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DANIEL OLIVER
CHAIRMAN
FEDERAL TRADE COMMISSION
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THE COMING OF AGE IN ADVERTISING REGULATION

I want to thank the Council of Better Business Bureaus for the opportunity to talk to you today. This is the third in a series of what members of the advertising industry have referred to as my "coming out" speeches. It's a pleasure to be here and to follow my predecessors in praising the work you have done to rid the marketplace of deception.

Do you know what I find especially appealing about your organization? The United States doesn't have to tax anyone to fund your budget. And you don't coerce any company with the force of law -- you rely on voluntary contributions and voluntary cooperation. Your members value your service and they are willing to pay for it.

You offer many specific advantages over government regulation. You directly involve the parties who possess the best institutional knowledge about the need for action and the alternatives available. You also offer individuals a forum devoid of the legal machinations that accompany FTC and court proceedings. Self-regulation is often more flexible than government regulation. Therefore, it is less likely to stifle innovation or excessively limit consumer choice. Self-regulation is often easier to change than government regulation, which can acquire its own constituencies. Self-regulation also provides useful guidance to industry. Your NAD/NARB (National Advertising Division/National Advertising Review Board) reports are good examples of this. And I think I state the obvious when I tell you that the speed with which self-regulatory bodies act, such as yours, often surpasses that of the FTC. Sometimes, we make the post office look like a private industry.

Additionally, self-regulatory efforts like those of the Better Business Bureaus aid us in carrying out our mission. Your local offices provide us with an early warning network for emerging consumer protection problems. The NAD's voluntary advertising review programs and other Better Business Bureaus' self-regulatory programs provide an initial layer of protection for the public that allows us to focus on the most serious types

of fraud and deceptive advertising. Also, your offices provide us with information that allows us to stop serious ongoing practices that are not subject to correction by the self-regulatory process. And last, but certainly not least, hundreds of thousands of individual consumers find relief through the various arbitration programs the Better Business Bureaus administer.

One excellent example is the Commission's GM mediation-arbitration program carried out, nationwide, under the good auspices of the Better Business Bureaus. I am pleased to have this opportunity today to share with you the results of our latest tabulation concerning the amount of relief consumers have obtained through this program. Our latest statistics show that over 100,000 consumers have received over \$40 million from GM during the first 20 months of this program. Our statistics further show that 97% of the consumers who participate in the program have received some form of compensation. Your efforts have been essential to the enormous success of this program, and are greatly appreciated.

Keep in mind that these statistics, impressive as they are, significantly understate the program's entire range of benefits to consumers. They represent awards for only the three components specified in the FTC's complaint against GM. They do not reflect payments for other engine or transmission problems covered by the Commission's order (which was broader than the complaint), payments made directly by GM to consumers who did not participate in the arbitration program, or the cash value of other repairs performed by GM under the arbitration program. But this program is by no means the only valuable contribution you have made to consumer protection.

I am especially impressed that your membership spans the economic spectrum from General Motors to the corner dry cleaners. Locally, your various bureaus perform invaluable services to the community in a wide variety of areas. I note that over the last year your combined bureaus received and processed approximately three million complaints and 10 million business inquiries, a truly astounding number. Additionally, the work the Bureaus perform reviewing local advertising and promoting consumer education is a credit to the dedication and hard work that is the hallmark of your grass roots organization. When viewed with respect to the work your organization performs at the national level, it becomes apparent that the only special interest common to your constituents is consumer satisfaction.

Nationally, you have also continued to play an important role in consumer protection. I noticed that your recent update in Do's and Don'ts listed 1,757 NAD decisions, with 15 appeals to the NARB. Over 50% of these cases resulted in the cessation or modification of claims. You are more than the conscience of

commerce. You have become a powerful regulator.

There is no question that you have been able to resolve cases that normally would have come to us. Indeed, just last year, the Commission was able to defer action on a number of issues which had been quickly and effectively resolved by the NAD. Some may criticize this, but I applaud it. There is no reason why we cannot and should not play complementary roles.

I could go on, but you have heard all this before. It is tempting for me to preach to the choir and simply repeat the same sermon. But I am going to resist that temptation. As a matter of fact, I would like to talk about resisting temptation as an important part of the coming of age in advertising regulation.

Speaking as one regulator to another -- well, I see no one has walked out on me -- let me explore something that I think we both can appreciate. And that is that no matter how much you regulate, you will never satisfy everyone. Some people seem to believe businesses exist solely to be regulated. Many distrust our free enterprise society and the forces of competition that drive it. Some want to regulate because the market doesn't always reward hard work. Others want to regulate because the market often does reward hard work. These arm chair regulators refuse to recognize that the choices consumers make are not based on how hard the producer worked, or how rich he'll get -- or whether his business will fail if the consumer doesn't buy. Critics of competition fail to recognize that the economy is too complex, and the abilities of regulators too limited, for a single individual or a group of individuals to direct and engineer the workings of the market place with any hope of achieving maximum efficiency -- or maximum freedom. Do you remember the gas lines of 1973? Each day, thousands of businesses develop, produce, and distribute the goods and services millions of consumers desire, at the lowest possible cost.

Others see regulation as a way to further their own economic self-interests. Whether it's a domestic industry -- textiles or computer chips -- pleading for protection against the onslaught of foreign competition, or doctors conspiring to prevent other doctors from establishing new types of practices that will compete with their established fee-for-service system, the hue and cry for more regulation is constantly heard.

Regardless of their agenda, these people can mount persuasive calls for intervention. Consumer groups want more regulation for consumers. The only way we could have satisfied some critics of the General Motors program would have been to order GM to sell one car, and give another one free. Other critics will accuse you of being captured by your membership. If business can capture government officials, the argument goes,

what hope do you have? It is important to recognize that businesses themselves may see regulation as a means to further their own special interests. These kinds of pressures demand response and can tempt one to regulate beyond reason or justification.

The pressure to regulate for the sake of regulation can be great; resisting it is not always easy.

Certainly, regulation that can correct market failure has its place. The FTC comes in when the market cannot remove an impediment to truthful advertising. We want doctors and lawyers to have the freedom to advertise, and we want their ads to be truthful. But the cornerstone of our philosophy at the FTC today is that a well-functioning marketplace provides the most effective protection for consumers. Consumers are harmed when competition is eliminated or when they are deprived of their ability to make adequately informed purchases.

But, we at the Commission also recognize that often the regulators can be the problem, not the solution. We are not the problem because we intend to be. Indeed, our intentions are often good, but our results can have unintended consequences.

I'm sure I need not remind you of the criticism levied at the FTC in the past. Much of it was justified, as the FTC zealously pursued the art of regulating to its zenith. Of course, the regulation often resulted in constricting, rather than promoting, the free and clean flow of truthful information. It was not for nothing that the FTC used to be called the second most powerful legislature in Washington.

The Commission's recent development and implementation of an analytical framework for targeting deception is designed to prevent this. Today, sound logic and an appreciation for market dynamics prevail. We focus on those practices that are likely to mislead reasonable consumers about material facts. This ensures that we are able to arrest those deceptive practices that are most likely to be important to consumers and are most likely to cause harm.

In the past, for example, the Commission has tended, at times, to become entangled in literalistic and unreasonable disputes over the meaning of words in ads, sometimes reading things into ads that simply weren't there.

For example, the FTC sued GM for representing that Road and Track magazine endorsed the Chevy Vega as the best-handling passenger car ever built in the U.S. Now, the fact was that Road and Track had said exactly that. Nevertheless, the FTC interpreted GM's advertisement of Road and Track's endorsement to mean that GM possessed its own elaborate scientific proof that

the Vega was the best-handling passenger car in the U.S. To this day, GM cannot tell Americans what independent experts say about its cars, without doing its own tests. GM's competitors are subject to no such restriction.

Another example of unreasonable regulation was the FTC's suit against the California Milk Producers Advisory Board challenging the slogan, "Everybody Needs Milk." The FTC interpreted this claim to mean that milk is essential for all individuals, even those who are allergic to it. After five years of litigation, an ALJ dismissed the case on the grounds that the FTC's challenge was unreasonable because only a small percentage of the population is allergic to milk.

One of my favorite examples of unreasonable regulation was the FTC's suit challenging Standard Oil's gasoline additive F-310, which the company represented was able to reduce air pollution. Standard Oil's ads featured two cars with balloons wrapped around their exhausts. One car used gasoline without the additive and its balloon was filled with black smoke. The other used fuel with the additive and its balloon was clear. The FTC believed this represented to consumers that the additive would "cause the disappearance of virtually 100% of exhaust emission pollutants." Fortunately, the court of appeals gagged on the FTC's logic, stating "We do not think that any television viewer would have a level of credulity so primitive that he could expect to breathe fresh air if he stuck his head into a bag inflated by exhaust, no matter how clean it looked." Many people on Capitol Hill actually think most consumers are that dumb -- er, except on that one day every other November.

Over the years, the Commission has also learned that more is not necessarily better. We have learned that requiring too much disclosure can actually suppress information rather than provide it. For instance, the Commission reduced the video disclosure requirements of the Truth In Lending Act from 10 to 5 seconds after discovering that a mandated 10 second disclosure of detailed credit information made it unlikely that useful credit terms would ever be advertised in a 30 second commercial. Similarly, presenting consumers with a jumble of disclosures at point-of-sale is often one of the best ways to ensure that they do not focus on the one or two most important items of information.

Perhaps more important, the Commission has learned to focus on the larger interests at stake. In the past, the FTC has sometimes acted as nothing more than a surrogate enforcement arm for competitors. Many past enforcement actions against advertisers that grew directly out of competitor complaints. They appear to have been primarily intended to protect sellers against competition from cheaper substitutes.

A good example was the FTC's historic, and infamous, suit against the Mary Carter Paint Company. Mary Carter offered a free can of paint with every can purchased, in effect an offer of two cans for the price of one. Not surprisingly, consumers who bought one can also took the second can for free. Because Mary Carter rarely sold single cans of paint, the FTC concluded the offer was deceptive because it implied Mary Carter had a usual and customary price for a single can of paint. The Commission rejected Mary Carter's offer to prove that each can of its paint matched in quality those paints usually sold in the same price range by its competitors. The Supreme Court upheld the Commission on that one -- but given the recent confirmations I would not expect it to do so again.

As former Commissioner Robert Pitofsky has noted, it is hard to imagine how such a practice could have harmed consumers in any way. The clear winners from Commission action were Mary Carter's competitors. The losers were consumers. They bought paint at the higher prices that Mary Carter had to charge more often. Consumers who bought from the competition also suffered, because Mary Carter lost an effective means of attracting business. And, of course, the free market lost another freedom -- that of Mary Carter (and everyone else who wanted to avoid the long arm of the FTC) to give consumers valuable information.

This case reminds me of the story about two tourists visiting a famous Franciscan Monastery in Washington. At the information desk, an elderly friar was handing out pamphlets filled with facts about the monastery. One visitor looked in the pamphlet and read that all the friars rose at 4 a.m., seven days a week. He went back to the old friar and said, "Surely this is a mistake." The friar read the sentence, smiled and said, "It certainly is a mistake. But, unfortunately, it's true."

Many people may be concerned about recent below-market-rate financing in the automobile industry. Fearing that some auto dealers may pass some or all of this financing cost back to the buyer in the form of a higher sales price, some would impose sharp restrictions or outright prohibitions on low-rate financing offers.

However, in below-market financing, the dealer's expense in offering good finance terms is only one of the factors that may affect the final sale price. The price of a particular vehicle may vary from dealer to dealer and from transaction to transaction, depending on the course of negotiations between an individual dealer and the consumer. When consumers know that the final price is a negotiated one, it is difficult to see any risk of deception, when the dealer -- so long as he is in compliance with the Truth In Lending Act and also discloses all other material terms and conditions -- articulates a particular price and package of options and financing as a starting point for

negotiations.

Moreover, where healthy competition exists -- as it surely does in automobile sales -- comparison shopping can enable consumers to judge the relative costs of popular features or of promotional financing. Consumers, therefore, have all of the tools they need to take the various factors into consideration and locate the deal that best suits them.

Let me sum up my remarks by emphasizing that regulation is no panacea. Don't be quick to resort to it, for regulation can do more damage than good. Don't be quick to conclude that a problem exists when it doesn't. By that, I mean don't misjudge the consumers' capacity to make rational decisions on the basis of the available information. You and I know the consumers aren't so dumb -- even if we don't have to get elected every other November.

We all know that the concept of self-regulation has been abused in the past. Lawyers adopted minimum fee schedules in order to ensure, they said, high-quality advice. The advertising profession adopted codes of conduct that discouraged advertisements that "disparaged" competing products. However, disparagement was defined so broadly in some cases that it prohibited useful comparative advertising. Those barriers have been significantly reduced, resulting in beneficial effects to the public. Ethical standards for professionals have often been used in the past to restrict the availability of useful information. This has begun to change. Focusing on the regulation's potential benefit to consumers rather than to competitors should bring about further change for the better.

Now there are many who will misinterpret my remarks today by saying that I am urging you to sanction deception -- that you should abandon consumers to fraudulent or deceptive claims. That, of course, is nonsense. What I am saying is that as regulators we should focus our efforts on those practices most likely to injure consumers and use remedies that prevent deception without chilling activities that provide useful information. Within these parameters the FTC has attacked, and under my tenure will continue to attack, unfair and deceptive practices. Moreover, we will continue our efforts to convince companies that they cannot evade the Commission simply because they are small, or because they seek refuge in bankruptcy court. The Commission's record under the Reagan Administration more than proves our commitment to combating fraud and deception.

My message to you today as fellow regulators is to resist the temptation to over-regulate. "Fight back," as that noted consumer advocate up the block urges.

Consider whether a complaint alleges injury to the consumer

or injury to competitors. If it is injury to the competitor, is it the kind of injury that the automobile industry inflicted on the horse and buggy industry? Remember that industries fail because consumers have decided they should fail.

Capitalism and competition often result in blood being spilled all over the floor. We care only if it is consumers' blood.

The economist Joseph Schumpeter described the salient feature of capitalism as the decline of some businesses -- caused by their competitors. A process, in other words: of creative destruction, of growth and decay. It is only natural that those businesses in decay should seek our protection against the forces that are causing their demise. They want protection against their competitors' lower prices, or more efficient techniques, or their methods of telling consumers about their product. You and I -- but most especially legislators -- must resist being enlisted on the side of modern-day buggy manufacturers or whale oil producers.

I once suggested -- facetiously? -- that a prize be given to the largest company to go bankrupt each year: not because we encourage business failure, but to make the point that we don't condemn it. Bankruptcy is not an entry barrier to Heaven.

Failure is part of our system. It reflects the voice of the consumers, speaking -- democratically, if you will -- in a million elections (commercial transactions) across the country, every day, every year.

Most regulation tends to impair competition -- and tends therefore to lessen the voice, and the vote, of the consumers. Let us be as careful in rigging -- er, I mean in regulating -- those elections, those commercial transactions, as we would be in interfering in a political election.

Join me in speaking up for the market. In advocating competition. The intellectual high ground is ours. Let us hold it for the sake of consumers. They know, better than all the regulators in the world, what is best for them -- and not just on election day.

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