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A FUNNY THING HAPPENED ON THE WAY
TO ADVERTISING DEREGULATION

REMARKS OF
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BEFORE
THE UTAH ADVERTISING FEDERATION

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HOTEL UTAH
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I am delighted to be here today -- as an emissary of the Reagan administration -- to bring the wonders of the "new" FTC to the advertising community of Salt Lake.

Of course, I recognize that while it may be technically accurate for me to describe myself as a representative of the Federal government, it does strain political credulity for me to pose as a spokesman either for the Reagan administration or for our new FTC Chairman, Jim Miller, and his staff. I might even be slightly suspect as yet another trojan horse to be-devil the administration.

As a friend commented the other day on one of the perhaps undervalued windfalls in being demoted from Chairman to minority (and dissenting) Commissioner: "It's a lot less stressful to throw darts than dodge them."

There is, of course, an implacable, if natural, urge for us oldtimers to carp at the new Commission leadership. It is an urge which I do not intend to suppress. After all, mixing metaphors a bit, a minority Commissioner can serve his country well by playing the role of the aggressive pike in a pond of sluggish carp. A little tail biting is a wonderful prod to action. So

whether it's carping or piking, I intend to be doing much of it.

On the other hand, while Jim Miller and I do not agree upon much of substance, we do seem to share the urge to pursue through FTC leadership our respective visions of economic and social justice.

Jim Miller is the first economist to head the Federal Trade Commission. He and his key staff have not accepted government service in the hopes of finding a quiet sinecure -- a safe haven in a troubled economic environment. When issues confront them at the Commission they do not automatically look for the politically safe way out -- the bureaucrat's instinctive search for the course of least resistance. They are at the Federal Trade Commission because they have a sense of mission and purpose -- both tied to President Reagan's laissez-faire ideology. They are committed to radical change in the way in which government relates to business and consumers.

These qualities, however admirable, may also prove fatal.

Four years ago we came to the Commission with a similar sense of purpose and mission and an itch for significant reform and change.

To the monumental horror and outrage of the advertising community, our first initiative was children's advertising. We challenged especially the advertising of highly sugared candy and cereals on television to three, four and five-year olds. Rightly or wrongly, we questioned such advertising as the commercial exploitation of children, and hence as a radical departure from the law's historic shielding of children from premature induction into hard-sell commercial persuasion.

We sought to exercise the historic role of the FTC in defining standards of ethical fair dealing in advertising to children.

This was, incidentally, not a radical departure by the FTC from law or precedent. The Supreme Court, as late as 1972, affirmed in the S&H case the FTC's responsibility for policing such practices. Nor were the Commission's concerns lacking in broad popular support. In 1979, a Harris poll conducted for ABC television (not an entirely disinterested party) confirmed that 78% of a broad citizen sample did not flinch from endorsing a ban on all broadcast advertising of "sugary products," to children, while 72% even supported a ban on all advertising to children under eight.

Our children's advertising initiative may have rested on sound legal grounds and even enjoyed broad popular empathy, if not a popular mandate. But it proved, in the end, to rest on political quicksand.

We tried; we evoked a political whirlwind; and we lost. The Commission had come in like a lion; it went out like a lamb, finally closing its children's advertising proceeding -- after having been hammered about the head, arms and shoulders by Congress' defenders of the constitutional freedom of three-year olds to have access to critical information about cocoa crisps. In terminating the proceeding, the Commission solemnly concluded that while advertising to children might well be inherently deceptive, it was beyond the Commission's creative imagination to fashion a suitable remedy.

The children's advertising confrontation certainly set the frigid tone of relations between the Commission and the advertising community during the late 1970's. Ironically though, a net balance sheet evaluating advertising's gains and losses with the Commission over that period would reveal that among the Commission's real accomplishments was the expansion of the freedom to advertise. For example, the Commission, most notably

in its Eyeglass Advertising Rule and its case against the American Medical Association, sought to eliminate unjustified restrictions imposed by professional bodies on truthful advertising in the name of ethical self-regulation. Indeed, I think it's fair to say that the Commission emerged as the government's leading advocate of the contribution which advertising can make to vigorous competition.

So, ironically, we began our time in office identified by the advertising community as a menace to advertising, and ended our four years as champions of the legitimacy of advertising.

Now, within the first few months of Chairman Miller's reign, I see signs and portents that he may very well be entering (from the right) the same political tornado that we were sucked into from the left side of the political spectrum. At his first press conference, Chairman Miller, in perfect keeping with his libertarian regulatory philosophy, indicated his strong reservations about previous Commission policies. He raised doubts as to the economic wisdom of the Commission's orders requiring manufacturers to remedy product defects which they know about and fail to disclose to consumers at the time of sale. He expressed unflappable nonchalance at the current wave of megagirth mergers.

And to advertisers, he offered freedom from what he saw as the burdens of the Commission's ten-year old advertising substantiation rule. This rule, adopted by a sturdy Republican Commission under President Nixon in 1972, requires, as you know, simply that before making specific claims for a product, an advertiser must have in hand reasonable evidence to substantiate the claims.

Now I happen to believe that the Chairman is dead wrong on all of these propositions. But I'm a liberal Democrat, and in case you haven't noticed, my President and party were defeated in the last election.

And it is not surprising that Miller's challenge to the advertising substantiation rule evoked howls of outrage from consumer advocates and unreconstructed liberals like me.

What is perhaps ironic for this administration of, by, and for business right or wrong, is that the howls of greatest anguish erupted from the advertising community itself.

"Removal of substantiation requirements would remove the guarantor of advertising legitimacy on which consumers and advertisers now depend. It would place the ethical advertiser at a pronounced disadvantage: his messages would no longer be

distinguishable from those of the unscrupulous. It would remove the 'base line' of proper ethical conduct to which all advertisers are now required to adhere; diminish the ability of existing self-regulatory mechanisms to resolve conflicts between competitors; force the consumer and the ethical advertiser to bear the penalty for unscrupulous advertising; and, promote chaos in the marketplace."

That isn't Ralph Nader talking, it's Kent Mitchell, Vice President of General Foods. I've known and respected Kent Mitchell for many years -- most of that time as a friendly adversary in such battles as the Fair Packaging and Labeling fights in Congress and, of course, the children's advertising proceeding. No one has ever accused Kent Mitchell of being an apologist for excessive regulation.

Trade association and editorial comment, too, has been running heavily against Mr. Miller's crusade to free advertisers from the burdens of substantiation. Meanwhile, public opinion polls doggedly refuse to confirm the Reagan administration's myth of a noisy majority clamoring for wholesale deregulation. Without exception, the polls continue to demonstrate strong popular support for

most forms of consumer and environmental regulation. Specifically, the American public appears particularly concerned about misleading advertising and desirous of stern regulation of it.

And so I believe that Jim Miller, in the first blush of enthusiasm at holding the reigns of power at the FTC, has been as guilty of misreading the political environment as I was four years ago. In my case I failed to notice, or refused to notice, that the consumer movement was no longer ascendant. In Jim Miller's case, neither the American public nor the responsible core of American business is behind him. Foolish or excessive regulations, of course, enjoy little popular support, and much appropriate business opprobrium. But businessmen as well as consumer advocates are deeply resistant to knocking out the underpinnings of the government as a cop on the beat of fair competition.

Of course Chairman Miller has indicated that he supports FTC action to halt or penalize clearly "false and deceptive advertising." But historically, without the ad substantiation rule, the Commission has proved virtually powerless to police such advertising effectively.

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For the Commission to pretend to be the national cop on the beat of honest advertising, with its advertising substantiation arm tied behind its back, is like giving the lion tamer a short whip without a crackle, and thereby placing an irresistible temptation before the most mischievous of the tigers.

To be fair to Chairman Miller, he has indicated only that he has serious doubts about the ad substantiation rule, not that he is poised to abolish the rule -- at least not yet, for he has asked the staff for a report "justifying" the existence of the ad substantiation program. To be fair to the advertising community, it has not been entirely clear what Miller's doubts are or where they might lead.

In my sometime rocky experience I've learned that businessmen are acutely allergic to two distinct regulatory viruses: the first, like the children's rulemaking proceeding, is regulation which poses a direct threat to profits or market shares. Or, as a consultant to a cereal company, in the midst of the political mobilization to kill the children's rule, said less subtly: "You hit the money nerve!"

The second allergy is an environment of regulatory uncertainty, resulting from a lack of clear competitive

ground rules fairly governing all competitors. Businessmen naturally resist situations which create opportunities for unfair gain or foul play by their competitors.

The irony is that in challenging ad substantiation, Miller has threatened one regulatory scheme which does serve the legitimate needs of business and consumer alike:

(1) Its basic command is simple and clear (though the Commission can do better in narrowing the fuzz around the edges);

(2) It has worked well in the 10 years since the Pfizer case announced the rule, with most knowledgeable observers noting a perceptible cleansing of deception from advertising. It has contributed to a great increase in the reliability of advertising generally, thereby reducing the number of cases the Commission has had to bring in recent years to police deceptive claims.

(3) It has played the leading role in fostering self-regulation, as recognized in the recent Ad Age editorial which warned:

"Self-regulation is not self-contained; its ultimate persuasiveness rests on the existence of a vigorous FTC, ready to insist that all advertising be

truthful and that advertisers substantiate their performance claims. When FTC retreats, it also exposes the self-regulation flank...In the decade since a "rejuvenated" FTC forced the advertising profession to raise its standard of ethics, the term "huckster" has been all but forgotten. Advertising professionals are able to hold their heads high. Consumers have good reason to assume that if it appears in an ad, it has to be true. These are great achievements, not to be lightly risked." (emphasis added)

(4) It has encouraged advertisers to build into their marketing programs a step which is now routine -- documenting claims to their satisfaction before making them. In a word it has become an accepted -- and perhaps even welcomed -- way of life among advertisers.

(5) It has economically benefited all truthful advertisers by enhancing the credibility of all advertising. In cautioning fellow business leaders on the follies of rampant deregulation, George Brockway, Board Chairman of W.W. Norton, warned:

"Ultimately, trust is what economics is all about. The simplest barter is impossible without some measure of it. Among barbarians the trust may be minimal, yet that is what marks them as uncivilized.

So if the traders are to do business, they must trust that there are limits to the deviousness of their trading partners. The greater the trust, the easier the trading; the easier the trading, the more trading can be done in a given period of time; and time is money, especially with the prime rate at 17 or 20 percent."

(6) It has helped make the standards of the most ethical and scrupulous competitors the standards for all. And it is this achievement which evoked an advertiser's plaintive question to Chairman Miller: "Do we have to return to the law of the jungle?"

For better or worse, my experience has taught me that the voice of business, if not the loudest, is nevertheless heard the most clearly by Congress, certainly by this administration. As the children's advertising proceeding taught us, regardless of the popular will, we usually get that regulation which business accepts as legitimate and necessary -- no more, as I discovered to my sorrow, and no less, as I believe Chairman Miller will discover.

As a citizen, I do lament business' unwillingness to forego the commercial exploitation of three, four and five-year olds.

But as a citizen, I'm grateful for the enlightened statesmanship of the advertising community in resisting Chairman Miller's appeals to unburden you of advertising substantiation procedures.

For better or worse, yours has been the voice and the political power which has delivered you from those FTC regulatory initiatives which you shunned. I hope and believe that yours will also be the voice and the political power which help deliver us all from the deregulatory Pied Piper.