making it. For example, the statement "our cookies taste best" is clearly puffery. So is "our gasoline puts a tiger in your tank" or "Coke is the real thing." On the other hand, the statement "you can earn $100,000 a year as our franchisee" is a statement that can be verified by experience and supported by analysis, and an advertiser will be held liable for its accuracy and supportability.

Explicitly limiting the ban on "deception" to statements of "fact" invites the unscrupulous to dress up misleading statements in the guise of opinion, in order to take advantage of the express exemption granted opinion statements. */

The third proposed change would inject a requirement that consumers behave "reasonably" before they are entitled to protection by the FTC. For vulnerable groups like children or the elderly, the Commission would have to show that a company "knew or should have known" the practice was deceptive.

As the law now stands it protects against any claims likely to deceive a substantial number of citizens. No inquiry is required to determine whether the conduct of those fooled meets some undefined standard of "reasonableness." In practice, of course, the Commission would not pursue a case involving conduct that would be likely only to fool someone behaving capriciously. The difficulty with the proposed change is that it could be read as a direct repudiation of the existing judicial standard, which was designed to protect the average consumer from deception.

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*/ If the Chairman's standard is meant to turn on "substance" rather than "form" (i.e. whether consumers actually understand a statement to be one of opinion or one of fact, regardless of whether the word "opinion" is used), then the standard will add nothing to existing law except confusion and litigation as lawyers and judges struggle to determine just what change the new provision is intended to effect. For an example of existing law that already draws this distinction, see Koch v. FTC, 206 F. 2d 311 (6th Cir., 1953).

Take, for example, the following quotation from a 1942 case involving the sale of a product called "Triple X Compound", which had been advertised as a cure for delayed menstruation in women. The product was both ineffective and dangerous. The advertiser argued that its artfully worded advertisements did not literally claim the product would be effective and that consumers (especially reasonable ones, presumably) should have understood the literal meaning of the ad. In rejecting this argument, the seventh circuit Court of Appeals wrote:

> The law is not made for experts but to protect the public--that vast multitude which includes the ignorant, the unthinking, and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions....Advertisements are intended not to be carefully dissected with a dictionary at hand, but rather to produce an impression upon prospective purchasers. Aronberg v. FTC, 132 F.2d 165, 167 (7th Cir. 1942).

Would this case be overruled by a reasonableness requirement? Perhaps that is not the intent of the proposal but it is by no means certain what kinds of consumer behavior could be labeled "unreasonable" by the courts. To cite just a couple of examples: is it "reasonable" to buy undeveloped land sight unseen? Tens of thousands of consumers have done so and, where the Commission found the sales pitch they were given was deceptive, we have obtained redress for them. Is it reasonable to permit yourself to be baited and switched to a more expensive product than you went to a store to buy? You are always free to leave the store and I can easily envision a court holding that "reasonable" consumers would have avoided being deceived by this practice which is routinely held to be deceptive.

As for the suggestion that the Commission prove that a company "knew or should have known" a practice affecting "vulnerable" groups was deceptive, I believe that an intent standard is certainly reasonable in a law that imposes monetary fines on an individual, and that standard already applies in the FTC Act where penalties are permitted. */ But the FTC Act is also remedial. It is designed to protect consumers from false advertising and other deceptive practices, not to punish business. On the contrary, the law protects honest competitors from the effects of these practices. The only relevant question in determining whether to challenge a practice should be whether the practice is deceptive, not whether the person engaged in it knows it is.

If a company is engaged in a campaign of false advertising, and this can be proven, it should not also be necessary for the government to show that the company should have known its advertising was false before the false ads can be halted. An advertiser's intent does not mitigate injury to customers and competitors caused by false advertising. Further, the knowledge standard could be read to mean that a businessperson could only know that his or her practices were deceptive if the same practices had been challenged in some other context before. Thus, the change could have the effect of introducing an actual notice requirement into the law, thereby virtually freezing the development of consumer protection at the date of its enactment. It is

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*/ See 15 U.S.C. §45(m)(1)(B).

very possible that the adoption of this standard would make it more, rather than less difficult for the Commission to protect vulnerable groups.

In an effort to respond to many of the concerns I and others have raised about the Chairman's proposals to redefine deception, the Director of the Bureau of Consumer Protection, Timothy J. Muris, has written a lengthy memorandum explaining how the new standards are intended to operate. The primary troubling feature of Mr. Muris' memorandum is not that his explanations concerning how the revised law would operate are not sensible, but is instead that there is no guarantee whatsoever that the courts or the Commission could or would apply the standards in the manner he says they are intended to be applied.

For example, the memorandum states:

> [A reasonableness] standard, however, would not impose any significant barrier in those cases that the Commission <u>should</u> prosecute. It would not require surveys or other extrinsic evidence in all cases, indeed, such evidence would be necessary only in that small class of 'close' cases. (emphasis in original) (page 11)

I find this purported explanation of the way his new statutory standards would be applied facile and hence disturbing. If his standards for case selection were used as internal guidelines by the Commission (which in fact in large measure they are), then I agree with them. That is the way they should work and the Commission tries very diligently to weed out "mistakes" in close cases. But we are here today because it is proposed that these standards be inserted into a statute, and I would only reiterate that if that were done the state and federal courts will not

assume that the Congress inserted them for no reason. If a standard as well developed in the case law as "deception" is altered, the courts will rightly assume that Congress intended to change the law. Most of our cases, "good" or "bad," are appealed to the federal courts, which have the last word. It seems distinctly unlikely to me that federal judges, faced with a new statute, will allow the Commission to instruct them about "good" and "bad" and to tell the court when (because the Commission says the case is good) the court should continue to follow previous law and allow inferences of consumer injury and harm, and when (because the case is close) the court should follow the new law and require survey evidence as to an ad's meaning and proof of actual injury and actual harm to consumers. It seems much more likely to me that the new statute would be read to require detailed consumer survey evidence documenting the Commission's interpretation of all allegedly deceptive advertising, however blatant or obviously false the Commission finds it to be. This kind of evidence will be expensive and burdensome to produce -- and the advertisers will share that burden with the Commission. The predictable result is fewer cases and far more lengthy proceedings to resolve the few that are brought.

A similar problem arises in Mr. Muris' discussion of how the Commission would go about proving that deception caused "substantial consumer injury." He writes in his memorandum:

> A requirement that the Commission in fact prove that this kind of injury is likely before it finds an ad deceptive is not a requirement for quantitative cost-benefit analysis in advertising cases.

> Nor need injury be measured in monetary terms. Rather, in most instances, a logical inference that injury is likely to exist would suffice, subject, of course, to rebuttal by the respondent's evidence. (emphasis in original) (page 22)

Even assuming that the Commission could distinguish between cases where a "logical inference" of injury would be appropriate and those where it would not and that the courts would accept our distinction without question as within our discretion (which is doubtful), some extensive documentation of injury would almost always be necessary to meet the respondent's inevitable evidence that consumers were not materially harmed by the proven deception. Once again, I emphasize that I agree with Mr. Muris that the Commission should focus its limited resources on cases where deception can cause the greatest injury to consumers. But once we have proven a claim is false, or unsubstantiated, we should not also have to examine what the product was really worth to consumers or what opportunities for benefit they missed by buying it rather than some other product.

In an effort to explain how the proposal would screen out cases where no injury occurred, Mr. Muris cites the recycled oil cases where the Commission found that it was deceptive to sell recycled oil without disclosing that the oil was, in fact, recycled. Since there is no difference in performance between recycled oil and oil refined from virgin crude, Mr. Muris concludes that no injury occurred, despite the Commission's undisputed finding that consumers preferred the product made from

virgin oil. Mr. Muris argues that had consumers realized the equivalence in performance of the two products, they would not have had an irrational preference for the virgin oil. I do not disagree with that conclusion, although Mr. Muris does not explain why sellers of recycled oil could not claim equivalent performance at the time they disclosed that their product was recycled. But I find the implications of his analysis troubling. Is the FTC to become an arbiter of consumer taste, judging what is good or bad for consumers in the guise of an economic analysis of consumer injury? Once again, the courts' inability or unwillingness to follow Mr. Muris' carefully constructed interpretive rules could lead to this result.

I would also point out that Mr. Muris' otherwise thorough memorandum does not discuss the ramifications of his proposal for the Commission's advertising substantiation program. Representatives of two advertising trade associations have informed me that they do not believe the proposal will affect the substantiation doctrine, which is based in large measure on the Commission's deception authority and forms the underpinning of the industry's own self-regulatory program. I believe they are wrong. In order to prove or even to infer injury, as a statutory requirement, the Commission would, it seems to me, have to prove that the claim was false -- i.e. that the product lacked the attribute the advertiser or seller claimed for it. It seems quite unlikely that the Commission could show that a claim which was simply unsubstantiated (or made without a

reasonable basis to believe it was true--as opposed to being plainly false) caused the kind of concrete, measurable injury that is contemplated by the proposal. Thus, the entire substantiation doctrine would be called into question, if not shortly disregarded.

In closing, I would note that in developing his proposal, the Chairman has identified several past Commission cases which he believes were serious mistakes and which he believes could not be brought under a weakened test for deception. In one of the cases the Chairman cites (Kroger, Docket No. 9012), I dissented from the majority's finding of liability and discussed at some length why I thought the Commission's interpretation of the advertisement as deceptive was misguided. And while that is true and remains my opinion of that case, I do not believe that that dissent, nor any of the other cases cited by the Chairman, supports a modification of the deception standard for several reasons:

First, it makes no sense to me to jeopardize the results of hundreds of good and sensible cases in order to preclude a handful of ill-chosen ones which may have been brought over a 44 year period. Second, the proponents of a weakened deception standard have given absolutely no indication at all of just how their various new standards would operate to eliminate the ill-chosen cases and at the same time enable the pursuit of meritorious cases without making prosecution of such "good" cases excessively burdensome, time-consuming and expensive. For example, if the new standard would operate to prevent one of the

allegedly ill-chosen cases by requiring the Commission to produce a survey to prove that consumers relied on a false claim, instead of being able to infer reliance as it now does, then it is fully predictable that courts will similarly read the new standard to require a survey in a strong, meritorious case. While the Commission would theoretically be able to obtain such a survey in a strong case, it has not sought to do so in many cases involving blatantly false claims both because such evidence is not required under current law and because of the substantial time and expense involved.

Undoubtedly the Commission has on occasion brought ill-advised cases, just as other prosecutorial bodies have. But the solution for that problem lies in the exercise of better prosecutorial discretion, not in weakening the law in a way that threatens to make the large majority of justifiable cases much more expensive and difficult to bring. A law long in operation should be changed where there is a potential for serious abuse that can be remedied. In this instance, the proponents of a change in the deception standard have not pointed to any serious abuse, nor do I believe they have thought through the consequences of their proposals on the vast majority of the agency's cases. This is in part, no doubt, because those consequences are, in all honesty, impossible to predict.

I do not believe that most honest businessmen and women have any interest in weakening the laws that prevent deceptive commercial practices. The proposed change, while accomplishing no significant benefit, will enormously complicate, lengthen, and make more expensive the task of FTC attorneys who must endeavor on dwindling resources to prevent deceptive practices. Especially at a time when we have pledged to deliver to the public more value for less money, I must take strong issue with a legislative proposal that will almost certainly effect the opposite result.

Thank you. I will be pleased to answer any questions you may have.