



Federal Trade Commission

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FEDERAL TRADE COMMISSION

before the

AMERICAN SOCIETY OF ASSOCIATION EXECUTIVES

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I'm delighted to be here today. While preparing my remarks, I reflected a bit on the nature of your profession. My first thought was that there has to be an easier way to turn a dollar than managing an association. You are asked to find common ground among dozens of association members, on the most divisive political and economic issues. When you succeed, the result is often a compromise that emboldens your enemies and disappoints your friends. And then you follow this with a request for dues. Like root-canal work, this process has only one attraction: it feels so good when it stops.

On further reflection, though, I concluded that your profession must also be an exciting one. You're at the vortex of industry's love-hate affair with government regulation. On the one hand, some members clamor for association action to eliminate costly government regulation. Other members -- or maybe some of the same members -- simultaneously cry for government intervention to halt foreign imports, to restrict new entrants into your field, or to limit free competition in other ways. Your work addresses some of the great issues of the day, and many of you will be on the front lines of the lobbying wars to come.

With that in mind, I'm here to do a little lobbying of my own. I will describe the villains in this piece -- the loud voices that press for regulation of foreign trade, for re-regulation of domestic industries, and for suppression of certain types of truthful advertising.

Second, I want to suggest to you the ways that associations, in the face of these pressures, can serve the consumer and their country, as well as their members.

Let me begin by disclosing my biases. As I have made clear on other occasions, there are three propositions that guide my efforts at the FTC.

The first is that competition leads to the optimal allocation of society's resources and to maximum consumer welfare. This is the premise of the antitrust laws. As Mr. Justice Black of the Supreme Court wrote in the case Northern Pacific Railway v. United States, the Sherman Act was designed to be a

comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

The second proposition guiding my efforts is a corollary of the first -- restraints on competition misallocate resources and reduce consumer welfare.

Third is my belief that the principal source of restraints on competition is government. In stressing this, I am in no way suggesting that private restraints cannot be a serious threat to competition. They can, and I assure you that the FTC will vigorously pursue anticompetitive private conduct. I also am not suggesting that government regulation is never justified. I believe, conservatively, in regulations requiring us all to drive on the right side of the road, as well as placing the Surgeon General's health warning on cigarette packages. I intend my remarks as a reminder that the State has as much opportunity as private parties, and a great deal more power, to deny citizens the economic, social, and political benefits of free competition. And it does so, when it unnecessarily interferes in the workings of the free market.

Today, the loudest pleas by industry for government intervention -- some of my villains -- involve foreign trade. Congress is now considering a wide range of legislative proposals affecting international trade. Many of these are protectionist and would impose billions of dollars of costs on consumers each year. Trade restrictions already cost the economy over 50 billion dollars annually. To a large degree, this is because import restrictions eliminate competitive foreign products from the marketplace, and hence lead to increased prices and to reduced choices for American consumers. In addition, some proposals increase the likelihood of further price hikes because they exempt domestic firms from various aspects of the antitrust laws. The last time protectionism had this degree of support, Congress enacted the Smoot-Hawley Tariff Act. That legislation helped plunge the world into the Great Depression.

There is further trouble on the domestic front. Many academics, consumer lobbyists, and politicians are gearing up to regulate -- or in some instances, "re-regulate" -- some industries. Financial markets are one target, perhaps not surprisingly, given the highly publicized abuses on Wall Street. Anticompetitive bills that would set ceilings on credit card

interest rates or ban physician dispensing of prescription drugs are under study. Some in Congress are also considering greater regulation of broadcasting stations and other industries. This turnabout in mood has prompted President Reagan to re-establish his Task Force on Regulatory Relief, which had been abolished in 1983 after its considerable accomplishments.

These two trends -- increased calls for protectionism and for greater domestic regulation -- directly affect many of your associations. I want to emphasize also another development that at the moment may affect most of you only indirectly, but one that could change the commercial landscape in the future. This is the growing pressure for government bans on the truthful advertising of lawful products. Two years ago, we saw a proposal to ban alcohol advertising.¹ Last year came a proposal to ban tobacco advertising.² Again this year, we see bills to ban tobacco ads.³ The justification given for depriving citizens of information is that they are better off without it. This is a trend we should all view with alarm, whatever our views concerning the particular products.

Let me suggest, if I may, three ways that associations might help our country and the consumer.

First: Resist the urge to request government to insulate your industry from competition. Although the road of competition may be painful in the short run, you may find your association a healthier, stronger set of competitors in the long run.

Second: Where the market is not operating correctly, consider reasonable, pro-competitive, self-regulatory measures rather than requests for mandatory government regulation.

Third: Avoid self-regulatory restrictions on truthful advertising, and oppose government advertising bans. Advertising bans will injure consumers, and they offend our political traditions of free speech.

¹ Hearing Before the Subcommittee on Alcoholism and Drug Abuse, Committee on Labor and Human Resources, United States Senate, 99th Cong. 1st Sess., February 7, 1985. Hearing Before the Subcommittee on Telecommunications, Consumer Protection and Finance, United States Senate, 99th Cong. 1st Sess., May 21, 1985.

² H.R. 4972, 99th Cong. 2d Sess. (Mr. Synar and others) (introduced June 10, 1986).

³ H.R. 1532, 100th Cong. 1st Sess. (Mr. Whittaker) (introduced March 10, 1987), H.R. 1272, 100th Cong. 1st Sess. (Mr. Synar and others) (introduced Feb. 25, 1987).

My first suggestion can be restated as, "Don't ask the government for special favors." Now, I wasn't born yesterday. I know that asking a trade association not to ask for special favors is like asking a duck not to swim, or a Congressman not to legislate. I fully recognize that many of you in industries hard-hit by imports will seek government intervention. However, to those of you still on the fence, or who are being asked to take sides, I make an appeal for enlightened self-interest. My message is that in the long run competition will be good for the country, and that should be good for you.

That's easy to say, especially for a government regulator. I know that competition can be painful and isn't always pretty. I once suggested, facetiously, that we give a prize each year to the largest company to go bankrupt, not to encourage failure, but to make the point that failure is not an entry barrier to Heaven. In a competitive economy, where consumers are free to vote with their dollars, some people and some firms will fail because they won't receive enough votes. When we interfere with the economy, we are really interfering with the "election" those consumers participated in. That interferes with their liberty. That liberty includes consumers' liberty to buy foreign goods -- painful as that example may be to some.

It's difficult to advocate free trade without sounding insensitive to the jobs issue. I am not insensitive to that issue, but I do have a broad view, which I recommend to all who are concerned with the economic health of the country as a whole, not just the health of a special interest. If the issue is jobs, we must be concerned about the jobs of all workers, not just of those most visibly affected by foreign competition. Economists have found that rising imports correlate with economic growth. The undeniable fact is that during the last four years when imports were rising, employment rose too. To be sure, cheap oil imports may cut jobs in the oil patch. But many other new jobs were created in industries dependent on oil as a raw material or fuel.

In addition, there are abundant examples of how protectionist restraints have injured American consumers. One is the voluntary restraint on automobile imports from Japan. The VRA's have had the predictable -- and predicted -- effects: fewer cars than consumers wanted, at higher prices than they would have had to pay. Most of the benefits, in the form of economic rents due to the quotas, went to Japan. No wonder their restraint was voluntary. Domestic producers, shielded from their most serious competition, raised their prices as well -- and also applauded the concept of voluntarism. As syndicated columnist Hobart Rowan said: "The quotas work out to be a wonderful cartel instrument for the big boys in Tokyo and Detroit; only the consumer gets short-changed." Mr. Rowan was correct, but incomplete. He neglected to touch on another political aspect:

that auto workers benefited from the quotas, as well as the big boys -- the corporate executives.

The fact is, we simply have to allow our economy to restructure itself, to fit the new realities of the globalized marketplace. Painful as it often is, continued readjustment will keep us lean and fit in the world economy. Protectionism merely slows down the process and makes it more difficult for everyone. Look at what protection from domestic market forces has done to the farming industry.

I believe also that associations have a public duty to think twice about asking for protection from domestic competition. In many places today, before a person can become a barber, or a funeral director, or an auto mechanic, he has to secure the State's permission. Are these impediments to entry into the free market always necessary? Unlike protectionist proposals, which tend to emphasize jobs, requests by industries for regulation of entry by domestic competitors are often cast as pro-consumer. But the consumer may be the victim where licensing boards become a vehicle for limiting supply or suppressing innovative products or services.

Our concern here is attempts by people who have been given some market power by the state to grab additional power. Health care providers, regulated by every state, are but one example. Some regulation may be appropriate. But at times we find doctors, hiding behind their state licenses, conspiring to prevent other doctors from establishing new types of practices that will compete with their established fee-for-service system. Or conspiring to prevent non-doctors or non-specialists from performing the medical services they are licensed to perform. For example, oral surgeons are sometimes prohibited from performing oral surgery in hospitals. Podiatrists in some places are denied hospital privileges. The actions of the doctors and hospitals in these cases are sometimes prompted, not by concern for the competence of the non-specialists, but by the doctors' concerns over competition.

As all of us in this room well know, the medical profession is not the only one that at times seeks to restrain competition. There are others -- though not, of course, lawyers . . . although I confess that I myself distinctly remember thinking, only a few moments after I learned I had passed the bar exam, that it really should be made tougher in future years.

This is a natural instinct: to keep life easy and avoid the rigors of competition. At times there may also be the good-faith desire to preserve an industry's image in the face of unscrupulous competitors. Whatever the impulse, I urge you to consider alternatives to requesting mandatory government regulation.

My second suggestion concerns self-regulation. In urging you to resist requesting special favors from government, I am not suggesting that competitive markets always operate perfectly. Certainly, the vast majority of commercial transactions work well without interference. However, there may be occasions when some kind of regulation is in the consumer's interest. One example might be where unscrupulous sellers of complex products have caused widespread injury due to consumers' inability to distinguish between good and bad products.

In such circumstances, an industry and its customers have a couple of choices. Either they can ask government to intervene, perhaps with mandatory codes or licensing schemes, or they can try to isolate the problem and address it through reasonable, pro-competitive, self-help measures.

I would strongly urge your associations to explore the latter. There are many examples of beneficial industry self-regulation. One example is reasonable product standards that can reduce the costs of transactions. Another example is the advertising industry's cooperation with the Better Business Bureau's advertising review programs.

Such self-regulatory programs have a number of natural advantages over government regulation. Industry members generally will have a better feel for the true nature of the market problem than will government regulators. Presumably, they also have extra incentives to find flexible solutions attuned to changes in circumstances.

And, finally, self-regulation, like a product, may be discarded when the need for it disappears. Government regulations, by contrast, acquire constituencies on Capitol Hill, and come to have a life of their own. A prime example is the agricultural marketing order legislation that was enacted 50 years ago. Market orders permit agricultural producers to operate cartels. However, in the 50 years since marketing order legislation was enacted, there has been a revolution in agricultural production, transportation, and financing techniques, which has long since eliminated any need for market orders -- assuming there ever really was one. But the loud-voiced cartel members pay large sums to lobbyists to "encourage" legislators to keep the special interest legislation intact.

Some of you who have battled with the FTC may be thinking: "Right. Chairman Oliver tells us to regulate ourselves, and then the Commission attacks us for restraining trade." Well, my message does come with a disclaimer.

If, in trying to address a genuine consumer problem, you use

the self-help program as an excuse to restrain trade unreasonably or to dupe consumers, we will come after you.⁴

The dividing line between reasonable and unreasonable self-regulation is not always obvious, and time does not permit a full examination of this question here. However, one test should be, "Does this program increase informed consumer choice?" A program that makes life harder for competent innovators, or paternalistically assumes that traditional producers know what's best for the consumer, does the consumer no favor. For those of you who are unsure as to the reasonableness of proposed self-help measures, we stand ready to give advice.

From the foregoing, it should be obvious that I believe more information is better than less -- which brings me to my third and final suggestion: Resist bans on truthful commercial advertising, whether instituted by industry or by government.

I should emphasize that the Commission has never taken the position that associations cannot take reasonable steps to control deceptive advertising by their members. It has been associations' blanket suppression of non-deceptive advertising that has sparked Commission action.

One celebrated FTC action was its suit against the American Medical Association.⁵ The AMA's code of ethics once prohibited virtually all means of disseminating truthful information to consumers. By 1977, the code had been revised to allow certain forms of advertising, but it still prohibited statements that were "self-laudatory." Because all advertising is to some degree self-laudatory, the code could still have constituted virtually a total ban. So the FTC challenged the code, and the Court of Appeals agreed with the Commission. Since the AMA case, the Commission has challenged other self-regulatory bans on truthful advertising.⁶ The Commission has also entered into consent

⁴ E.g., Federal Trade Commission v. Indiana Federation of Dentists, 106 S. Ct. 2009 (1986) (concerted refusal by dentists to provide x-rays to insurers in connection with insurer cost-containment program).

⁵ 94 F.T.C. 701 (1979), aff'd as modified, 638 F.2d 443 (2d Cir. 1980), aff'd by an equally divided court, 445 U.S. 676 (1982) (order modified, 99 F.T.C. 440 (1982) and 100 F.T.C. 572 (1982)).

⁶ E.g., Oklahoma Optometry Association, D-9191 (1985); Michigan Optometry Association, C-3170 (1985); Washington, D.C. Dermatological Society, 102 F.T.C. 1292 (1983).

agreements with a number of state boards that allegedly restricted truthful advertising.⁷

However, there are now new threats to freedom of expression far more serious than any I have described today. These are the proposals in Congress to ban even truthful commercial advertising of alcohol and cigarettes. Such proposed bans really raise two separate but related questions. First, under the First Amendment's guarantees of free speech, are the bans legal? Second, as a matter of public policy, are they wise?

The Federal Trade Commission can't stop these proposed government bans on advertising singlehandedly. Concerned citizens and their associations must mobilize to counter this threat. However, the Commission's experience in evaluating the costs and benefits of advertising restrictions should be helpful to your consideration of these proposals. We have learned at the FTC to view prohibitions on providing information with deep suspicion. They have repeatedly been found to impede competition, thus making producers less, rather than more, responsive to the needs of consumers. Where bans of truthful advertising are removed, consumers are better off.

Many government regulators, the FTC included, have come to have a more realistic, less jaundiced view of advertising. Consumers are not mere putty in the hands of advertisers, as many people once believed. They evaluate commercial messages, not in a vacuum, but in the context of their lives. Consumers are not ignorant zombies, manipulated by Madison Avenue copywriting psychiatrists. Consumers aren't stupid. As Hal Riney, producer of the "Bartles & James" commercials, put it, "Consumers know as much about advertising as I do."

Advertising Age recently observed that banning cigarette advertising on the basis that it glorifies cigarette smoking is the first step towards government censorship of the media. Certainly if truthful commercials can be banned, why not movies or T.V.? If this sounds farfetched, consider this: the FTC received a petition to investigate the movie "Superman II" because it included references to a particular brand of cigarettes.

The time to stop advertising bans is now, before these movements advance any further. The choice is between keeping information freely available for consumers and suppressing information "for the public good." That is the choice between consumer sovereignty and government control, between an informed

⁷ E.g., Montana Board of Optometry, C-3161 (1986); Rhode Island Board of Accountancy, D-9181 (1986); Wyoming State Board of Registration in Podiatry, C-3176 (1985).

public and an ignorant one. Preserving freedom of choice is everyone's responsibility. And I'm not talking solely to the advertising associations here. Censorship is everyone's problem.

Today I have made three requests to you: to resist the urge to insulate your industry from competition, to consider self-regulation, and to oppose self-regulatory and government-sponsored restrictions on truthful advertising. Let me summarize my remarks by recalling a story about Frederic Bastiat, the famous 19th century French economist. With tongue in cheek, Bastiat once drafted a petition for the candlemakers, a powerful lobby of his day.⁸ The petition requested protection from unfair foreign competition -- in this case, the sun. The candlemakers suggested, in Bastiat's scenario, that the fairest way to remedy this "intolerable" competition would be for the French legislature to pass a law similar to the ones already enacted for the coal, iron, corn, and fabric industries.

To prop up this valuable national industry, Bastiat's proposed law would have required the citizens to board up all windows or other openings through which the sunlight passed. How otherwise, he argued, could the French economy develop if the candle industry were faced with the unfair competition of the sun, where labor and transportation costs are non-existent? What would have happened to French culture -- and French restaurants -- if the domestic candle industry had collapsed? Today we hear many of our own domestic industries once again decrying the unfair competition from the "sun."

The American ethic is to invite "rough and tumble" competition, not to "fix" the rules of the game. But is that always our practice? Believe in that "rough and tumble," and in your own competitive abilities, and the secret of America's past successes will remain the key to her bright and sunny future.

Bastiat's facetious proposal of extremist special interest advocacy is amusing, but his point is serious nonetheless. Seeking to advance our own industry is not our only responsibility. We also have -- all of us -- a responsibility to preserve our system of self-government from an overload of special interests. We need to consider the broader issue: In a democratic society, to what extent is it proper to use government to take away something from one person, in order to transfer it to another? To grant a privilege to one person, but not to another?

James Madison wrote in Federalist 10 that "measures are too often decided, not according to the rules of justice and the

⁸Frederic Bastiat, *Economic Sophisms*. G.P. Putnam's Sons, N.Y., 1922. First published in Paris in 1845.

rights of the minor party, but by the superior force of an interested and overbearing majority." And Madison also wrote that special interests have a right, even a responsibility, to help "refine and enlarge the public views" on issues of national importance. We in government are not supposed to be advocates of only one point of view. Instead, we must constantly ask why a special privilege should be granted, why a special interest should supersede the general interest. Both the legitimacy and the authority of government are related to how well government resists the special pleaders, how well it looks after the general interest. That, I think, is the most important political question of all.

In this bicentennial year of the Constitution, we would do well to remember that there is a collective responsibility to remember the national interest, our fellow citizens' interest, as well as our own.

-- FINIS --